

Memorandum 93-15

Subject: 1993 Legislative Program

This memorandum will indicate the status of the Commission's 1993 legislative program. It also requests approval of a technical cleanup of last year's legislation on litigation involving a decedent. See discussion below.

Annual Resolution of Continuing Authority to Study Topics on Agenda

In addition to continuing existing authority to study topics, this year's resolution adds three new topics to the Commission's agenda as requested by the Commission in its Annual Report for 1992: (1) Uniform Unincorporated Nonprofit Association Act, (2) unfair competition litigation, and (3) derivative actions and the business judgment rule. Senator Lockyer has agreed to carry this resolution under sponsorship of the Senate Judiciary Committee. The resolution has been introduced as Senate Concurrent Resolution No. 4. A copy of the resolution is attached as Exhibits pp. 1-5.

Family Code Cleanup

A 250 page draft has been submitted to Legislative Counsel to incorporate 1992 family law bills into the Family Code, along with other technical changes in the Family Code. We will distribute the bill to the Commission for review when a printed copy becomes available. We plan to add more to the bill as additional changes are discovered and approved by the Commission. Assembly Member Speier will carry this bill.

Deposit of Estate Planning Documents with Attorney

This recommendation allows an attorney who cannot locate the owner of estate planning documents in the custody of the attorney to transfer them to another attorney or lodge them with the clerk of the superior court where the owner's estate might be administered, with notice to

the State Bar. Assembly Member Horcher has agreed to take this bill. We anticipate support from the State Bar and opposition from the county clerks.

Quieting Title to Personal Property

This recommendation is to make clear that title to personal property can be acquired by prescription after the statute of limitations for recovery of the property has run. We anticipate that this will be part of the Assembly Judiciary Committee's omnibus civil practice bill. The recommendation is currently being circulated to interested organizations to make sure it is unobjectionable and therefore appropriate for inclusion in the committee bill.

Parent-Child Relationship for Intestate Succession

We anticipate this recommendation will be approved for submission to the Legislature at the Commission's January 1993 meeting. It is a technical clarification and does not merit a separate bill; it should be added to another bill dealing with probate matters. We are currently looking for an appropriate vehicle.

Litigation Involving Decedents Cleanup

Commission-recommended legislation was enacted last session to recodify and clarify the rules governing litigation involving a decedent. Three technical problems concerning this legislation have been called to the staff's attention:

(1) The legislation relocates Code of Civil Procedure Section 374 into Civil Code Section 1363, but later enacted legislation "chaptered out" this change. Section 374 is now out of place and needs to be re-relocated.

(2) The relocation of Section 374 to Section 1363 was intended to be nonsubstantive, but incorporating it in the text of Section 1363 results in an inadvertent substantive change. The simplest cure is to relocate Section 374 to a separate section, Code of Civil Procedure Section 383.

(3) The legislation relocates Code of Civil Procedure Section 353 to Section 366.2 (one year statute of limitations for actions against decedent), but it is not clear that a claim under the trust claims act tolls the statute since Section 366.2 is a later enactment. Section 366.2 needs to be revised to state directly that a claim under the trust claims act tolls the statute.

A draft of these revisions is attached as Exhibits pp. 6-12. The staff requests Commission approval to include these changes in cleanup legislation. The California Trial Lawyers Association will assist, since it is their revision of Code of Civil Procedure 374 enacted last session that is inadvertently impacted by the Commission's legislation.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Introduced by Committee on Judiciary**January 7, 1993**

Senate Concurrent Resolution No. 4—Relative to the California Law Revision Commission.

LEGISLATIVE COUNSEL'S DIGEST

SCR 4, as introduced, Committee on Judiciary. California Law Revision Commission.

Existing law requires the California Law Revision Commission to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, including a list of studies in progress and a list of topics intended for future consideration, and, after the filing of the commission's first report, its studies are confined to topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study, or referred to it for study, by concurrent resolution of the Legislature.

This measure would give legislative approval to the commission to continue its study of numerous, specified topics that the Legislature has previously authorized or directed the commission to study and would refer to the commission new topics for study relative to the Uniform Unincorporated Nonprofit Association Act, unfair competition, shareholder's derivative actions, and the liability of corporate directors.

Fiscal committee: yes.

1 WHEREAS, The California Law Revision Commission
2 is authorized to study only topics set forth in the calendar
3 contained in its report to the Governor and the
4 Legislature which are thereafter approved for study by
5 concurrent resolution of the Legislature, and topics
6 which have been referred to the commission for study by
7 concurrent resolution of the Legislature; and

8 WHEREAS, The commission, in its annual report
9 covering its activities for 1992, lists 26 topics, all of which
10 the Legislature has previously authorized or directed the
11 commission to study, and lists three new topics which the
12 commission recommends it be authorized to study; now,
13 therefore, be it

14 *Resolved by the Senate of the State of California, the*
15 *Assembly thereof concurring,* That the Legislature
16 approves for continued study by the California Law
17 Revision Commission the topics listed below, all of which
18 the Legislature has previously authorized or directed the
19 commission to study:

20 (1) Whether the law relating to creditors' remedies
21 (including, but not limited to, attachment, garnishment,
22 execution, repossession of property (including the claim
23 and delivery statute, self-help repossession of property,
24 and the Commercial Code repossession of property
25 provisions), civil arrest, confession of judgment
26 procedures, default judgment procedures, enforcement
27 of judgments, the right of redemption, procedures under
28 private power of sale in a trust deed or mortgage,
29 possessory and nonpossessory liens, and related matters)
30 should be revised;

31 (2) Whether the California Probate Code should be
32 revised, including, but not limited to, whether California
33 should adopt, in whole or in part, the Uniform Probate
34 Code;

35 (3) Whether the law relating to real and personal
36 property (including, but not limited to, a Marketable
37 Title Act, covenants, servitudes, conditions, and
38 restrictions on land use or relating to land, possibilities of
39 reverter, powers of termination, Section 1464 of the Civil
40 Code, escheat of property and the disposition of

1 unclaimed or abandoned property, eminent domain,
2 quiet title actions, abandonment or vacation of public
3 streets and highways, partition, rights and duties
4 attendant upon assignment, subletting, termination, or
5 abandonment of a lease, powers of appointment, and
6 related matters) should be revised;

7 (4) Whether the law relating to family law (including,
8 but not limited to, community property) should be
9 revised;

10 (5) Whether the law relating to the award of
11 prejudgment interest in civil actions and related matters
12 should be revised;

13 (6) Whether the law relating to class actions should be
14 revised;

15 (7) Whether the law relating to offers of compromise
16 should be revised;

17 (8) Whether the law relating to discovery in civil cases
18 should be revised;

19 (9) Whether a summary procedure should be
20 provided by which property owners can remove doubtful
21 or invalid liens from their property, including a provision
22 for payment of attorney's fees to the prevailing party;

23 (10) Whether acts governing special assessments for
24 public improvements should be simplified and unified;

25 (11) Whether the law on injunctions and related
26 matters should be revised;

27 (12) Whether the law relating to involuntary dismissal
28 for lack of prosecution should be revised;

29 (13) Whether the law relating to statutes of limitations
30 applicable to felonies should be revised;

31 (14) Whether the law relating to the rights and
32 disabilities of minor and incompetent persons should be
33 revised;

34 (15) Whether the law relating to custody of children,
35 adoption, guardianship, freedom from parental custody
36 and control, and related matters should be revised;

37 (16) Whether the Evidence Code should be revised;

38 (17) Whether the law relating to arbitration should be
39 revised;

40 (18) Whether the law relating to modification of

1 contracts should be revised;

2 (19) Whether the law relating to sovereign or
3 governmental immunity in California should be revised;

4 (20) Whether the decisional, statutory, and
5 constitutional rules governing the liability of public
6 entities for inverse condemnation should be revised
7 (including, but not limited to, liability for damages
8 resulting from flood control projects) and whether the
9 law relating to the liability of private persons under
10 similar circumstances should be revised;

11 (21) Whether the law relating to liquidated damages
12 in contracts generally, and particularly in leases, should
13 be revised;

14 (22) Whether the parol evidence rule should be
15 revised;

16 (23) Whether the law relating to pleadings in civil
17 actions and proceedings should be revised;

18 (24) Whether there should be changes to
19 administrative law;

20 (25) Whether the law relating to the payment and the
21 shifting of attorneys' fees between litigants should be
22 revised;

23 (26) Whether the law relating to the adjudication of
24 child and family civil proceedings should be revised, and
25 whether a Family Relations Code should be established;
26 and be it further

27 *Resolved*, That the Legislature refers to the California
28 Law Revision Commission for study the new topics listed
29 below:

30 (1) Whether the Uniform Unincorporated Nonprofit
31 Association Act, or parts of the Uniform Act, and related
32 matters should be adopted in California;

33 (2) Whether the law governing unfair competition
34 litigation under Chapter 5 (commencing with Section
35 17200) of Part 2 of Division 7 of the Business and
36 Professions Code should be revised to clarify the scope of
37 the chapter and to resolve procedural problems in
38 litigation under the chapter, including the res judicata
39 and collateral estoppel effect on the public of a judgment
40 between the parties to the litigation, and related matters;

1 (3) Whether the requirement of paragraph (2) of
2 subdivision (b) of Section 800 of the Corporations Code
3 that the plaintiff in a shareholder's derivative action must
4 allege the plaintiff's efforts to secure board action or the
5 reasons for not making the effort, and the standard under
6 Section 309 of the Corporations Code for protection of a
7 director from liability for a good faith business judgment,
8 and related matters, should be revised; and be it further
9 *Resolved*, That the Secretary of the Senate transmit a
10 copy of this resolution to the California Law Revision
11 Commission.

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An act to amend Section 1363 of the Civil Code, and to amend Sections 366.2 and 411.36 of, to add Section 383 to, and to repeal Section 374 of, the Code of Civil Procedure, relating to actions and proceedings, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Civ. Code § 1363 (amended)

SECTION 1. Section 1363 of the Civil Code is amended to read:

1363. (a) A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association.

(b) An association, whether incorporated or unincorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.

(c) Unless the governing documents provide otherwise, and regardless of whether the association is incorporated or unincorporated, the association has all of the following powers:

(1) ~~The~~ may exercise the powers granted to a nonprofit mutual benefit corporation as enumerated in Section 7140 of the Corporations Code, except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with Section 7313 of the Corporations Code.

(2) ~~Standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:~~

(A) ~~Enforcement of the governing documents.~~

(B) ~~Damage to the common areas.~~

(C) ~~Damage to the separate interests that the association is obligated to maintain or repair.~~

~~(D) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.~~

~~(3) The other~~

An association, whether incorporated or unincorporated, may exercise the powers granted to an association by Section 383 of the Code of Civil Procedure and the powers granted to the association in this title.

(d) Meetings of the membership of the association shall be conducted in accordance with a recognized system of parliamentary procedure or such parliamentary procedures as the association may adopt.

(e) Notwithstanding any other provision of law, notice of meetings of the members shall specify those matters the board intends to present for action by the members, but, except as otherwise provided by law, any proper matter may be presented at the meeting for action.

(f) Members of the association shall have access to association records in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code.

(g) Any member of the association may attend meetings of the board of directors of the association, except when the board adjourns to executive session to consider litigation, matters that relate to the formation of contracts with third parties, or personnel matters.

(h) Any matter discussed in executive session shall be generally noted in the minutes of the board of directors.

(i) If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents or rules of the association, including any monetary penalty relating to the activities of a guest or invitee of a member, the board of directors shall adopt and distribute to each member, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents. The board of directors shall not be required to distribute any additional schedules of monetary penalties unless there are changes from the schedule that was adopted and distributed to the members pursuant to this subdivision. The board

of directors of the association shall meet in executive session if requested by the member being disciplined, and the member shall be entitled to attend the executive session.

(j) Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association shall be entitled to attend all meetings of the joint association other than executive sessions, (1) shall be given reasonable opportunity for participation in those meetings and (2) shall be entitled to the same access to the joint association's records as they are to the participating association's records.

(k) The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes, of any meeting of the board of directors of an association, other than an executive session, shall be available to members within 30 days of the meeting. The minutes, proposed minutes, or summary minutes shall be distributed to any member of the association upon request and upon reimbursement of the association's costs in making that distribution.

(l) Members of the association shall be notified in writing at the time that the pro forma budget required in Section 1365 is distributed or at the time of any general mailing to the entire membership of the association of their right to have copies of the minutes of meetings of the board of directors and how and where those minutes may be obtained.

(m) Nothing in this section shall be construed to create, expand, or reduce the authority of the board of directors of an association to impose monetary penalties on an association member for a violation of the governing documents or rules of the association.

Comment. Section 1363 is amended to delete revisions in subdivision (c) made by Section 1.5 of Chapter 1332 of the Statutes of 1992. The matter is governed by Code of Civil Procedure Section 383, formerly Code of Civil Procedure Section 374, as amended by Section 1 of Chapter 1283 of the Statutes of 1992.

Code Civ. Proc. § 366.2 (amended)

SEC. 3. Section 366.2 of the Code of Civil Procedure is amended to read:

366.2. (a) ~~Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, if~~ Except as provided in subdivisions (b) and (c):

(1) If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

~~(b) Subject to Chapter 8 (commencing with Section 9350) of Part 4 of Division 7 of the Probate Code, the~~

(2) The limitations period provided in this section for commencement of an action is not tolled or extended for any reason.

(b) This section is subject to:

(1) Part 4 (commencing with Section 9000) of Division 7 of the Probate Code (creditor claims in administration of estates of decedents).

(2) Part 8 (commencing with Section 19000) of Division 9 of the Probate Code (payment of claims, debts, and expenses from revocable trust of deceased settlor).

(c) This section applies to actions brought on liabilities of persons dying on or after January 1, 1993.

Comment. Section 366.2 is amended to make clear it is subject to the trust claims procedure as well as the probate claims procedure. This does not change, but clarifies, existing law.

Under these procedures, a creditor's claim may be extinguished before expiration of the one-year limitations period by failure to file a claim. Prob. Code §§ 9002 (probate), 19004 (trust). Conversely, filing of a claim tolls the one-year limitations period. Prob. Code §§ 9352 (probate), 19253 (trust).

Code Civ. Proc. § 374 (repealed)

SEC. 4. Section 374 of the Code of Civil Procedure is repealed.

~~374. (a) An association established to manage a common interest development shall have standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative~~

~~proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:~~

~~(1) Enforcement of the governing documents,~~

~~(2) Damage to the common areas,~~

~~(3) Damage to the separate interests which the association is obligated to maintain or repair,~~

~~(4) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair,~~

~~(b) In any action maintained by an association pursuant to paragraph (2), (3), or (4) of subdivision (a), the amount of damages recovered by the association shall be reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based upon principles of comparative fault. In such an action, the comparative fault of the association or its managing agents may be raised by way of defense, but shall not be the basis for any cross action or separate action against the association or its managing agents for contribution or implied indemnity, where the only damage was sustained by the association or its members. It is the intent of the Legislature in enacting this subdivision to require that comparative fault be plead as an affirmative defense, rather than a separate cause of action, where the only damage was sustained by the association or its members,~~

~~(c) In any action involving damages described in paragraph (2), (3), or (4) of subdivision (a), the defendant or cross defendant may allege and prove the comparative fault of the association or its managing agents as a setoff to his or her liability even if the association is not a party to the litigation or is no longer a party whether by reason of settlement, dismissal, or otherwise,~~

~~(d) Subdivisions (b) and (c) apply to actions commenced on or after January 1, 1993.~~

~~(e) Nothing in this section shall affect (1) any person's liability under Section 1431 of the Civil Code, or (2) the liability of the association or its managing agent for any act or omission which causes damages to another.~~

Comment. Former Section 374 is continued without change in Section 383, for organizational purposes.

Code Civ. Proc. § 411.36 (amended)

SEC. 5. Section 411.36 of the Code of Civil Procedure is amended to read:

411.36. (a) In every action brought by a common interest development association pursuant to Section 374 ~~383~~, or cross actions or separate actions arising therefrom for indemnity or contribution, arising out of the occupational negligence of a person holding a valid contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, on or before the date of service of the complaint on any defendant, the plaintiff's attorney shall file the certificate specified by subdivision (b). [remainder of section unchanged]

Comment. Section 411.36 is amended to correct a section reference.

Code Civ. Proc. § 383 (added)

SEC. 2. Section 383 is added to the Code of Civil Procedure, to read:

383. (a) An association established to manage a common interest development shall have standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:

(1) Enforcement of the governing documents.

(2) Damage to the common areas.

(3) Damage to the separate interests which the association is obligated to maintain or repair.

(4) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.

(b) In any action maintained by an association pursuant to paragraph (2), (3), or (4) of subdivision (a), the amount of damages recovered by the association shall be reduced by the amount of damages allocated to the association or its managing agents in direct

proportion to their percentage of fault based upon principles of comparative fault. In such an action, the comparative fault of the association or its managing agents may be raised by way of defense, but shall not be the basis for any cross-action or separate action against the association or its managing agents for contribution or implied indemnity, where the only damage was sustained by the association or its members. It is the intent of the Legislature in enacting this subdivision to require that comparative fault be plead as an affirmative defense, rather than a separate cause of action, where the only damage was sustained by the association or its members.

(c) In any action involving damages described in paragraph (2), (3), or (4) of subdivision (a), the defendant or cross-defendant may allege and prove the comparative fault of the association or its managing agents as a setoff to his or her liability even if the association is not a party to the litigation or is no longer a party whether by reason of settlement, dismissal, or otherwise.

(d) Subdivisions (b) and (c) apply to actions commenced on or after January 1, 1993.

(e) Nothing in this section shall affect (1) any person's liability under Section 1431 of the Civil Code, or (2) the liability of the association or its managing agent for any act or omission which causes damages to another.

Comment. Section 383 continues former Section 374 without change, for organizational purposes.

Urgency Clause

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Chapters 178, 1283, and 1332 of the Statutes of 1992 affect Civil Code Section 1363 and Code of Civil Procedure Section 374 in different ways with complex double-jointing and chaptering out consequences. In order to eliminate the confusion caused by this situation and to maintain continuity in the law it is necessary that this act go into immediate effect.