

#67

3/28/66

First Supplement to Memorandum 66-17

Subject: Study 67 - Suit in Common Name

Attached to this supplement is a draft of legislation designed to carry out the recommendations made in the research study on suit in common name. We will be referring to this statute during the course of our discussion of Memorandum 66-17 and the research study.

Respectfully submitted,

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Executive Secretary

SECTION 1. Section 388 of the Code of Civil Procedure is repealed.

388. --When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability.

SEC. 2. Section 388 is added to the Code of Civil Procedure,
to read:

388. (a) As used in this section, "unincorporated association" means any unincorporated organization engaging in any activity of any nature, whether for profit or not, under a common name. The term includes, by way of illustration but not way of limitation, a joint stock company, labor union, partnership, church, fraternal order, or club, unless such organization is incorporated.

(b) An unincorporated association may sue and be sued in its common name.

(c) Any person who it is alleged is liable for the injury, damage, or loss, including a member of the association, may be joined as a defendant in any action against an unincorporated association to recover for such injury, damage, or loss.

(d) A judgment against an unincorporated association binds only the property of the association and does not bind the individual property of a member of the association. If a judgment is rendered against the unincorporated association and also against a member of the association for the same injury, damage, or loss, execution shall not issue against the individual property of the member unless execution against the property of the unincorporated association has been returned wholly or partially unsatisfied.

SEC. 3. Chapter 2 (commencing with Section 21100) of Part 1 of Title 3 of the Corporations Code is repealed.

Note. Chapter 2 reads as follows:

CHAPTER 2. -- LIABILITY OF MEMBERS

~~21100. -- Members of a nonprofit association are not individually or personally liable for debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, construction, repair, or furnishing of buildings or other structures, to be used for the purposes of the association.~~

~~21101. -- Any contract by which a member of a nonprofit association assumes any such debt or liability is invalid unless the contract or some note or memorandum thereof, specifically identifying the contract which is assumed, is in writing and signed by the party to be charged or by his agent.~~

~~21102. -- No presumption or inference existed prior to September 15, 1945, or exists after that date, that a member of a nonprofit association has consented or agreed to the incurring of any obligation by the association, from the fact of joining or being a member of the association, or signing its by-laws.~~

21103.--Notwithstanding any other evidence of legislative intent, it is the controlling legislative intent that if any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter and the application of such provision to persons and circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 4. Chapter 2 (commencing with Section 21100) is added to Part 1 of Title 3 of the Corporations Code, to read:

CHAPTER 2. . LIABILITY OF MEMBERS

21100. A member of a nonprofit association is not individually or personally liable on any contract entered into in the name of and on behalf of the association unless such member assumes such liability by contract and the contract or some note or memorandum thereof, specifically identifying the contract which is assumed, is in writing and signed by the party to be charged or his agent.

21101. A member of a nonprofit association is not liable for the negligent or wrongful act or omission of an officer, agent, or employee of the association unless such member participated in, authorized, or subsequently ratified the negligent or wrongful act or omission. Authorization or ratification of a negligent or wrongful act or omission may not be inferred merely from the fact of joining or being a member of the association or signing its by-laws.

SEC. 5. Section 21200.5 of the Corporations Code is amended to read:

21200.5. Any unincorporated association that is an organized medical society limiting its membership to doctors of medicine who are licensed physicians and surgeons and that has as members a majority of the eligible physicians and surgeons residing in the area in which it functions (which must be at least one county) may, without incorporation, purchase, receive, own, hold, lease, mortgage, pledge, or encumber by deed of trust or otherwise, manage and sell all such real estate and other property as may be convenient for the purposes and objects of the association. ~~The members of any such unincorporated association are not individually or personally liable for debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, construction, repairing or furnishing of buildings or other structures to be used for the purposes of the association or for debts or liabilities contracted or incurred by the association in the carrying out or performance of any of its purposes; provided, that such purposes are within the purposes stated in Section 21000 of this part.~~

SEC. 6. Part 3 (commencing with Section 22500) is added to Title 3 of the Corporations Code, to read:

PART 3. UNINCORPORATED ASSOCIATIONS

22500. As used in this part, "unincorporated association" means any unincorporated organization engaging in any activity of any nature, whether for profit or not, under a common name. The term includes, by way of illustration but not by way of limitation, a joint stock company, labor union, partnership, church, fraternal order, or club, unless such organization is incorporated.

22501. An unincorporated association is liable for its negligent or wrongful act or omission, and for the negligent or wrongful act or omission of its officer, agent, or employee acting within the scope of his office, agency, or employment, to the same extent as if the association were a legal entity. Nothing in this section affects the liability between partners or the liability between a partnership and the partners therein.

22502. An unincorporated association is liable on any contract executed in the name of and on behalf of the association by a person authorized by the association to execute the contract.

22503. (a) Any unincorporated association may file with the Secretary of State on a form prescribed by him a statement designating,

as the agent of such unincorporated association for the purpose of service of process, any natural person residing in this state, setting forth his complete business or residence address. The association may at any time file a new statement which designates a different agent for the service of process and such filing shall be deemed to revoke the prior designation.

(b) Any unincorporated association may file with the Secretary of State on a form prescribed by him a certificate listing the location and mailing address of the association's principal office or place of business in this state. The association may at any time file a new certificate showing a new location or mailing address of its principal office or place of business in this state.

(c) The Secretary of State shall prescribe a form that will permit the statement referred to in subdivision (a) and the certificate referred to in subdivision (b) to be combined in one document.

(d) For filing the statement referred to in subdivision (a) or the certificate referred to in subdivision (b) or the combined document referred to in subdivision (c), the Secretary of State shall charge and collect the fee prescribed in the Government Code for designation of an agent for the purpose of service of process.

SEC. 7. Section 410 of the Code of Civil Procedure is amended to read:

410. The summons may be served by the sheriff, a constable, or marshal, of the county where the defendant is found, or any other person over the age of 18, not a party to the action. A copy of the complaint must be served, with the summons, upon each of the defendants. When the service is against a corporation, or against an unincorporated association in an action brought under ~~asseeiates-conducting-business-under-a-common-name,-in-the-manner~~ authorized by Section 388, there shall appear on the copy of the summons that is served a notice stating in substance: "To the person served: You are hereby served in the within action (or proceeding) on behalf of (here state the name of the corporation or the unincorporated association ~~common-name-under-which-business~~ is-conducted-by-the-asseeiates) as a person upon whom the summons and a copy of the complaint must be served to effect service against said party under the provisions of (here state appropriate provisions of Section ~~388~~ or 411) of this code." When service is intended to be made upon said person as an individual as well as a person upon whom service must be made on behalf of said corporation or said association asseeiates , said notice shall also indicate that service is had upon said person as an individual as well as on behalf of said corporation or said association asseeiates . In a case in which the foregoing provisions of the section require that notice of the capacity (in which a person is served must appear on the copy of the summons that is served, the certificate or affidavit

of service must recite that such notice appeared on such copy of the summons, if, in fact, it did appear. When service is against a corporation, or against an unincorporated association in an action brought under associates-conducting-a-business-under-a common-name,-in-the-manner-authorized-by Section 388, and notice of that fact does not appear on the copy of the summons or a recital of such notification does not appear on the certificate or affidavit of service of process as required by this section, no default may be taken against such corporation or such association associates . When service is made upon the person served as an individual as well as on behalf of the corporation or association associates conducting-a-business-under-a-common-name , and the notice of that fact does not appear on the copy of the summons or a recital of such notification does not appear in the certificate or affidavit of service of process as required by this section, no default may be taken against such person.

When the summons is served by the sheriff, a constable or marshal, it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to plaintiff if he is acting as his own attorney, otherwise to plaintiff's attorney. When it is served by any other person, it must be returned to the same place, with the affidavit of such person of its service, and of the service of a copy of the complaint.

If the summons is lost subsequent to service and before it is returned, an affidavit of the official or other person making service, showing the facts of service of the summons, may be returned in lieu of the summons and with the same effect as if the summons were itself returned.

SEC. 8. Section 411 of the Code of Civil Procedure is amended to read:

411. The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a domestic corporation; to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. If such corporation is a bank, to any of the foregoing officers or agents thereof, or to a cashier or an assistant cashier thereof. If no such officer or agent of the corporation can be found within the state after diligent search, then to the Secretary of State as provided in Sections 3301 to 3304, inclusive, of the Corporations Code, unless the corporation be of a class expressly excepted from the operation of those sections.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business in this state; in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code. If the suit is against a foreign partnership described in Section 15700 of the Corporations Code, in the manner provided by that section.

21.1. If the suit is against an unincorporation association: except as provided in subsection 2, to the agent designated for the purpose of receiving service as provided in Section 22503 of the Corporations Code. If no such agent has been designated prior to the commencement of the action, or if such agent cannot be found.

within the state after diligent search, then to any one or more of the association's members and by mailing a copy thereof to the last known mailing address, if any, of the principal office or place of business of the association.

3. If against a minor, under the age of 14 years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person residing within this state and for whom a guardian or conservator has been appointed: to such person, and also to his guardian or conservator.

5. Except as otherwise specifically provided by statute, in an action or proceeding against a local or state public agency, to the clerk, secretary, president, presiding officer or other head thereof or of the governing body of such public agency. "Public agency" includes (1) every city, county, and city and county; (2) every public agency, authority, board, bureau, commission, corporation, district and every other political subdivision; and (3) every department and division of the state.

6. In all cases where a corporation has forfeited its charter or right to do business in this state, or has dissolved, by delivering a copy thereof to one of the persons who have become the trustees of the corporation and of its stockholders or members; or, in a proper case, as provided in Sections 3305 and 3306 of the Corporations Code.

7. If the suit is one brought against a candidate for public office and arises out of or in connection with any matter concerning his candidacy or the election laws and said candidate cannot be found within the state after diligent search, then as provided for in Section 54 of the Elections Code.

8. In all other cases to the defendant personally.

SEC. 9. Section 395.2 is added to the Code of Civil Procedure,
to read:

395.2. If an unincorporated association has filed a certificate with the Secretary of State pursuant to Section 22503 of the Corporations Code listing its principal office or place of business in this state, the proper county for the trial of an action against such unincorporated association is the same as it would be if the unincorporated association were a corporation.

SEC. 10. Section 1030 of the Code of Civil Procedure is amended to read:

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

After the lapse of 30 days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge, may order the action or special proceeding to be dismissed.