

#67

5/31/66

Memorandum 66-26

Subject: Study 67 - Suit in Common Name

Attached to this memorandum you will find two copies of a tentative recommendation relating to suit by and against unincorporated associations. One copy is for you to mark and return to the staff at the June meeting. The other is for you to retain.

The tentative recommendation does not include any provisions dealing with the liability or immunity of members of unincorporated associations. After consideration of the problems that would be raised if we included such provisions in the statute, the staff concluded that we could not submit a recommendation on this subject to the 1967 legislative session if we attempted to deal with these problems. Because we consider the remaining provisions of the proposed legislation important, we do not believe that a recommendation on this subject should be delayed until we can prepare or have prepared a research study on liability and immunity of members.

The staff has also concluded that an attempt to obtain background research based on letters sent to law professors and others will not provide the Commission with the kind of thorough research that is necessary to provide a basis for sound revision of the substantive law. Accordingly, we have not included with this memorandum any letter to be sent to law professors who might be interested in this subject.

None of the explanatory text of the attached tentative recommendation has been approved. Neither the preliminary discussion nor the comments have been before you before. Much of the statute, however, has been approved. The portions that are not approved are pointed out below.

Section 388 (repeal)

The repeal of Code of Civil Procedure Section 388 has been approved.

Section 388 (new)

The text of subdivisions (a) and (b) has been approved.

From a grammatical standpoint, should "the association's" be substituted for "its common" in subdivision (b) immediately preceding "name"?

The ~~text~~ of subdivision (c) has been revised in accordance with the Commission's instructions. The substance of the subdivision has been previously approved.

Subdivision (d) was passed over at the first May meeting with the expressed intent of returning to it. However, it was never finally considered.

Section 395.2

Section 395.2 was approved.

Section 410

Section 410 was approved.

Section 411

Subdivision 2.1 has been revised in accordance with the Commission's decisions at the first May meeting.

Sections 24000-24003

In the last draft, these sections appeared before you as Sections 22500-22503 of the Corporations Code. We have renumbered them as indicated because we belatedly discovered that the new numbering system is necessary to fit them into the Corporations Code as Part 4 of Title 3.

Section 24000

The section was approved, subject to the Commission's directive to eliminate governmental bodies from the definition. The words we have chosen to accomplish this are taken from the Commercial Code's definition of an organization in Commercial Code Section 1201(28).

Section 24001

Section 24001 appears as it was revised and approved at the first May meeting.

Section 24002

The text of Section 24002 has been substantially revised to carry out the Commission's directive that the section should authorize the filing of a single document containing both the designation of the service agent and the designation of the principal place of business. The substance of the section was previously approved.

Section 24003

Section 24003 has been added at the Commission's direction. As the comment points out, however, it cannot have any effect on the applicability of federal tax laws.

If we had included a provision in this statute limiting the liability of association members, the inclusion of Section 24003 might be necessary to leave the tax status of the association unaffected by California tax laws. Since we have not included such a provision in this statute, we question the need for this section. The section is merely procedural in its present form--the substantive liability of association members is not affected. A plaintiff must merely identify members as individuals if he wants a judgment binding on individual members; and an association plaintiff is merely accorded a right of suit that it now has in the federal courts.

We suggest, therefore, that Section 24003 be omitted from the statute.

Respectfully submitted,

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Assistant Administrative Secretary

TENTATIVE RECOMMENDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
SUIT BY OR AGAINST UNINCORPORATED ASSOCIATIONS

At common law, an unincorporated association could neither sue nor be sued in the association's name. If the association incurred an obligation either in contract or tort, a party seeking to enforce the obligation had to proceed against all of the members of the association as parties defendant. Similarly, if an unincorporated association desired to bring an action to enforce some obligation owing to the association, all of the members of the association had to be named as parties plaintiff.

As the purposes for which unincorporated associations are organized have increased, and as the activities of unincorporated associations have expanded, the common law rules have been found to be increasingly burdensome. In modern times, unincorporated associations--such as partnerships, churches, lodges, clubs, labor unions, and business and professional societies--are organized for and carry on virtually every kind of commercial, charitable, and social activity. Because the common law rules that forbid an unincorporated association from appearing in court in its own name seriously impede the expeditious enforcement of obligations incurred during the course of these activities, many states have enacted statutes that permit an unincorporated association to sue and be sued in its own name.

By statute, California provides that persons associated for the transaction of business may be sued in their common name. The California Supreme Court has held that one type of unincorporated association--a labor union--may sue in its own name. There is no general statute, however, that permits unincorporated associations in California to sue in their own names. Moreover,

the California rules governing service of process and venue in actions against unincorporated associations are unnecessarily disadvantageous to such associations. The existing California statutes are in need of substantial revision if the procedural rules applicable to actions brought by or against unincorporated associations are to be kept in harmony with modern conditions. Accordingly, the Law Revision Commission recommends:

1. Legislation should be enacted which would make it clear that any unincorporated association may be sued in the association's name. Section 388 of the Code of Civil Procedure now permits two or more persons who transact business under a common name to be sued in that common name. There is no apparent reason why any association that incurs an obligation in the association's name should not be subject to suit in the name of the association, and the requirement that an association be engaged in "business" before it may be sued in the association's name has been largely nullified by judicial decision. See Herald v. Glendale Lodge, 46 Cal. App. 325, 189 Pac. 329 (1920). Accordingly, the limitation now contained in Section 388 that an unincorporated association must be engaged in "business" before it can be sued in its common name should be repealed.

2. An unincorporated association should be able to sue in its own name to enforce obligations owing to the association. It makes little sense to require all the members of a labor union or all the members of a church to join as parties plaintiff in an action brought to enforce an obligation owing to the union or the church and not to the individual members thereof. To require all of the members to join as plaintiffs imposes an extremely onerous procedural burden upon the plaintiff association without corresponding benefit to the defendant. If the defendant wishes to know who the members are, he may discover that information through the use of ordinary discovery procedures. Usually, however, the interests and identity of the individual members are irrelevant; thus, the present prohibition against suits by unincorporated associations results in the institution of actions by individuals

who are not really interested in the action as individuals. Permitting an unincorporated association to sue in the association's name, therefore, will further the principle expressed in Code of Civil Procedure Section 367 that every action should be prosecuted in the name of the real party in interest. In Daniels v. Sanitarium Assn, Inc., 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963), the Supreme Court held that a labor union could maintain an action in its own name. The principle of the Daniels case should be applicable to all unincorporated associations when they are seeking enforcement of obligations owing to the association as such.

3. A judgment against an unincorporated association should bind only the association itself and not the individual members thereof. Code of Civil Procedure Section 388 now provides that a judgment in an action against an unincorporated association binds the association and, in addition, those members who are served with process. A recent amendment of Code of Civil Procedure Section 410 suggests that the individual members of an association may be bound by a judgment against an association only if they are served in their individual capacities. These statutes should be revised so that it is clear that an individual member of an association is not liable upon a judgment against the association itself. If a party wishes to obtain a judgment binding upon an individual member, he should be required to name that member as a defendant and see that the member is served in such a way as to confer the court with jurisdiction to render a judgment against the member in his individual capacity.

4. If a judgment is secured against both an unincorporated association and a member thereof sued in his individual capacity, the judgment creditor

should be required to rely on the association's assets for satisfaction of the judgment before he may levy upon the individual member's assets.

A judgment against an association is an obligation of all of the members of the association; hence, the joint assets of the members held in the association's name should be used for the satisfaction of the association's obligations before any individual member is called on to satisfy the association's obligations.

5. Legislation should be enacted clarifying the extent to which an unincorporated association is liable for the acts and omissions of its officers, agents, and employees. Recent cases have held that certain associations are liable for their torts. Inglis v. Operating Engineers Local Union No. 12, 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962); Marshall v. Int'l Longshoremen's & Warehousemen's Union, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962). The recently enacted Uniform Commercial Code defines a "person" who may contract obligations thereunder to include unincorporated associations. COMM. CODE § 1201(28)-1201(30). Other statutes permit certain kinds of associations to incur obligations under particular types of contracts. See, e.g., CORP. CODE § 21200; INS. CODE §§ 11040-11041; LABOR CODE § 1126. To remove any remaining uncertainty concerning the kinds of obligations that unincorporated associations may incur, legislation should be enacted providing that such an association is responsible for an act or omission of an officer, agent, or employee of the association acting within the scope of his office, agency, or employment, to the same extent as if the association were a natural person.

6. Under existing law, an unincorporated association may be sued in any county where any member of the association resides. Juneau Spruce Co. v. Int'l Longshoremen, 37 Cal.2d 760, 235 P.2d 607 (1951). As a result,

associations with large, widespread memberships are subject to suit in areas where they conduct no business and have incurred no obligations. A plaintiff who desires to sue an unincorporated association may frequently "shop" for a forum sympathetic to his cause and antagonistic to the association's cause. To eliminate this sort of forum shopping, and to give unincorporated associations venue rights that are equivalent to those now held by individuals and corporations, legislation should be enacted permitting an unincorporated association to file a designation of its principal place of business with the Secretary of State. After filing such a designation, the unincorporated association should be subject to suit only in the county of its principal place of business, in the county where a contract is made or is to be performed, or in the county where an obligation or liability arises or the breach occurs. This would subject an unincorporated association to the same venue provisions to which a corporation is subject, provided that the unincorporated association first files a designation of its principal place of business with the Secretary of State so that the information is readily ascertainable.

7. Under existing California law, service of process may be made upon an unincorporated association by serving any member thereof. CODE CIV. PROC. § 388. This permits a plaintiff to obtain jurisdiction over an unincorporated association without necessarily notifying any of the responsible officers of the association of the pendency of the litigation. A plaintiff can, under existing law, serve a member who has little interest in the association or whose interests are actually more closely identified with those of the plaintiff than they are with those of the association. If that member fails to notify the association of the pending litigation, a default judgment may be taken against the association. Accordingly, legislation

should be enacted requiring service to be made upon the responsible officers of an unincorporated association if the association has officers. If an unincorporated association files a designation of an agent for the service of process with the Secretary of State, an attempt to serve such agent at the address appearing in the designation filed with the Secretary of State should be required before service upon the members of the association is permitted. If the officers of the association cannot be found in this state after due diligence, and if the agent for the service of process cannot be found at the address designated in the Secretary of State's office, a party should then be permitted to serve process upon an unincorporated association by service upon an individual member. But even in this case, the party should be required to mail a copy of the summons to the last known mailing address of the association.

The Commission's recommendations would be effectuated by the enactment of the following legislation:

An act to repeal Section 388 of, to amend Sections 410 and 411 of, and to add Sections 388 and 395.2 to, the Code of Civil Procedure, and to add Part 4 (commencing with Section 24000) to Title 3 of the Corporations Code, relating to unincorporated associations.

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

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.~~

Comment. Section 388 is superseded by a new Section 388.

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 of two or more persons which engages in any activity of any nature, whether for profit or not, under a common name.

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

(c) A member of an unincorporated association is not liable, and his property is not subject to execution, upon a judgment against the association unless the judgment is also against the member, the member was named as a party to the action in his individual capacity, and the court had jurisdiction over the member in his individual capacity.

(d) If a judgment is rendered against an 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.

Comment. Section 388 permits any association, whether engaged in business or not, to sue or be sued in its common name. Under the prior law, persons engaged in business under a common name could be sued in that common name but they could not sue in the common name. The term "business," however, was construed so broadly that it constituted little if any limitation on the right to sue an unincorporated association. See Herald v. Glendale

Lodge, 46 Cal. App. 325, 189 Pac. 329 (1920). Section 388 omits this meaningless limitation and grants associations the additional privilege of suing in the association name.

Subdivision (c) makes it clear that a member of an unincorporated association is not liable in his individual capacity on judgments against the association. If a member is also named as a party and jurisdiction over the member in his individual capacity is secured, a judgment may bind the member as well as the association; but it must be clear from the proceedings that the party seeking the judgment is proceeding against the individual as well as the association. Subdivision (c) probably restates the prior California law as stated in Code of Civil Procedure Section 410, but until the amendment of Section 410 in this act the exact meaning of Section 410 was somewhat obscure.

Subdivision (d) prescribes a marshaling principle that is applicable when a judgment is rendered against both an association and a member in his individual capacity. The assets of the association must be exhausted before the assets of the member can be relied on for satisfaction of the judgment. Subdivision (d) is new. Under the prior law, a judgment creditor could satisfy the judgment from the property of the members of the association without first resorting to the property of the association.

SEC. 3. 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 24002 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.

Comment. Under Section 16 of Article XII of the Constitution of California, both corporations and unincorporated associations may be sued "in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs." In addition, that section of the constitution provides that a corporation (but not an association) may be sued in the county where its principal place of business is located. An unincorporated association, however, may be sued in any county where the plaintiff can find a member of the association. Juneau Spruce Co. v. Int'l Longshoremen, 37 Cal.2d 760, 235 P.2d 607 (1951). Thus, large unincorporated associations may be subjected to a kind of "forum shopping" that is not possible where corporations or individuals are concerned.

Under Section 395.2, an unincorporated association, by filing a designation of its principal place of business with the Secretary of State, may avoid this sort of forum shopping and may secure the advantages of the venue provisions applicable to corporations under the state constitution.

SEC. 4. 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 ~~asociates-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-asociates~~) 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 the~~ Code of Civil Procedure ." 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 ~~asociates~~ , 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 ~~asociates~~ . 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 asseeiates-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 asseeiates . When service is made upon the person served as an individual as well as on behalf of the corporation or association asseeiates 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.

Comment. The amendments to Section 410 merely conform the section to the revised version of Section 388.

SEC. 5. 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.

2.1. If the suit is against an unincorporated association (not including a "public agency" as defined in subdivision 5): to the president or other head of the association, a vice president, a secretary, an assistant secretary, general manager, general partner, or a person designated as agent for service of process as provided in Section 24002 of the Corporations Code. If no president or other head of the association, vice president, secretary, assistant secretary, general manager, or general partner can be found within the

state after diligent search, and if the person designated as agent for service of process cannot be found at his address as specified in the certificate designating him as the agent of the association for the service of process, 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.

Comment. Subdivision 2.1 has been added to Section 410 to permit service upon an unincorporated association in much the same manner that service may be made upon a corporation. The revised form of the section provides assurance that the responsible officers of an unincorporated association will be aware of any actions that are brought against the association. Prior law did not provide such assurance, for service could be made under the prior law upon any member of the association.

SEC. 6. Part 4 (commencing with Section 24000) is added to Title 3 of the Corporations Code, to read:

PART 4. UNINCORPORATED ASSOCIATIONS

24000. As used in this part, "unincorporated association" means any unincorporated organization of two or more persons which engages in any activity of any nature, whether for profit or not, under a common name but does not include a government or governmental subdivision or agency.

Comment. Section 24000 is merely definitional. The definition includes all private associations of any kind and excludes all governmental entities, authorities, boards, bureaus, commissions, departments, and associations of any kind.

24001. Except as otherwise provided by statute, an unincorporated association is liable for its act or omission, and for the 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 natural person. Nothing in this section affects the liability between members of an association or the liability between an association and the members thereof.

Comment. Section 24001 provides that unincorporated associations are liable for acts or omissions done by or under the authority of the association to the same extent that natural persons are liable. The exception at the beginning of the section is intended to avoid repeal of any statutory limitations on association liability such as that found in Section 21400 of the Corporations Code (relating to death benefits payable by unincorporated fraternal societies).

Section 24001 is probably declarative of the prior California law insofar as the tort liability of unincorporated associations is concerned. See Inglis v. Operating Engineers Local Union No. 12, 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962); Marshall v. Int'l Longshoremen's & Warehousemen's Union, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

Whether Section 24001 is declarative of the California law relating to the contractual liability of unincorporated associations is uncertain. In the absence of statute, a contract of an unincorporated association was regarded as the contract of the individual members of the association who authorized or ratified the contract. Pacific Freight Lines v. Valley Motor Lines, 72 Cal. App.2d 505, 164 P.2d 901 (1946); Security-First National Bank v. Cooper, 62 Cal. App.2d 653, 145 P.2d 722 (1944); Leake v. City of Venice, 50 Cal. App. 462, 195 Pac. 440 (1920). By statute, however, unincorporated associations have been authorized to enter into a wide

variety of transactions and thus incur liability on behalf of the association. See, e.g., COM. CODE § 1201(28)-(30); CORP. CODE § 21200; INS. CODE §§ 11040-11041; LABOR CODE § 1126. Section 24001 eliminates whatever gaps may have remained in the previous statutory provisions making unincorporated associations responsible for their contractual obligations.

24002. (a) An unincorporated association may file with the Secretary of State on a form prescribed by him a certificate containing either or both of the following statements:

(1) A statement designating any person residing in this state as the agent of the association for the service of process and setting forth his complete business or residence address.

(2) A statement designating the location and mailing address of the association's principal office or place of business in this state.

(b) The association may at any time file a new certificate as provided in this section, which certificate shall supersede the prior certificate.

(c) For filing a certificate as provided in this section, the Secretary of State shall charge and collect the fee prescribed in Government Code Section 12185 for filing a designation of agent.

Comment. Section 24002 provides a procedure whereby an unincorporated association may designate a principal place of business for venue purposes (Code of Civil Procedure Section 395.2) and an agent upon whom service of process may be made (subdivision 2.1 of Section 411 of the Code of Civil Procedure). See the California Law Revision Commission's Comments to Code of Civil Procedure Sections 395.2 and 411.

24003. Nothing in this part affects the duty or lack of duty of any unincorporated association to pay any tax under any law relating to taxation.

Comment. Under Section 24001, unincorporated associations may be subject to some liabilities to which they were not previously liable as entities. Section 24002, together with Sections 395.2 and 411 of the Code of Civil Procedure, makes the procedure for suing an unincorporated association much the same as the procedure for suing a corporation. Section 24003 makes it clear that these sections are procedural only, and they do not have the effect of creating new legal entities for taxing purposes.

Of course, Section 24003 will be effective to accomplish its stated purpose only insofar as the California tax laws are concerned. The nature of the associations that are treated as taxpaying entities under federal law is determined by federal law, not state law.