

6-19-2019

## The Best Defense is No Offense: Reforming Louisiana's Security for Court Costs Statute

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# The Best Defense Is No Offense: Reforming Louisiana’s Security for Court Costs Statute

## TABLE OF CONTENTS

Introduction .....	1176
I. Security for Court Costs: Historical Genesis, Development, and Louisiana’s Approach.....	1179
A. Roman Law Origins and the <i>Cautio Judicatum Solvi</i> : Historical Background of Security for Court Costs.....	1180
B. Synopsis of Louisiana Law: Louisiana Revised Statutes § 13:4522.....	1182
1. The Purpose of Louisiana’s Statutory Scheme.....	1183
2. Procedural Particulars of Louisiana Revised Statutes § 13:4522 .....	1184
3. <i>Carter v. Phillips</i> : Louisiana’s Current Framework for Ruling on a § 13:4522 Motion.....	1186
II. Comparative Survey of International Jurisdictions:	
A Global Approach to Security for Court Costs .....	1187
A. Canadian Approach to Security for Court Costs.....	1189
B. Irish Approach to Security for Court Costs .....	1192
C. South African Approach to Security for Court Costs .....	1193
III. Bringing It All Together: Crafting an Analytical Framework for Louisiana Courts .....	1195
B. Omitting an Inquiry into the Merits of the Claim .....	1198
C. Procedural Dance: Burden Shifting and Special Circumstances.....	1199
D. Requiring a Bill of Costs .....	1200
E. Special Problems Involving Pro Se Litigants: Heeding Judge Chatelain’s Concurrence in <i>Clarkston v. Funderburk</i> .....	1201
Conclusion.....	1204
Appendix A .....	1205
Appendix B .....	1207

[A]ttorneys shoulder a special responsibility. It is our responsibility to keep the doors to the courthouse open even to those who cannot afford to pay for counsel. For the phrase “equal justice under law” to be fully meaningful, it must comprise those persons who lack the financial resources to afford counsel. Otherwise “equal justice under law” will mean in effect “equal justice under law for those with incomes over the poverty level.” What a poor definition of justice!<sup>1</sup>

### INTRODUCTION

The United States Supreme Court has long recognized an individual’s fundamental right of access to the courts.<sup>2</sup> This right of access, however, is not without limitation<sup>3</sup>—the courthouse doors are easily and often barricaded.<sup>4</sup> Though not explicitly addressed by the Supreme Court, a plethora of federal district courts have enacted local rules authorizing the imposition of security for costs and fees.<sup>5</sup> Even in the absence of a local rule, federal courts have imposed security by way of “inherent power.”<sup>6</sup> In

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1. Frank F. Drowota, III, ‘*Equal Justice Under Law*’ *Doesn’t Mean Only If You Can Afford It*, 41 TENN. B.J. 26, 26 (2005). The Honorable Frank F. Drowota, III is a former chief justice of the Tennessee Supreme Court. *Id.* at 26 n.a2.

2. *See* *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (“[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”).

3. *See* John A. Gliedman, *Access to Federal Courts and Security for Costs and Fees*, 74 ST. JOHN’S L. REV. 953, 971 (2000) (“This right [of access to the courts] may be curtailed . . . upon a showing of an overriding state interest.”) (footnote omitted).

4. For a brief discussion on recent U.S. Supreme Court jurisprudence limiting access to justice, see Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 GREEN BAG 2d 375 (2011) (discussing recent cases involving limitation of class action lawsuits, preemption, habeas corpus claims, standing, lawsuits against local governments, and denial of relief to victims of abuses of power).

5. *See* Gliedman, *supra* note 3, at 954 n.4 (listing various local rules of federal courts that authorize security for court costs).

6. *See* *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 143 (1st Cir. 1976) (“Even in the absence of a standing local rule, a federal district court has the inherent power to require security for costs when warranted by the circumstances of the case.”).

addition, 41 states<sup>7</sup>—including Louisiana<sup>8</sup>—have general security for costs statutes, which enable defendants in civil actions to demand that the plaintiff<sup>9</sup> furnish security for the costs arising from the suit in the event that a judgment is ultimately awarded against the plaintiff.<sup>10</sup> In Louisiana, a successful motion for security poses serious implications for a plaintiff's suit, resulting in a total bar to the litigation.<sup>11</sup> Security for costs is also a widely recognized procedural mechanism, both domestically and internationally. Although a variety of jurisdictions use multifaceted approaches,<sup>12</sup> consider special circumstances,<sup>13</sup> and rely on balancing tests<sup>14</sup> when ruling on a motion for security for costs, Louisiana courts lack sufficient direction when confronted with such a motion.

The current statutory scheme and jurisprudence governing the application of Louisiana's security for court costs statute fails to provide

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7. See Deborah A. DeMott, *Security for Costs and Rules*, in SHAREHOLDER DERIV. ACTIONS L. & PRAC. § 3:3 n.1 (2017) (listing each state and their respective statute(s) that authorize security for court costs).

8. See LA. REV. STAT. § 13:4522 (2019) (general statute authorizing security for court costs); see also *id.* § 13:1215 (specific statute authorizing security for costs in Orleans Parish).

9. Although security for costs is ordinarily sought from a plaintiff, various rules and statutes also authorize security from appellants or intervenors. See, e.g., *id.* § 13:4522 (authorizing a defendant to seek security for court costs from either a plaintiff or intervenor).

10. See DeMott, *supra* note 7, § 3.3.

11. See LA. REV. STAT. § 13:4522.

12. See, e.g., Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), under Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.); see also *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 144 (1st Cir. 1976):

[W]e suggest that there are pertinent factors for the district court to consider, including, but not limited to ownership by a nondomiciliary plaintiff of attachable property in the district, the likelihood of success on the merits, the presence of a co-plaintiff who is domiciled in the district, the probable length and complexity of the litigation, the conduct of the litigants, and the purposes of the litigation.

(footnotes omitted).

13. Irish courts consider a number of “special circumstances,” which may either support or defeat a motion for security for costs. See Hilary Biehler, *Security for Costs: A Reappraisal of Established Principles*, 35 DUBLIN U. L.J. 173, 176–77 (2012) (footnotes omitted); see also discussion *infra* Part II.B.

14. See, e.g., Michele Havenga, *Security for Costs in Corporate Litigation*, 15 S. AFR. MERCANTILE L.J. 354, 362 (2003) (discussing how South African courts use a balancing approach when ruling on a motion for security for costs); see discussion *infra* Part II.C.

guidance to trial courts.<sup>15</sup> Louisiana's security for court costs statute, therefore, should be amended and clarified to assist trial courts in rendering an equitable outcome when confronted with a motion under Louisiana Revised Statutes § 13:4522. Although present jurisprudence interpreting § 13:4522 instructs trial courts on where to look when determining whether a defendant has shown that the plaintiff should post security for costs, the law remains silent as to what factors or circumstances the court should consider and what weight the courts should give such factors. To resolve these issues, this Comment provides a roadmap for Louisiana courts to follow when confronted with a motion for security for court costs.

This roadmap incorporates selected aspects, theories, and standards from other jurisdictions—both national and international—to form a focused and equitable analytical framework. Because security for costs is widely used as a procedural mechanism throughout both American and international legal systems,<sup>16</sup> reference to foreign jurisprudence and legal theories will assist Louisiana in refining its own system of security for costs. Particularly, Louisiana courts should adopt a modified version of the multifaceted approach used by Ontario, Canada's judiciary. Louisiana should also follow Irish jurisprudence and recognize special circumstances that either support or defeat an order for security for costs. Unlike other jurisdictions, however, Louisiana courts should omit an inquiry into the merits when ruling on a motion for security for costs, similar to the South African approach. Louisiana courts should also acknowledge particular concerns involving pro se litigants in the context of security for costs and aim to promulgate and share “valuable information”<sup>17</sup> to self-represented litigants. Finally, a defendant should attach an itemized bill of costs to a security for costs motion.<sup>18</sup>

Part I of this Comment generally reviews the background of security for court costs with particular emphasis on the security's historical genesis in ancient Rome, its use in early English common law, and its subsequent American development. Part I also introduces Louisiana's approach to

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15. Compare LA. REV. STAT. § 13:4522, with Rules of Civil Procedure, Rule 56, R.R.O. 1990, reg. 194 (Can.), under Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

16. See Armand Schonfrucht, *Costs in Litigation*, 5 INT'L LEGAL PRAC. 69 (1980) (detailing a comparative study of systems in operation in the United States, West Germany, France, India, and England).

17. See *Clarkston v. Funderburk*, 211 So. 3d 509, 519 (La. Ct. App. 2017) (Chatelain, J. concurring) (“[T]he dissemination of . . . information to the self-represented litigant from the very inception of litigation is essential to further the search for justice and foster the impartiality of the trial judge.”).

18. See *infra* Appendix B.

security for court costs, as embodied in § 13:4522. Part II analyzes several jurisdictions' approaches to the concept of security for court costs and introduces seminal court cases and jurisprudential theories behind the security. Part III proposes an analytical framework to guide Louisiana courts when ruling on a § 13:4522 motion. In so doing, Part III identifies ideal legal theories and jurisprudential standards from the jurisdictions analyzed in Part II and then crafts those theories and standards into a roadmap for Louisiana courts. This Comment concludes by introducing a curative piece of legislation and a model bill of costs to be attached to a motion for security for costs.

### I. SECURITY FOR COURT COSTS: HISTORICAL GENESIS, DEVELOPMENT, AND LOUISIANA'S APPROACH

Security for costs is a powerful procedural tool.<sup>19</sup> A plaintiff's failure to post ordered security bars the progression of litigation and results in the suit's dismissal.<sup>20</sup> Yet, many practitioners often overlook this unique device.<sup>21</sup> "Security for [court] costs"<sup>22</sup> is defined as "[m]oney, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses."<sup>23</sup> This procedural mechanism<sup>24</sup> is relatively straightforward: a defendant simply files a motion to require the security. In turn, the security acts as a condition precedent to the plaintiff's access to the court system.<sup>25</sup> In Louisiana, security for costs can only be

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19. Sahar Cadili, *Motions for Security for Costs*, ONTARIO B. ASS'N 2 (June 1, 2015), [http://www.lawrences.com/docs/default-source/publications/security-for-costs-paper-final-pdf-\(00209965\).pdf](http://www.lawrences.com/docs/default-source/publications/security-for-costs-paper-final-pdf-(00209965).pdf) [<https://perma.cc/YV9W-387W>].

20. See LA. REV. STAT. § 13:4522.

21. See Cadili, *supra* note 19, at 2.

22. This Comment uses the terms "security for court costs," "security for costs," and "cost bond" interchangeably.

23. *Security for Costs*, BLACK'S LAW DICTIONARY (10th ed. 2014).

24. Security for court costs is generally regarded as a procedural matter. *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 143 (1st Cir. 1976) (citing 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.73, at 1457–59 (2d ed. 1961); 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 83.03, at 1483–87 (2d ed. 1961)). *But see* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556 (1949) (concluding that a New Jersey statute could not "be disregarded by the federal court as a mere procedural device").

25. Jerel L. Ellington, *The Security for Costs Requirement in California—A Violation of Procedural Due Process?*, 6 PEPP. L. REV. 191, 191 (1978).

ordered from either a plaintiff or an intervenor<sup>26</sup>—never the defendant.<sup>27</sup> Security for court costs serves a two-fold purpose: first, the security protects defendants by establishing an available fund to defray costs incurred in defending against a claim; and second, the security discourages “unmeritorious and frivolous” lawsuits.<sup>28</sup> The device likewise serves a strategic purpose as an effective method of deterring vexatious<sup>29</sup> litigation.<sup>30</sup> Since a plaintiff is required to post the security before the litigation can resume, security for costs forces a plaintiff to scrutinize his claim and seriously consider the suit’s viability.<sup>31</sup> The practice of ordering security for costs can be traced back to ancient Rome, where security for costs was originally conceived.

*A. Roman Law Origins and the Cautio Judicatum Solvi: Historical Background of Security for Court Costs*

While a majority of legal commentators point to early England as the birthplace of security for costs,<sup>32</sup> its origin is in fact much older.<sup>33</sup> Indeed, security for costs is rooted in the Roman law concept of *cautio judicatum solvi*<sup>34</sup> (Latin for “security that the judgment will be paid”).<sup>35</sup> The law governing *satisdatio*, or security in legal actions,<sup>36</sup> under Roman rule can be restated as follows. In real actions, the possessor, i.e., the defendant,

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26. See LA. REV. STAT. § 13:4522 (2019).

27. See *McGlynn v. Donahue*, No. 2017 CW 0183, 2017 WL 2189806, at \*1 (La. Ct. App. May 18, 2017) (“Neither [Louisiana Revised Statutes § 13:1215 nor § 13:4522] requires the defendant to provide security for costs. The courts of this state have rejected arguments that a defendant in a reconventional demand can compel the defendant in the principal demand to provide security for costs.”).

28. See Ellington, *supra* note 25, at 191.

29. A “vexatious suit” is defined as “[a] lawsuit instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued.” *Vexatious Suit*, BLACK’S LAW DICTIONARY (10th ed. 2014).

30. See Cadili, *supra* note 19, at 2.

31. *Id.*

32. See, e.g., Stephen Colbran, *The Origin of Security for Costs*, 14 QUEENSLAND LAW. 44 (1993) (identifying early England as the origin of security for court costs).

33. See Bernhard Berger, *Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28 ASS’N SUISSE DE L’ARBITRAGE BULL. 7, 7 (2010).

34. See *id.*

35. *Cautio judicatum solvi*, BLACK’S LAW DICTIONARY (10th ed. 2014).

36. *Satisdatio*, BLACK’S LAW DICTIONARY (10th ed. 2014).

had to give security *cautio judicatum solvi*.<sup>37</sup> Interestingly, this is a stark deviation from the current security-for-court-costs scheme, in which only the plaintiff or intervenor can be ordered to post security.<sup>38</sup> This security hinged on three points: (1) that the defendant would pay the sum fixed as an alternative on the condemnation for the non-delivery of the thing in dispute; (2) that he would appear for sentence; and (3) that he would not employ fraud in obeying the judge's order.<sup>39</sup> A plaintiff, however, did not have to give security in real actions; nevertheless, if he sued via a procurator,<sup>40</sup> otherwise known as a mandatary in the civil law or an agent in the common law, security was required.<sup>41</sup> In personal actions, neither the defendant nor the plaintiff were obligated to post security.<sup>42</sup>

The evolution and progression of security for costs from the civil law to the common law, however, was slow. As one legal commentator noted, "It was only by degrees that security for costs made its way into the common law."<sup>43</sup> Under early English law, the prevailing party could not recover his litigation costs.<sup>44</sup> Thus, a defendant faced a predicament: he would have to invest time, money, and other valuable resources in defending himself against claims, but he could not seek reimbursement for those expenses—not even if he was ultimately successful.<sup>45</sup> The enactment of the Statute of Gloucester<sup>46</sup> rectified this inequitable principle in 1278 by permitting prevailing parties to recover their costs incurred while either prosecuting or defending against a claim.<sup>47</sup> Unlike the modern American

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37. GORDON CAMPBELL, *A COMPENDIUM ON ROMAN LAW FOUNDED ON THE INSTITUTES OF JUSTINIAN: TOGETHER WITH EXAMINATION QUESTIONS SET IN THE UNIVERSITY AND BAR EXAMINATIONS WITH SOLUTIONS AND DEFINITIONS OF LEADING TERMS IN THE WORDS OF THE PRINCIPAL AUTHORITIES* 147 (1878). *See also* PATRICK CUMIN, *A MANUAL OF CIVIL LAW; OR, EXAMINATION IN THE INSTITUTES OF JUSTINIAN* 361–64 (1854).

38. *See* LA. REV. STAT. § 13:4522 (2019). *See also infra* Part I.B.2.

39. CAMPBELL, *supra* note 37, at 147; CUMIN, *supra* note 37, at 361–64.

40. Under Roman law, a procurator was "[a] person informally appointed to represent another in a judicial proceeding." *Procurator*, BLACK'S LAW DICTIONARY (10th ed. 2014).

41. *Id.*

42. CAMPBELL, *supra* note 37, at 148.

43. Colbran, *supra* note 32, at 48 (footnote omitted).

44. *See* 4 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 536–37 (3d ed. 1945) (commenting that the "amercement of the vanquished party was . . . considered sufficient punishment" at common law, and, therefore, costs were not necessary).

45. *Id.*

46. 6 Edw. 1, c. 1 § 1 (1278), *reprinted in* 1 THE STATUTES OF THE REALM 47 (1993).

47. *See* Gliedman, *supra* note 3, at 956.

rule, the English rule regarding costs and fees allowed the prevailing party to recover both ordinary litigation costs and attorney's fees.<sup>48</sup>

Several centuries after the Statute of Gloucester was enacted, security for costs became routine practice in English courtrooms.<sup>49</sup> By the late 18th century, various other European courts required security for costs.<sup>50</sup> American jurisdictions soon followed suit and began requiring security for costs in qualified actions.<sup>51</sup> Louisiana quickly joined the growing number of American states recognizing this procedural device,<sup>52</sup> with the earliest cases arising in the mid-19th century.<sup>53</sup>

### *B. Synopsis of Louisiana Law: Louisiana Revised Statutes § 13:4522*

As an internationally recognized mechanism originating in ancient Rome, Louisiana embraced security for costs and viewed it as a protective measure.<sup>54</sup> In Louisiana, security for costs is one form of security that may be required from a party. In fact, parties are subject to orders for security at several stages throughout a suit's lifespan.<sup>55</sup> These stages include security for court costs,<sup>56</sup> jury costs,<sup>57</sup> wrongful issuance of conservatory writs,<sup>58</sup> and faithful performance of duties as legal representatives.<sup>59</sup> Presently, Louisiana's security for costs statute is codified in Louisiana

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48. See Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 856 (1929) ("It is common understanding in America that the difference between the American and the English rules as to costs lies in the fact that under the English system the successful party may recover the charges that he has to pay his own lawyer.").

49. See Gliedman, *supra* note 3, at 957.

50. See *id.* at 956–57 (footnote omitted).

51. See, e.g., *Shaw v. Wallace*, 2 Dall. 179, 179–80 (Pa. 1792) (requiring security for costs from a New York plaintiff); *McEwen v. Gibbs*, 4 Dall. 137, 137 (Pa. 1794) (requiring security for costs from a "certified bankrupt" plaintiff).

52. See cases cited *supra* note 24.

53. See, e.g., *Greiner v. Prendergast*, 2 Rob. 235 (La. 1842) (ruling that the state is dispensed from the requirement of providing security for court costs on appeal); *Haughton v. Haughton*, 11 La. Ann. 200 (La. 1856) ("Much discretion must be left to the judge of the first instance in [determining the amount of security for court costs], in order to prevent the abuse of the process of the court.").

54. See, e.g., *Grinage v. Times-Democrat Publ'g Co.*, 31 So. 682, 683 (La. 1902).

55. FRANK L. MARAIST, CIVIL PROCEDURE - SPECIAL PROCEEDINGS, in 1A LOUISIANA CIVIL LAW TREATISE § 10.1 (2017 ed.).

56. See LA. REV. STAT. § 13:4522 (2019).

57. See LA. CODE CIV. PROC. arts. 1733–34.1 (2019).

58. See *id.* arts. 3501, 3610.

59. See *id.* arts. 3151–53, 4131–37.

Revised Statutes § 13:4522. Enacted in 1926, this two-sentence statute is entitled “Defendant may demand security for costs” and states:

The defendant before pleading in all cases may by motion demand and require the plaintiff or intervenor to give security for the cost in such case, and on failure to do so within the time fixed by the court such suit or intervention, as the case may be, shall be dismissed without prejudice. This section shall not apply to the Parish of Orleans<sup>60</sup> and to cases brought in forma pauperis,<sup>61</sup> nor to the state or any political subdivision thereof.<sup>62</sup>

The brevity of the statute should not be mistaken for clarity. Several Louisiana courts have grappled with this procedural mechanism.<sup>63</sup>

### *1. The Purpose of Louisiana’s Statutory Scheme*

Almost three decades prior to the enactment of the current statute, the Louisiana Supreme Court resolved a challenge to Act No. 136 of 1880, a precursor to § 13:4522.<sup>64</sup> In *Grinage v. Times-Democrat Publishing Co.*, the Louisiana Supreme Court discussed the underlying rationale behind Louisiana’s statutory scheme for security for costs.<sup>65</sup> The court acknowledged two intertwined truths: (1) a defendant has a right to defend himself when impleaded in the courts; but (2) the defendant, “in many cases,” will incur expenses in making that defense.<sup>66</sup> Although the primary responsibility for the costs of the suit lies with the plaintiff, the court recognized the reality that the plaintiff may not be able to bear this

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60. A parallel provision at Louisiana Revised Statutes § 13:1215 allows a defendant to require the posting of a cost bond in Civil District Court for the Parish of Orleans. Unlike § 13:4522, which contemplates the filing of a motion and a contradictory hearing, § 13:1215 provides for the filing of an *ex parte* motion and order. LA. REV. STAT. § 13:1215.

61. “Paupers,” or the indigent, are generally “permitted to disregard filing fees and court costs.” *In Forma Pauperis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

62. LA. REV. STAT. § 13:4522.

63. *See, e.g.*, *Grinage v. Times-Democrat Publ’g Co.*, 31 So. 682, 683 (La. 1902); *see also* *Carter v. Phillips*, 337 So. 2d 187, 188 (La. 1976).

64. “Section 4 of the act enacts that the defendant . . . shall have the right to require the plaintiff to give bond for costs, in such amount as the court may fix, to secure repayment, on final determination of the suit, of the costs expended by such defendant therein.” *Grinage*, 31 So. at 683.

65. *Id.*

66. *Id.*

financial burden.<sup>67</sup> Thus, “[a] defendant may make large outlays in vindicating his position, and may successfully vindicate it, and yet at the end of the suit . . . may be unable to recoup his expenditures.”<sup>68</sup> Seven decades later in *Carter v. Phillips*,<sup>69</sup> the Louisiana Supreme Court again generally expounded upon security for costs and § 13:4522: “[I]t secures the payment of those expenses incurred by the defendant in defense of the suit which may be taxed as court costs and which the plaintiff may finally be condemned to pay.”<sup>70</sup> This careful balance between an aggrieved party’s right to access of the courts and the protection of defendants from insolvent plaintiffs or frivolous claims remains relevant today.<sup>71</sup>

## 2. *Procedural Particulars of Louisiana Revised Statutes § 13:4522*

Louisiana’s security for costs statute is an infrequently used provision that allows a defendant to require a plaintiff or intervenor to post bond for security for costs.<sup>72</sup> If the plaintiff or intervenor fails to post the ordered bond, the suit is dismissed without prejudice.<sup>73</sup> Although § 13:4522 states that it applies “in all cases,”<sup>74</sup> the statute explicitly does not apply in three situations: (1) to suits brought *in forma pauperis*; (2) to suits brought in the Parish of Orleans; or (3) where the state or any political subdivision of the state is the plaintiff or intervenor.<sup>75</sup> Louisiana’s statutory scheme for security for court costs has also survived constitutional challenges, which challenged the provisions as violative of due process and discriminatory against plaintiffs as a class.<sup>76</sup> Despite the statutory language that the

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67. *Id.*

68. *Id.*

69. *Carter v. Phillips*, 337 So. 2d 187 (La. 1976). See discussion *infra* Part I.B.3.

70. *Id.* at 188.

71. See generally Rebecca Love Kourlis et al., *Would “loser pays” eliminate frivolous lawsuits and defenses?*, NEWTALK (Aug. 19, 2008, 9:00 AM), <http://newtalk.org/2008/08/would-loser-pays-eliminate-fri.php> [<https://perma.cc/9C7M-B62Z>].

72. MAX TOBIAS, JR. ET AL., LA. PRAC. CIV. PRETRIAL § 8:13 (2016).

73. See LA. REV. STAT. § 13:4522 (2019).

74. *Id.*

75. See TOBIAS, JR. ET AL., *supra* note 72.

76. See, e.g., *Michel v. Edmonson*, 218 So. 2d 103 (La. Ct. App. 1968) (upholding the statute in the face of constitutional challenges); *Grinage v. Times-Democrat Publ’g Co.*, 31 So. 682, 683 (La. 1902) (“The constitutional declaration that the courts shall be open, and every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law . . . is not to be understood or construed as taking from the legislature the power to prescribe reasonable rules and regulations relative to the costs incurred

defendant must bring this motion before pleading,<sup>77</sup> the Louisiana Supreme Court in *Jones v. Williams*<sup>78</sup> interpreted the statute to allow the defendant to demand a bond for costs when the necessity arises.<sup>79</sup> The court explained that a defendant's right to seek security for costs is not forfeited by entering a plea in the suit.<sup>80</sup> Rather, the defendant may demand a bond for costs when "the necessity therefor arises."<sup>81</sup>

The statute requires a cost bond<sup>82</sup> only for those necessary expenses which a defendant may have to pay in advance of a judgment deciding who shall pay costs and which the plaintiff may be condemned to pay.<sup>83</sup> Thus, the statute's scope is narrowly confined to a small collection of expenditures.<sup>84</sup> Examples of items that may be taxed as court costs include the following: fees of expert witnesses; necessary depositions of witnesses; and certain notary public fees.<sup>85</sup> The statute does not permit a cost bond to encompass potential attorney's fees, pecuniary damages, or punitive damages.<sup>86</sup>

Although the security usually consists of a surety bond,<sup>87</sup> a plaintiff has the option of furnishing a cash bond.<sup>88</sup> When a surety bond is provided, it must be made payable to the clerk of the trial court in which the proceeding is pending.<sup>89</sup> Although the defendant bears the burden of showing the necessity of a bond for costs before the plaintiff or intervenor

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in litigation."); *Bize v. Lavradain*, 263 So. 3d 584, 592–97 (La. Ct. App. 2018) (upholding the statute in the face of constitutional challenges).

77. LA. REV. STAT. § 13:4522.

78. *Jones v. Williams*, 184 So. 565 (La. 1938).

79. *Id.* at 567.

80. *Id.*

81. *Id.* (emphasis added).

82. A "cost bond" is defined as "[a] bond given by a litigant to secure the payment of court costs." *Cost Bond*, BLACK'S LAW DICTIONARY (10th ed. 2014) (listed under "bond").

83. *Vines v. Vines*, 379 So. 2d 1219, 1221 (La. Ct. App. 1980).

84. *See id.*

85. *Id.*

86. *See id.*

87. A "performance bond" is defined as "[a] bond given by a surety to ensure the timely performance of a contract. . . . The face amount of the bond is typically 2% of the value of performance, but occasionally as much as 5%." *Performance Bond*, BLACK'S LAW DICTIONARY (10th ed. 2014). For a brief discussion on the distinction between a surety bond and a cash bond, see Emily Beach, *Surety Bond vs. Cash Bond*, ZACKS INV. RES. (May 7, 2018), <https://finance.zacks.com/surety-bond-vs-cash-bond-3462.html> [<https://perma.cc/HD6T-JBFV>].

88. *See* LA. CODE CIV. PROC. art. 5121 (2019).

89. *See id.*

may be required to furnish a bond,<sup>90</sup> the trial court has wide discretion in determining how that showing is made.<sup>91</sup> Ultimately, the trial court has discretion in setting the amount of the cost bond that the plaintiff must post, if any.<sup>92</sup>

3. *Carter v. Phillips: Louisiana's Current Framework for Ruling on a § 13:4522 Motion*

Procedurally, the mechanism behind Louisiana's security for costs statute is relatively straightforward.<sup>93</sup> Actual application of the statute, however, has proven more difficult.<sup>94</sup> Louisiana trial courts presently rely on a skeletal framework the Louisiana Supreme Court established in *Carter v. Phillips* when ruling on a motion for security for costs ("§ 13:4522 motion").<sup>95</sup> In *Carter*, 19-year-old Elsie Carter brought a medical malpractice suit for damages of \$250,000 against Dr. Phillips and his insurer.<sup>96</sup> Carter alleged that Dr. Phillips severed her facial nerves during oral surgery.<sup>97</sup> After Carter furnished a jury bond<sup>98</sup> of \$1,000, the defendants filed a motion for security for costs in the amount of \$900 pursuant to § 13:4522.<sup>99</sup> Adjusted for inflation, this equates to approximately \$4,066 in 2018 dollars.<sup>100</sup> The defendants claimed that a proper defense of the suit would require them to expend funds on several items, particularly expert medical witness testimony and deposition fees.<sup>101</sup> At a contradictory hearing on the motion—at which no evidence

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90. See *Carville v. City of Plaquemine*, 303 So. 2d 291, 293 (La. Ct. App. 1973).

91. See *Carter v. Phillips*, 337 So. 2d 187, 188 (La. 1976) (enumerating various outlets the trial court can look to when determining whether a defendant has made a proper showing under the statute).

92. See *Carville*, 303 So. 2d at 293.

93. If the defendant's motion is granted, the plaintiff must post the ordered security within the timeframe the court establishes. Otherwise, the plaintiff's suit is dismissed without prejudice. See LA. REV. STAT. § 13:4522 (2019).

94. See, e.g., *Carter*, 337 So. 2d at 188.

95. *Id.*

96. *Id.*

97. *Id.*

98. The scope of this Comment is limited to security for court costs, i.e., cost bonds, and does not discuss jury bonds. For a brief discussion on jury bonds, see generally BILLIE COLOMBARO ET AL., LA. PRAC. CIV. TRIAL §§ 3:6–3:12 (2017).

99. *Carter*, 337 So. 2d at 188.

100. *CPI Inflation Calculator*, BUREAU LAB. STATS., <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=900&year1=197601&year2=201812> [https://perma.cc/633P-UMV4] (last visited Feb. 7, 2019).

101. *Carter*, 337 So. 2d at 188.

was offered either in support or in opposition—the trial court granted the motion and ordered Carter to post a \$900 bond for court costs.<sup>102</sup> If Carter did not post the bond, her suit would be dismissed.<sup>103</sup>

In annulling the trial court's cost bond, the Louisiana Supreme Court enunciated a very broad net for the trial court to cast when ruling on a § 13:4522 motion:

[I]t is within the discretion of the trial judge to determine whether the showing required [by § 13:4522] be made by the allegations in the motion, supporting affidavits, the arguments of counsel at the hearing, introduction of evidence, or in any other manner which the trial judge deems appropriate.<sup>104</sup>

Thus, *Carter* seemingly provides Louisiana trial courts a roadmap cut in half: although it provides several vehicles for the trip,<sup>105</sup> the law remains silent as to what roads, highways, or shortcuts are available to reach the ultimate destination—that is, to grant or deny the defendant's motion.<sup>106</sup>

Under the Louisiana Supreme Court's current guidance, trial courts have several outlets at their disposal when ruling on a motion for security for court costs.<sup>107</sup> This framework, however, fails to instruct trial courts as to what courts should look for when navigating the allegations in the motion, supporting affidavits, arguments of counsel, and other evidence.<sup>108</sup> For example, the framework is silent as to whether the court should consider the plaintiff's likelihood of success on the merits, whether the defendant is using the motion in an attempt to stifle a genuine claim, or whether potential court costs from the action are going to be high because of the length and complexity of the litigation.<sup>109</sup>

## II. COMPARATIVE SURVEY OF INTERNATIONAL JURISDICTIONS: A GLOBAL APPROACH TO SECURITY FOR COURT COSTS

Louisiana will benefit from borrowing legal rules from Ontario, Ireland, and South Africa that govern security for court costs. These

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102. *Id.*

103. *Id.*

104. *Id.* at 189.

105. For example, a trial court can look to the allegations in the motion, supporting affidavits, arguments of counsel at a contradictory hearing, and the introduction of evidence. *See id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. *See generally id.*

particular jurisdictions are included for two reasons. First, there is a notable amount of scholarship on the topic of security for costs in relation to these jurisdictions.<sup>110</sup> Second, this scholarship is informed by a jurisprudence that touches on each integral part of the security: the rationale behind it, the procedural mechanism, and the ultimate impact on the longevity of litigation.<sup>111</sup> What is notably absent, however, is reference to a pure civilian jurisdiction and its respective approach to security for costs. Louisiana's legal system was largely modeled after the French Code Napoléon,<sup>112</sup> arguably the *pièce de résistance* of the civilian world.<sup>113</sup> Although security for costs is a common procedure many common law systems recognize, the practice has less footing in civil law jurisdictions.<sup>114</sup> Unfortunately, “[g]iven the limited scope and effect of the rules on costs, there are no specific provisions in French law regarding security for costs.”<sup>115</sup> Thus, the inquiry into Louisiana's civilian counterpart ends there. Nevertheless, reference to other international legal systems is instructive in formulating an analytical framework for Louisiana courts to follow. Although geographically unlike, a convergence of these three jurisdictions—Ontario, Ireland, and South Africa—establishes a clear

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110. See, e.g., Cadili, *supra* note 19; Biehler, *supra* note 13; Havenga, *supra* note 14.

111. See, e.g., Cadili, *supra* note 19; Biehler, *supra* note 13; Havenga, *supra* note 14.

112. See Robert A. Pascal, *Louisiana's Mixed Legal System*, 15 REV. GEN. 341, 343–44 (1984) (“It is because of this *Civil Code* . . . that Louisiana can be said to have a ‘mixed’ or a ‘bi-legal’ system.”) (footnotes omitted).

113. See MICHAEL GALLAGHER, REPRESENTATIVE GOVERNMENT IN MODERN EUROPE 77 (4th ed., McGraw-Hill 2005) (“[The Napoleonic Code] was . . . the first modern legal code to be adopted with a pan-European scope and it strongly influenced the law of many of the countries formed during and after the Napoleonic Wars.”).

114. Chris Parker et al., *A Global Perspective on Availability of Security for Costs and Claim in International Arbitration: Mirage or Oasis?*, HERBERT SMITH FREEHILLS (Feb. 1, 2017), <https://www.herbertsmithfreehills.com/latest-thinking/a-global-perspective-on-availability-of-security-for-costs-and-claim-in> [<https://perma.cc/67UQ-49LF>].

115. Tim Portwood, *France*, in THE DISPUTE RESOLUTION REVIEW 155, 164 (Damian Taylor ed., 2017); see also Michael Bühler & Pierre Heitzmann, *France*, JONES DAY 57 (Oct. 2009), [http://www.jonesday.com/files/Publication/ee6ac2d0-ade4ef-4f9e-8a82-fc3dbfadaf7b/Presentation/PublicationAttachment/0c4deb70-26ef-4d77-b5de-0171692d4971/PLC%20Arbitration%20Handbook%20-%20%20Article%20MB%20\(France\).pdf](http://www.jonesday.com/files/Publication/ee6ac2d0-ade4ef-4f9e-8a82-fc3dbfadaf7b/Presentation/PublicationAttachment/0c4deb70-26ef-4d77-b5de-0171692d4971/PLC%20Arbitration%20Handbook%20-%20%20Article%20MB%20(France).pdf).PDF [<https://perma.cc/UK45-72RY>] (“There is no specific statutory provision addressing security for costs.”).

framework for Louisiana courts to follow when ruling on a motion for security for court costs.<sup>116</sup>

#### A. Canadian Approach to Security for Court Costs

Ontario's system for security for costs is governed by a detailed and sophisticated statute, and Louisiana can benefit from borrowing certain aspects incorporated therein.<sup>117</sup> Canadian civil procedure, including rules regulating costs and fees, is largely based on individual province rules.<sup>118</sup> Thus, procedural mechanisms and rules vary depending on the province.<sup>119</sup> Like the U.S. judicial system, Canada has both a federal court and provincial courts with separate and distinct rules.<sup>120</sup> As one of Canada's 13 provinces and territories, Ontario is governed by the Ontario Rules of Civil Procedure ("Ontario Rules").<sup>121</sup> Unlike Louisiana's two-sentence statute governing security for costs, the Ontario Rules offer a detailed statutory scheme concerning security for costs.<sup>122</sup> Particularly, Rule 56.01 of the Ontario Rules outlines the specific circumstances in which a defendant is allowed to bring a motion for security for costs.<sup>123</sup> The rule provides that a court, upon motion of a defendant or respondent, may order security for costs in six circumstances: (1) the plaintiff resides outside Ontario; (2) the plaintiff has another proceeding seeking the same relief elsewhere; (3) there is an outstanding order against the plaintiff for costs that remain unpaid; (4) the plaintiff has insufficient assets in Ontario to cover a potential judgment for costs; (5) the suit is frivolous; or (6) a statute entitles the defendant to security for costs.<sup>124</sup> Thus, a defendant must first

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116. See discussion *infra* Part II.A (discussing Ontario's approach), Part II.B (discussing Ireland's approach), and Part II.C (discussing South Africa's approach).

117. See Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

118. H. Patrick Glenn, *Costs and Fees in Common Law Canada and Quebec*, U. MICH. 1, [http://www-personal.umich.edu/~purzel/national\\_reports/Canada.pdf](http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf) [<https://perma.cc/S2S3-M9H4>] (last visited Apr. 2, 2019).

119. *Id.*

120. *Id.*

121. For a brief introduction to civil procedure in Ontario, see Eric P. Polten & Peter Glezel, *Civil Procedure in Ontario*, POLTEN & ASSOCS. (2014), <https://www.poltenassociates.com/Civil-Procedure-English-0011.pdf> [<https://perma.cc/BGK7-8KNM>].

122. See Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

123. Cadili, *supra* note 19, at 2.

124. Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

establish that one of these six discrete circumstances is present when seeking security for costs.<sup>125</sup>

Rules 56.02–56.09 outline the procedural particulars of security for costs under the Ontario Rules.<sup>126</sup> Several security for costs statutes focus on the residency of the plaintiff,<sup>127</sup> and Ontario is no different.<sup>128</sup> Many jurisdictions hinge the inquiry on whether the plaintiff resides in the jurisdiction.<sup>129</sup> If the plaintiff is a resident within the jurisdiction, then the plaintiff—or his assets—is likely more susceptible to the court’s reach.<sup>130</sup> If the plaintiff resides elsewhere, there is an implicit assumption that the court and the defendant will face jurisdictional obstacles in securing court costs from the plaintiff.<sup>131</sup>

Although Ontario residency is one of the factors to be considered, satisfying this or any of the other enumerated grounds in Rule 56.01 does not necessarily entitle a defendant to security for costs.<sup>132</sup> In *Zeitoun v. The Economical Insurance Group*, the Ontario Divisional Court held that Rule 56.01 is merely a threshold measure.<sup>133</sup> Once a defendant satisfies one of

125. See Cadili, *supra* note 19, at 2.

126. See Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

127. See, e.g., D. ARIZ. R. 54.1(c) (security for costs may be demanded from non-resident plaintiffs); D. ME. R. 54.1 (providing that a defendant may request security for costs from a non-resident plaintiff); D. MD. ADM. R. 103(4) (a non-resident plaintiff may be required to post a security for costs); E.D. PA. CIV. R. 54.1(a) (an order for security for costs may be entered against a non-resident plaintiff); see also *Fitzgerald v. Whitmore* (1786) 99 Eng. Rep. 1140 (K.B.) (noting that English residents were required to give security for costs when pursuing claims in European countries); *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] QB 609 at 625 (Eng.) (stating that “the plaintiff must be ordinarily resident out of the jurisdiction and the [European Union]” for security for costs to be ordered).

128. See Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

129. See, e.g., *id.* (listing non-residency as one of six grounds for which a plaintiff may be ordered to post security). For a discussion on constitutional issues related to this resident vs. non-resident distinction, see Ellington, *supra* note 25.

130. See generally LA. CODE CIV. PROC. arts. 6(A)(1) (establishing the “presence theory” of personal jurisdiction), 6(A)(2) (2019) (establishing the “domicile theory” of personal jurisdiction).

131. *Id.* Of course, as Justice Oliver Wendell Holmes, Jr. noted, “the foundation of jurisdiction is physical power.” *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

132. See Cadili, *supra* note 19, at 3.

133. See *id.* (quoting *Zeitoun v. The Econ. Ins. Grp.* (2008), 292 D.L.R. 4th 313 (Can. Ont. S.C.J. (Div. Ct.)), *aff’d* 307 D.L.R. 4th 218 (Can. Ont.)).

the six categories, the court must then determine whether an order for security for costs would be equitable.<sup>134</sup> Once this inquiry is triggered, the court must consider a number of factors, including “the merits of the claim, the financial circumstances of the plaintiff, and the possible effect of . . . preventing a bona fide claim from proceeding.”<sup>135</sup> Like Louisiana courts, Ontario courts retain broad discretion to decide whether to grant or deny a motion for security for costs.<sup>136</sup>

Once the defendant has made a proper showing by triggering one of the enumerated grounds in Rule 56.01, a plaintiff may resist the motion in one of two ways: (1) the plaintiff establishes that he has sufficient assets in Ontario; or (2) the plaintiff shows that he is indigent and that justice weighs against an order for security.<sup>137</sup> Although showing sufficient assets is generally easy to satisfy,<sup>138</sup> an impecuniosity defense requires the plaintiff to show that his financial difficulties will result in the suit’s dismissal if he is ordered to pay security.<sup>139</sup> The plaintiff must also demonstrate that his claim is not “plainly devoid of merit.”<sup>140</sup> This requirement is an easy obstacle to overcome, as the plainly-devoid-of-merit standard is a very low evidentiary threshold.<sup>141</sup> The rationale behind allowing impecuniosity as a defense is grounded on fundamental fairness; ultimately, justice would not be served if a plaintiff’s suit is stopped in its tracks merely because of the plaintiff’s poverty.<sup>142</sup> Further, there is an even greater potential for fundamental unfairness if the defendant caused the plaintiff’s impecuniosity.<sup>143</sup>

In sum, the Ontario Rules establish a detailed procedural framework for a court to follow when ruling on a motion for security for costs.<sup>144</sup> Rule 56.01 requires a threshold inquiry into whether one of six enumerated

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134. *See id.*

135. *DiFilippo v. DiFilippo*, 2013 CanLII 5460, ¶ 26 (Can. Ont. S.C.) (internal citation omitted).

136. *Id.* (internal citation omitted).

137. *Cadili*, *supra* note 19, at 4. *See DiFilippo*, 2013 CanLII 5460, ¶ 27.

138. For example, a plaintiff corporation could submit its corporate balance sheet or an affidavit to establish its amount of assets.

139. *See Cadili*, *supra* note 19, at 4.

140. *Id.*

141. *DiFilippo*, 2013 CanLII 5460, ¶ 28 (internal citation omitted).

142. *See Cadili*, *supra* note 19, at 4 (footnote omitted).

143. *Id.* at 5 (footnote omitted). *See discussion infra* Part II.B (discussing situation where the defendant caused the plaintiff’s lack of financial resources).

144. *See* Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

conditions are met.<sup>145</sup> Meeting one of the six conditions triggers an additional inquiry by the court to determine whether security for costs would be just. A plaintiff is sometimes able to resist a security for costs motion by demonstrating that he has sufficient assets within the jurisdiction or that he is impecunious and his claim is not “plainly devoid of merit.”<sup>146</sup> If a plaintiff is unable to counter using either of these arguments, only then may a court utilize its broad discretion and order security for costs.<sup>147</sup>

### *B. Irish Approach to Security for Court Costs*

Across the pond, Irish courts apply a similar security-for-costs scheme. Notably, Irish jurisprudence recognizes “special circumstances” that may either support or defeat a motion for security for costs.<sup>148</sup> The authority of an Irish court to consider a motion for security for costs is explicitly recognized under Order 29 of the Rules of the Superior Courts of 1986.<sup>149</sup> As a court rule, Order 29 contains seven subsections and focuses heavily on the residence of the plaintiff.<sup>150</sup> For security to be ordered against an individual plaintiff pursuant to Order 29, two conditions must be satisfied: (1) the plaintiff must reside outside of the jurisdiction and the European Union; and (2) the defendant must establish a prima facie defense to the plaintiff’s claim.<sup>151</sup> Even when both these conditions are satisfied, however, Irish courts still possess significant discretion and may deny a motion for security for costs in special circumstances.<sup>152</sup> Such “special circumstances” include the following situations: (1) when the

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145. See Cadili, *supra* note 19, at 3 (quoting *Zeitoun v. The Econ. Ins. Grp.* (2008), 292 D.L.R. 4th 313 (Can. Ont. S.C.J. (Div. Ct.)), *aff’d* 307 D.L.R. 4th 218 (Can. Ont.)).

146. See DiFilippo v. DiFilippo, 2013 CanLII 5460, ¶ 28 (Can. Ont. S.C.) (internal citation omitted).

147. Cadili, *supra* note 19, at 3 (quoting *Zeitoun*, 292 D.L.R. 4th 313).

148. See Biehler, *supra* note 13, at 176–77.

149. Rules of the Superior Courts 1986 (O. 29) (Ir.), <http://www.courts.ie/rules.nsf/0/7b00be9a0cd3941380256f8e005984ac> [<https://perma.cc/EN7X-3RZU>] (last visited Apr. 2, 2019).

150. See *id.*; see also David L. Scannell, *The Influence of the General Principles of Community Law on Rules of Procedure and Rules of Substance in Ireland*, 1 JUD. STUD. INST. J. 64, 120 (2001) (“Orders for security for costs have traditionally been available only as against plaintiffs resident outside the jurisdiction on the basis that, if they were not available, spurious claims could be made with impunity and orders for costs could be evaded with facility.”).

151. Biehler, *supra* note 13, at 176–77.

152. *Id.* at 176.

plaintiff shows he has sufficient assets within the jurisdiction or the European Union; (2) when the plaintiff's inability to provide security was caused by the defendant's wrong; or (3) when the defendant's application for security for costs is delayed—that is, filed outside of the prescribed filing time.<sup>153</sup>

Unlike Ontario's approach to security for costs, Irish jurisprudence remains unclear as to whether the plaintiff's poverty qualifies as a special circumstance that would defeat a motion for security for costs.<sup>154</sup> Several opinions have grappled with this issue.<sup>155</sup> In *Flynn v. Rivers*,<sup>156</sup> the court noted the plaintiff's limited financial resources and concluded that an order requiring security would be unjust.<sup>157</sup> Thus, the order was refused by the *Flynn* court.<sup>158</sup> More recent jurisprudence, however, is inconsistent on the issue.<sup>159</sup> Although the High Court of Ireland in *Heaney v. Malocca* adopted and followed the approach taken in *Flynn*, the Irish Supreme Court reversed course.<sup>160</sup> Noting that the *Flynn* decision had gone too far, the Irish Supreme Court held that a defendant is entitled to security for costs if the plaintiff resides outside of the jurisdiction, absent any special circumstances.<sup>161</sup> Additionally, the court did not explicitly adopt the theory that the plaintiff's poverty could constitute such a special circumstance.<sup>162</sup>

### C. South African Approach to Security for Court Costs

Although both Ontario and Ireland permit a court to inquire into the merits of a claim when deciding whether to order security, South African courts take a different approach by disallowing such an inquisition.<sup>163</sup> Prior to 2008, § 13 of the Companies Act 61 of 1974 (“§ 13”), together with its predecessor, § 216 of the Companies Act 46 of 1926, provided

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153. *Id.* at 176–77 (footnotes omitted).

154. *Id.* at 177.

155. *See Flynn v. Rivers* [1951] 86 ILTR 85 (H. Ct.) (Ir.); *Heaney v. Malocca* [1958] IR 111 (SC) (Ir.); *Jahwar v. Betta Livestock* [2001] 4 IR 42 (H. Ct.) (Ir.).

156. *Flynn*, 86 ILTR 85.

157. Biehler, *supra* note 13, at 177.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Havenga, *supra* note 14, at 362.

South African<sup>164</sup> “courts with the power to require an impecunious plaintiff company<sup>165</sup> to furnish security for costs if there was reason to believe that the plaintiff would not be able to pay an adverse costs order.”<sup>166</sup> The purpose of § 13 was simple: to protect the public from bankrupt companies.<sup>167</sup>

Similar to Louisiana’s § 13:4522, § 13 grants discretion to the trial court when ruling on a motion for security for costs.<sup>168</sup> The South African law also requires a two-pronged inquiry by the trial court.<sup>169</sup> First, the defendant must show that there is good reason to believe that the plaintiff, if unsuccessful, would be unable to pay a judgment for costs.<sup>170</sup> Second, if the court is satisfied by the defendant’s showing, it must then exercise its discretion in accordance with § 13.<sup>171</sup> At this stage,

[t]he task of the court was considered to be a balancing exercise: it weighed, on the one hand, the injustice to the plaintiff if it were prevented from pursuing a proper claim by an order for security, and, on the other hand, the injustice to the defendant if no security were ordered and the defendant later found himself unable to recover costs from an unsuccessful plaintiff.<sup>172</sup>

This second inquiry is a fact-intensive exercise by the trial court. If the court determines that the injustice the plaintiff would suffer overshadows the possibility that the defendant may not recover his costs at the end of the suit, then no order for security should be made.<sup>173</sup> On the contrary, if the injustice of preventing the plaintiff’s claim from being pursued is

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164. The Republic of South Africa, much like Louisiana, is a “mixed” legal system. See *History and Background*, SUP. CT. APPEAL S. AFR. (2015), <http://www.justice.gov.za/sca/historysca.htm> [<https://perma.cc/4U3V-WRY2>].

165. Louisiana Revised Statutes § 13:4522 applies to both juridical (e.g., a corporation or partnership) and natural plaintiffs. See LA. CIV. CODE art. 24 (2019).

166. Willem Janse van Rensburg & Clayton Gow, *Analysis: Security for Costs*, S. AFR. INST. CHARTED ACCTS. (Feb. 2015), <https://www.accountancysa.org.za/analysis-security-for-costs/> [<https://perma.cc/Q G5J-LEFB>].

167. Havenga, *supra* note 14, at 355.

168. *Id.* at 362.

169. *Id.* at 361–62.

170. *Id.*

171. *Id.* at 362.

172. *Id.*

173. *Id.*

minimal and the defendant's injustice of not recovering his costs is significant, then security for costs should be ordered.<sup>174</sup>

Unlike several other jurisdictions, the South African judiciary does not consider the merits of the case when deciding whether to order security.<sup>175</sup> Under this scheme, a court should not inquire into the merits of the plaintiff's claim or express an opinion on the prospects of success.<sup>176</sup> Ultimately, inquiring into the merits of the underlying claim is a questionable practice, as the discovery process often has not begun at the time a motion for security is filed.<sup>177</sup>

### III. BRINGING IT ALL TOGETHER: CRAFTING AN ANALYTICAL FRAMEWORK FOR LOUISIANA COURTS

The approaches Canadian, Irish, and South African courts take regarding security for costs are distinct and equally instructive for other jurisdictions. As a mixed legal system, Louisiana enjoys a diversity of both cultural and scholarly influences on its legal landscape.<sup>178</sup> This convergence of influences has catapulted Louisiana's legal system from the ordinary to the unique.<sup>179</sup> In this vein, Louisiana courts and the Louisiana Legislature should embrace the recognition and incorporation of useful jurisprudential standards and legal theories from international jurisdictions.<sup>180</sup> Louisiana should take a comparative approach and refine

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174. *Id.*

175. *Id.*

176. *Id.* (citations omitted).

177. Gliedman, *supra* note 3, at 955. *See also* discussion *infra* Part.III.B.

178. *See* Pascal, *supra* note 112, at 343–44 (“It is because of this *Civil Code*, fundamentally Spanish with some other influences, largely French in 1825 and the years immediately following that date, and more recently Anglo-American, that Louisiana can be said to have a ‘mixed’ or a ‘bi-legal’ system.”) (footnotes omitted); *see also* John A. Dixon, Jr., *Judicial Method in Interpretation of Law in Louisiana*, 42 LA. L. REV. 1661, 1661 (1982) (“Louisiana is now referred to by some observers as a mixed jurisdiction influenced by both the common law and the civil law.”) (footnote omitted). For a brief discussion on the survival and future of Louisiana's civilian heritage, *see* generally Thomas E. Carbonneau, *The Survival of Civil Law in North America: The Case of Louisiana*, 84 L. LIBR. J. 171 (1992).

179. *See* John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18, 33 (1959) (“[L]ouisiana has developed a legal system of its own, and although grounded on civil law, it must be classified as *sui generis*.”).

180. *See generally* Huey L. Golden, *The Conditional Sale in Louisiana Jurisprudence: Anatomy of a Synecdoche*, 54 LA. L. REV. 359, 360 (“[L]ouisiana is a unique legal laboratory in which scholars are able to study the effects of borrowing legal rules from other jurisdictions.”).

its own scheme for security for court costs to make up for the lack of a comprehensive framework.

Statutorily, the Louisiana Legislature should amend § 13:4522 to form a more detailed piece of legislation.<sup>181</sup> In particular, Louisiana courts should begin with a multifaceted approach as the threshold inquiry when ruling on a § 13:4522 motion. On the judicial level, Louisiana courts should adopt a burden-shifting procedure under a motion for security for court costs. If the court is satisfied that one or more of the factors under the newly amended statute are met, then the court should shift its inquiry to whether any “special” or exigent circumstances exist to either support or defeat a motion. At this point, the burden of proof will shift to the plaintiff to defeat a motion for security for costs. Finally, a defendant should be required to submit a bill of costs alongside a motion for security for costs.

A. *Adopting a Multifaceted Approach to Security for Court Costs*

The Louisiana Legislature should amend § 13:4522 and replace it with detailed legislation incorporating a multifaceted approach to security for costs.<sup>182</sup> Under this multifaceted approach, Louisiana courts should begin their analyses of a § 13:4522 motion by determining whether one of six discrete factors are present. Based on Ontario’s model, a Louisiana court’s inquiry should begin by determining whether the defendant has shown that:

- (1) the plaintiff or intervenor is domiciled outside Louisiana;
  - (2) the plaintiff or intervenor has another proceeding for the same relief pending in Louisiana or elsewhere;
  - (3) the defendant has an order against the plaintiff or intervenor for costs in the same or another proceeding that remain unpaid in whole or in part;
  - (4) there is good reason to believe that the plaintiff or intervenor has insufficient assets in Louisiana to pay the costs of the defendant;
  - (5) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or intervenor has insufficient assets in Louisiana to pay the costs of the defendant;
- or

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181. See *infra* Appendix A (model statute and the incorporated multifaceted approach).

182. See *id.*

(6) the defendant is entitled to security for costs by law.<sup>183</sup>

These six enumerated factors would establish the bounds of a § 13:4522 motion. Directing a trial court to consider these factors—instead of the fairly broad and indeterminate standard under *Carter v. Phillips*<sup>184</sup>—will better contain Louisiana’s system for security for costs.

By adopting this proposed legislation in place of the current two-sentence statutory scheme provided in § 13:4522, trial courts will be equipped with a straightforward framework from which to rule on a security for costs motion. Both plaintiffs and defendants will benefit from the advance knowledge of the specific situations that will require security for costs. The model legislation also retains a bedrock principle underlying security for costs: the protection of defendants against vexatious claims and insolvent plaintiffs.

A multifaceted approach presents both benefits and costs. Although multifaceted approaches to legal issues are common in the courtroom, they are not perfect.<sup>185</sup> These imperfections are primarily rooted in an approach’s design.<sup>186</sup> For example, a test or approach may inadvertently include redundant factors.<sup>187</sup> Such a duplication of factors would inevitably tie up judicial resources with no measurable return.<sup>188</sup> Some commentators have warned of excessive reliance on multifactor tests, which may, in return, produce “mechanical jurisprudence.”<sup>189</sup> Nevertheless, multifactor tests and “checklists” present several distinct advantages. First, “such tests possess the potential for mitigating cognitive error by nudging judges toward more deliberative processes.”<sup>190</sup> Second, “[m]ultifactor tests can help ensure that judges consider all relevant factors and can remind them of their responsibility to base decisions on more than mere intuition.”<sup>191</sup> Thus, litigators and Louisiana courts alike will be positioned to benefit from adopting a multifaceted approach to security for costs.

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183. This proposed legislation is modeled directly after Ontario’s. *See* Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

184. *See* *Carter v. Phillips*, 337 So. 2d 187, 188 (La. 1976).

185. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 40–41 (2007).

186. *Id.* at 41.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

### B. Omitting an Inquiry into the Merits of the Claim

Although one of the factors enumerated by both domestic and foreign jurisprudence permits a trial court to inquire into the underlying merits of a claim when deciding a motion for security for costs,<sup>192</sup> Louisiana should not adopt such a factor. Because of the early stage of the litigation at which security for costs is usually requested, it is possible for the record to be void of any features that would suggest that the case lacks merit.<sup>193</sup>

Federal case law also recognizes the omission of an inquiry into the merits of the underlying claim.<sup>194</sup> In *Jernryd v. Nilsson*, an Illinois federal district court ruled on a motion for security for costs from multiple defendants under the local rules of the court.<sup>195</sup> One defendant's motion requested a cost bond of \$750,000, but the other defendant's motion requested \$50,000.<sup>196</sup> The court determined it could not make any factual findings about the merits of the case because of the early stage of the litigation.<sup>197</sup> The court noted that "[a] security bond is *not* warranted on the grounds that the action lacks merit."<sup>198</sup> The *Jernryd* court's decision recognized the difficulty in determining the potential merits of a case at such an early stage in the litigation, and that even if it were able to make such a decision, a lack of merit does not necessarily warrant imposition of security for costs.<sup>199</sup>

The *Jernryd* outcome was not an isolated occurrence of a court disfavoring an early inquisition into the merits of the case. In *Atlanta Shipping Corp. v. Chemical Bank*, the District Court for the Southern District of New York granted the defendant's motion for security for court costs and ordered the plaintiff to post a \$10,000 bond "as security for costs" under "either the state or local rule."<sup>200</sup> The court "perceive[d] a high risk that the plaintiff, a debtor in bankruptcy, [would] be unable to

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192. See, e.g., *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 144 (1st Cir. 1976) (listing "likelihood of success on the merits" as one of several factors for a trial court to consider).

193. Gliedman, *supra* note 3, at 966.

194. See, e.g., *Jernryd v. Nilsson*, 1988 U.S. Dist. LEXIS 11985 (N.D. Ill. Oct. 20, 1988); *Atlanta Shipping Corp. v. Chem. Bank*, 631 F. Supp. 335 (S.D.N.Y. 1986), *aff'd*, 818 F.2d 240 (2d Cir. 1987).

195. *Jernryd*, 1988 U.S. Dist. LEXIS 11985, at \*4-5 (N.D. Ill. Oct. 20, 1988).

196. *Id.* at \*3.

197. *Id.* at \*5-6.

198. *Id.* at \*5 (citing *River Plate Reinsurance Co. v. Jay-Mar Grp., Ltd.*, 588 F. Supp. 23, \*27 (S.D.N.Y. 1984)) (emphasis added).

199. *Id.* at \*5-6.

200. *Atlanta Shipping Corp. v. Chem. Bank*, 631 F. Supp. 335, 352 (S.D.N.Y. 1986), *aff'd*, 818 F.2d 240 (2d Cir. 1987).

pay the defendant's costs should the defendant prevail."<sup>201</sup> Additionally, the plaintiff, a foreign corporation, had no reachable assets.<sup>202</sup> The combination of the plaintiff's status as a debtor in bankruptcy and its lack of assets persuaded the court to order the plaintiff to post a bond for security for costs.<sup>203</sup> Nevertheless, the court noted: "The plaintiff asks us to make a preliminary determination on the merits in order to decide whether to require costs. At this stage, that determination is *neither possible nor necessary*."<sup>204</sup> Similar to the *Jernryd* decision, the *Atlanta Shipping* court correctly recognized its inability to make a determination on the merits of the claim because of the early stage of the litigation.<sup>205</sup>

Both *Jernryd* and *Atlanta Shipping* stand for the proposition that the court is not in the proper position to effectively critique an undeveloped and insufficient record. Furthermore, a court's inquiry into the merits of a claim at a § 13:4522 hearing may have indirect consequences.<sup>206</sup> Particularly, the court may tacitly convince the plaintiff to drop his claim if the court's premature views on the case are unfavorable.<sup>207</sup> This inadvertent consequence could occur before a full discovery is even conducted.<sup>208</sup> Ultimately, a court's inquisition into the merits of the underlying claim at this early stage of the litigation process—prior to formal discovery—"shows that the repercussions of the security requirements are quite significant."<sup>209</sup> In light of these significant consequences, a Louisiana court should forgo an inquiry into the underlying merits of a claim when ruling on a § 13:4522 motion.

### C. Procedural Dance: Burden Shifting and Special Circumstances

In addition to omitting an inquiry into the merits of the plaintiff's claim, Louisiana courts should adopt a procedural framework akin to that of Ontario and Ireland. Although the initial burden should be on the defendant to show the necessity for a bond for costs,<sup>210</sup> the burden should then shift to the plaintiff to establish either: (1) that he has sufficient assets in Louisiana; or (2) "that it is impecunious and that an injustice would

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201. *Id.* at 353.

202. *Id.*

203. *Id.*

204. *Id.* at 353 n.25 (emphasis added).

205. *Id.*

206. Gliedman, *supra* note 3, at 973.

207. *Id.*

208. *Id.*

209. *Id.*

210. *See* discussion *supra* Part I.B.

result if it were not allowed to proceed with its claim.”<sup>211</sup> There is currently no burden shifting framework under § 13:4522.<sup>212</sup> Although the initial burden lies with the defendant to show the necessity for security for court costs, the law is silent as to what response, if any, should come from the plaintiff.<sup>213</sup>

In addition to adopting this burden shifting framework, Louisiana courts should recognize a number of applicable “special circumstances,” which may either prove supportive or fatal to a defendant’s motion for security for costs. A number of jurisdictions, including both Ontario and Ireland, support this form of inquiry.<sup>214</sup> Under the Ontario Rules and jurisprudence, for example, a court is encouraged to look to a number of factors when exercising its vast discretion in ordering security, including: the amount of costs the defendant already incurred; whether the plaintiff may attempt to avoid paying a judgment for costs; the conduct of the parties during the proceedings; and whether the plaintiff owns sufficient assets within the jurisdiction with which to satisfy a judgment for costs.<sup>215</sup>

Ontario courts also recognize the potential for injustice where the plaintiff’s impoverishment was caused by the defendant; rightly, this weighs against ordering security.<sup>216</sup> Likewise, where the plaintiff’s inability to provide security was caused by the acts or omissions of the defendant, Irish courts deem this a special circumstance in favor of denying the defendant’s security for costs motion.<sup>217</sup> Louisiana courts, too, should recognize this situation as a special circumstance. Courts will then be equipped to protect plaintiffs in situations in which the defendant’s actions or omissions caused a significant pecuniary loss to the plaintiff.<sup>218</sup>

#### *D. Requiring a Bill of Costs*

Finally, a defendant should be required to submit a bill of costs<sup>219</sup> in conjunction with a motion for security for court costs under § 13:4522. The purpose of this measure is simple: to force the defendant to itemize

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211. Cadili, *supra* note 19, at 4.

212. See LA. REV. STAT. § 13:4522 (2019).

213. See *Carville v. City of Plaquemine*, 303 So. 2d 291, 293 (La. Ct. App. 1973).

214. See discussion *supra* Part II.A and Part II.B.

215. Cadili, *supra* note 19, at 5.

216. *Id.*

217. Biehler, *supra* note 13.

218. For example, a defendant’s alleged failure to perform under the terms of a contract or commission of fraud or conversion can involve serious implications for a plaintiff’s purse.

219. See *infra* Appendix B (sample bill of costs).

the expected costs that may be taxed as court costs at the end of the judicial proceeding.<sup>220</sup> Requiring a bill of costs is ideal as it provides the trial court with an expeditious and clear look into the heart of the motion for security for costs.<sup>221</sup> Rather than relying on broad and unsupported assertions within a defendant's motion, a bill of costs affords a trial court the opportunity to carefully examine whether the amount the defendant requested is justified. In fact, a defendant's failure to show any taxable costs is fatal to a motion under § 13:4522.<sup>222</sup> The bill of costs requirement also fits squarely within the original framework *Carter v. Phillips* established.<sup>223</sup>

*E. Special Problems Involving Pro Se Litigants: Heeding Judge Chatelain's Concurrence in Clarkston v. Funderburk*

Adopting a multifaceted approach, requiring a bill of costs, and recognizing appropriate burden shifting and special circumstances is essential to securing more equitable results under Louisiana's security for court costs statute.<sup>224</sup> Nevertheless, unique concerns arise in the context of pro se litigants. Particularly, a pro se litigant may qualify to proceed *in forma pauperis* but may not make the required election to do so.<sup>225</sup> Thus, a self-represented indigent may be especially susceptible to an order for security for costs and may face the consequence of having his suit dismissed.<sup>226</sup>

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220. *See Bill*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A certified, itemized statement of the amount of costs owed by one litigant to another, prepared so that the prevailing party may recover the costs from the losing party.").

221. For a brief discussion on the role of the bill of costs in federal practice, see Jaret J. Fuente, *Preparing a Bill of Costs*, A.B.A., <http://apps.americanbar.org/dch/thedl.cfm?filename=/YL406000/relatedresources/billofcosts.pdf> [<https://perma.cc/7K8A-P24T>] (last visited Feb. 2, 2019).

222. *See Whitson v. Am. Ice Co.*, 113 So. 849, 851 (La. 1927) (annulling a trial court's order for security for costs where defendant failed to show that it "was about to incur any expense or liability for fees which might ultimately be taxed as costs against the plaintiff").

223. *See Carter v. Phillips*, 337 So. 2d 187, 188 (La. 1976).

224. *See LA. REV. STAT. § 13:4522* (2019).

225. "A person who wishes to exercise the privilege of proceeding *in forma pauperis* must apply to the court for permission to do so in his or her first pleading, or in an *ex parte* written motion if requested later." Roger A. Setter, *Special Provisions for In Forma Pauperis Appeals—Procedure for Invoking Right to Proceed In Forma Pauperis*, in LA. PRAC. CIV. APP. § 3:87 (2017).

226. *See LA. REV. STAT. § 13:4522* (failure to post ordered security for costs will result in a suit's dismissal without prejudice).

*Clarkston v. Funderburk* illustrates this situation.<sup>227</sup> In that case, Aleashia Clarkston was terminated from her position as public school teacher with the Iberia Parish School Board.<sup>228</sup> Clarkston asserted “that she was wrongfully terminated, denied due process as a tenured employee, and publicly defamed.”<sup>229</sup> The Louisiana Association of Educators assigned attorney Ike Funderburk to represent Clarkston in her case against the school board, but Clarkston learned approximately 14 months later that he had never filed a suit on her behalf.<sup>230</sup> Thus, Clarkston’s claims against the school board prescribed, and she subsequently brought a legal malpractice suit against Funderburk.<sup>231</sup> In the malpractice proceeding, Funderburk filed a motion for security for court costs pursuant to Louisiana Revised Statutes § 13:4522.<sup>232</sup> The cost bond was set at a staggering \$10,000.<sup>233</sup> Clarkston, a pro se litigant, requested a 30-day extension “due to financial hardship,” but ultimately failed to post the ordered security.<sup>234</sup> The court dismissed Clarkston’s suit against her former attorney, and she then appealed the trial court’s actions to the Third Circuit.<sup>235</sup>

Although the appellate court affirmed the trial court’s order for security for costs and the suit’s ultimate dismissal,<sup>236</sup> Judge David Chatelain wrote separately to highlight particular sensitivities involving pro se litigants in the context of security for costs. Judge Chatelain noted:

From the outset, as evident in this case, the legislature has incorporated legal jargon in La. R.S. 13:4522. In particular, the statute is made inapplicable “to cases brought in forma pauperis.” Although “in forma pauperis” may be a term of art easily understandable within the legal community, the same may not be true among the general populace. Alone this may be problematic. However, when read in conjunction with [Louisiana Code of Judicial Conduct] Canon 3 it becomes even more so for the trial judge who is required to be impartial, but who is permitted “to facilitate the abilities of all litigants, including self-represented

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227. *Clarkston v. Funderburk*, 211 So. 3d 509 (La. Ct. App. 2017).

228. *Id.* at 510.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 511.

235. *Id.*

236. *Id.*

litigants.” The facts of the present case highlight that problem.<sup>237</sup>

Thus, Judge Chatelain’s concurrence expresses two primary concerns: first, the trial court is required to be impartial; and second, self-represented litigants may be disadvantaged when dealing with statutes that incorporate legal jargon, such as Louisiana Revised Statutes § 13:4522.

Although Clarkston responded affirmatively to the trial court when questioned about whether she understood the gravity of a \$10,000 order for security for costs, “she opined the bond amount was substantial for her to provide.”<sup>238</sup> Judge Chatelain noted that “to require the trial judge . . . to have explained the term ‘in forma pauperis’ and all that entailed, would have caused the trial judge to suggest a defense to the defendant’s motion.”<sup>239</sup> This explanation, Judge Chatelain suggests, “would have placed the trial judge in an untenable position, one that Canon 3 guards against.”<sup>240</sup> Thus, Judge Chatelain recommends several avenues to “ameliorate this seemingly growing concern” surrounding pro se litigants in Louisiana.<sup>241</sup> Particularly, Judge Chatelain points to a number of guides and manuals for the self-represented litigant. These resources, however, are but the first step. Judge Chatelain continues:

Notwithstanding the availability of these resources, it seems crucial that the dissemination of such information to the self-represented litigant from the very inception of litigation is essential to further the search for justice and foster the impartiality of the trial judge. To do otherwise keeps valuable information hidden from the self-represented litigant, thwarts justice, and places an undue burden on trial judges.<sup>242</sup>

Ultimately, Judge Chatelain urges that invaluable resources and information be distributed to self-represented litigants. Otherwise, pro se litigants will be deprived of justice, while simultaneously straining the resources of trial courts.

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237. *Id.* at 519 (Chatelain, J. concurring).

238. *Id.*

239. *Id.*

240. *Id.* Canon 3 of the Louisiana Code of Judicial Conduct mandates that “[a] judge shall perform the duties of office impartially and diligently.” *Code of Judicial Conduct*, LA. SUP. CT. (Jan. 7, 2016), <https://www.lasc.org/rules/supreme/cjc.asp> [<https://perma.cc/GZ3N-Z3KH>].

241. *Clarkston*, 211 So. 3d at 519 (Chatelain, J., concurring).

242. *Id.*

Judge Chatelain's concurrence highlights some of the problems pro se litigants in Louisiana face in the context of security for court costs. Thus, in addition to adopting formalities such as a multifaceted approach to security for costs, requiring a bill of costs, and implementing a burden-shifting scheme, Louisiana courts should heed Judge Chatelain's warnings and implement his recommended solutions when working with self-represented litigants.

### CONCLUSION

Although often overlooked by the legal practitioner, a security for costs motion is a powerful procedural tool<sup>243</sup> that carries serious implications in litigation.<sup>244</sup> Failure to post ordered security may act as a total bar to the suit.<sup>245</sup> To achieve clarity and equity, the Louisiana Legislature should refine Louisiana's statutory scheme for security for costs by adopting a comparative approach to the issue. A convergence of international jurisprudence—borrowed from Canada, Ireland, and South Africa—yields a clear framework for Louisiana courts to follow when ruling on a motion for security for court costs.<sup>246</sup> Acting as a metaphorical flashlight, this procedural and analytical framework illuminates identifiable factors and circumstances for a trial court to consider when deciding whether to grant or deny a § 13:4552 motion. Thus, rather than confining itself to the four corners of the defendant's motion, a trial court will be equipped to consider factors such as a plaintiff's domicile, assets within the jurisdiction, and the conduct of the parties when ruling on a security for costs motion. Louisiana courts should also take notice of particular concerns involving pro se litigants, and work to ensure that Louisiana's indigent are not denied access to justice. Implementing these changes will continue shielding defendants from frivolous claims, while ensuring that courthouse doors remain open in Louisiana.

*Bradley C. Guin\**

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243. Cadili, *supra* note 19, at 2.

244. *See* LA. REV. STAT. § 13:4522 (2019) (plaintiff or intervenor's failure to post ordered security will result in dismissal of suit).

245. *See id.*

246. *See* discussion *supra* Part II.

\* J.D./D.C.L., 2019. Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to my friends and family, without whose support this Comment—and my legal education—would not have been possible. Finally, special thanks is owed to Professor Olivier Moréteau, who provided helpful insight and guidance in the drafting of this Comment.

## APPENDIX A: MODEL SECURITY FOR COSTS STATUTE

Below is a model statute regarding security for costs.<sup>247</sup> Section A establishes an initial six-factor test for determining whether security for costs can be ordered from a plaintiff or intervenor. If the defendant is successful in showing that one or more of the factors is applicable, then the task of the court is to determine whether ordering security for costs would be just. Under the Ontarian perspective, “the satisfaction of the enumerated categories ‘merely triggers the inquiry’ into whether an order for security would be just.”<sup>248</sup> At this point, the court considers “a number of [other] factors including . . . the financial circumstances of the plaintiff and the possible effect of an order for security for costs preventing a bona fide claim from proceeding.”<sup>249</sup> Unlike the Ontarian perspective, a Louisiana court should adhere to the South African approach and not consider the merits of the plaintiff or intervenor’s claims.

The model statute also codifies several bedrock principles underlying security for costs. For example, Section B underscores a trial court’s broad discretion in deciding whether to grant or deny a motion for security for costs. Section C also makes clear that a plaintiff or intervenor’s failure to post a cost bond will result in the suit’s dismissal without prejudice. Further, the model statute retains several aspects currently found in § 13:4522. Particularly, the statute does not apply in three situations: (1) to the Parish of Orleans; (2) to suits brought *in forma pauperis*; or (3) to the state or any political subdivision thereof.<sup>250</sup> The model statute does include a new provision allowing a court to modify the amount of a cost bond where it is necessary. Section D can apply if a plaintiff or intervenor changes domicile outside of Louisiana or vice versa, or if the underlying reasons justifying an order for security for costs are no longer present.

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247. This model statute borrows heavily from Ontario’s rule governing security for costs. *See* Rules of Civil Procedure, R.R.O. 1990, reg. 194 (Can.), *under* Courts of Justice Act, R.S.O. 1990, c. C.43 (Can.).

248. Cadili, *supra* note 19, at 3 (citing *DiFilippo v. DiFilippo*, 2013 CanLII 5460, ¶ 26 (Can. Ont. S.C.)).

249. *Id.*

250. *See* LA. REV. STAT. § 13:4522 (2019).

- A. The court, on motion by the defendant in a proceeding, may make such order for security for costs as is just where it appears that:
- (1) the plaintiff or intervenor is domiciled outside Louisiana;
  - (2) the plaintiff or intervenor has another proceeding for the same relief pending in Louisiana or elsewhere;
  - (3) the defendant has an order against the plaintiff or intervenor for costs in the same or another proceeding that remain unpaid in whole or in part;
  - (4) there is good reason to believe that the plaintiff or intervenor has insufficient assets in Louisiana to pay the costs;
  - (5) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or intervenor has insufficient assets in Louisiana to pay the costs of the defendant; or
  - (6) the defendant is entitled to security for costs by law.
- B. The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.
- C. Where a plaintiff or intervenor defaults in giving the security required by an order, the court, on motion of any party, may dismiss the proceeding without prejudice against the defendant who obtained the order.
- D. The amount of security required by an order for security for costs may be increased or decreased at any time for good cause shown.
- E. This section shall not apply to the Parish of Orleans and to cases brought *in forma pauperis*, nor to the state or any political subdivision thereof.

APPENDIX B: SAMPLE BILL OF COSTS TO BE ATTACHED TO A MOTION  
FOR SECURITY FOR COSTS<sup>251</sup>

[Caption of Lawsuit]

**BILL OF COSTS**

***Expert Witness Fees***

Expert Witness #1 (\$500/hr. x est. 10 hr.)	\$5,000.00
Expert Witness #2 (\$450/hr. x est. 3 hr.)	\$1,350.00

***Deposition Fees***

Deposition of Expert Witness #1	\$500.00
Deposition of Expert Witness #2	\$450.00
Deposition of Lay Witness #1	\$375.00
Deposition of Lay Witness #2	\$375.00

***Notary Public Fees***

Notarization of documents	\$150.00
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**Total Expected Costs**

**\$8,050.00**

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251. This bill of costs is modeled after a sample document used under Ontario's security for costs rule. *See* Cadili, *supra* note 19, at 16.