

1/4/67

Memorandum 67-10

Subject: Study 67 - Suit by or Against Unincorporated Associations

Attached to this memorandum on pink paper is an advance private copy of a portion of the CAJ's report to the Board of Governors. This portion of CAJ's report approves the substance of the Commission's recommendation relating to unincorporated associations. Several suggestions, however, are made and are considered below.

Definitions of "Unincorporated Association"

CAJ suggests that the definitions of "unincorporated association" include a specific reference to a partnership in order to make it clear that the act applies to partnerships as well as to other forms of unincorporated associations.

In its present form, Section 388 refers to a partnership only as a person who can be a member of an unincorporated association. To meet this objection, the definition in paragraph (1) of subdivision (a) could be revised to include a reference to a partnership. Another method of meeting the objection would be to revise the entire section to read simply as follows:

388. Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known.

Proposed Section 24000 of the Corporations Code would have to be revised also to accommodate the suggested change. It might be revised to read as follows:

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

(b) As used in this section, "person" includes a natural person, corporation, partnership or any other unincorporated organization, and a government or governmental subdivision or agency.

CAJ asks if a limited partnership with but one general partner is intended to be covered by the act. We see no reason to suppose that such an organization would not be covered by the act. Such a limited partnership is an organization of two or more persons and it is unincorporated.

Effect on Other Laws

CAJ expresses concern as to the possible effect of the new act upon the Limited Partnership Act and other laws. The concern expressed, however, is not very specific.

For example, CAJ's report expresses concern over the rule of liability for the act of an officer or employee that is stated in proposed Corporations Code Section 24001. But we cannot tell from their comment what the nature of their concern is. It may be that they fear that Section 24001 in some way repeals by implication the common law that the individual members of any association are personally liable for the association's obligations. The section, however, deals only with the liability of the association as an association and does not purport to state any rule relating to the individual liabilities of the members. Perhaps, too, this is not the specific nature of CAJ's concern.

CAJ next expresses concern over the effect of proposed Corporations Code Section 24002 upon the general laws relating to attachments and, in particular, Corporations Code Section 15025 which refers to an attachment on a claim against a partnership. CAJ wonders if any of these laws will be repealed by implication by Section 24002. Again, we cannot see how this could occur. We see nothing inconsistent between proposed Section 24002

and the attachment laws contained in Code of Civil Procedure Sections 537-561. Section 537 authorizes the attachment of the property of the defendant. Proposed Corporations Code Section 24002 provides, in effect, that only the property of the named defendant (in the case of an action against an unincorporated association) may be levied upon under a writ of execution issued to enforce a judgment against the named defendant. The comment points out that the plaintiff may rely on the property belonging to the individual members of the association if he names those members as defendants. So far as Section 15025 is concerned, it provides merely that a partner's right in specific partnership of property is not subject to attachment or execution except on a claim against the partnership. We see no inconsistency between Section 15025 and proposed Corporations Code Section 24002.

CAJ also expresses concern over the relationship between Corporations Code Section 15700 and proposed Corporations Code Section 24003. Section 15700 now requires "every partnership, other than a commercial or banking partnership established and transacting business in a place without the United States, which is domiciled without this state and has no regular place of business within this state" to file with the Secretary of State a designation of some natural person residing within this state as an agent for the service of process upon the partnership. The designation must be filed within 40 days from the time the partnership commences to do business in this state. Section 15700 goes on to provide for service upon the person designated or upon the Secretary of State if no such person is designated or if no such person can be found.

There is some inconsistency between this section and our recommendation. Proposed Section 24003 authorizes any unincorporated association to designate either a natural person or a corporation as a process agent. Section 15700 requires the foreign partnerships to which it applies to file a designation of a natural person as a process agent. Inasmuch as Section 24003 is permissive and Section 15700 is mandatory, it seems likely that the foreign partnerships to which Section 15700 applies must designate a natural person as a process agent regardless of what Section 24003 provides. The only sanction in Section 15700 for failure to comply with its requirement is that service may be made upon the Secretary of State. It seems likely, therefore, that if a foreign partnership designated a corporate agent for the service of process under Section 24003, service upon the partnership could be accomplished either by service upon the process agent or by service upon the Secretary of State under Section 15700.

If a foreign partnership complies with Section 24003 by naming a natural person as a process agent, it seems likely that this would be considered as a compliance with both Section 24003 and Section 15700.

Thus, although there are some inconsistencies between the two sections, they are inconsistencies in policy only and do not prevent both sections from being given full effect.

The question for the Commission is whether Corporations Code Section 15700 should be revised to provide specifically that a designation of a process agent in compliance with Section 24003 is a sufficient compliance with the requirement of Section 15700.

Section 388

CAJ points out that "a government or governmental subdivision or agency" is excluded from the definition of an unincorporated association in Section

24000 but is not excluded from the definition of an unincorporated association in Section 388.

The only purpose served by Section 388 is to authorize the unincorporated associations defined therein to sue and be sued. So far as governmental agencies are concerned, Government Code Section 945 serves precisely the same purpose. Thus, no purpose would be served by excluding governmental agencies from Section 388. On the other hand, a purpose is served by excluding such agencies from Sections 24000 et seq., for those sections establish procedural provisions which are not intended to supersede the procedural provisions in the Government Code relating to actions by and against public entities.

Limitation of Definition to "This Section"

CAJ questions the limitation of the definition in Section 388 to "this section."

The definition is so limited because an unincorporated association as defined in Section 388 is not the unincorporated association referred to at other places in our statute. In Section 395.2, reference is made to an unincorporated association that has filed a statement under Corporations Code Section 24003. The Section 388 definition is inapplicable there because only an unincorporated association as defined in Corporations Code Section 24000 can file such a statement with the Secretary of State. In Section 410 an unincorporated association is referred to, but the specific cross-reference to Section 388 picks up the definition contained in Section 388. In Section 411 an unincorporated association is again referred to, but without the definition. The context, however, seems to be clear enough that any unincorporated association except a public agency is referred to in that section.

As a matter of drafting technique, however, it seems undesirable to define two terms for use only in the same section in which the definitions appear. I know of no other statute authorizing suits by and against unincorporated associations which does this. Most of them take a simpler drafting approach such as that suggested above under "Definitions of Unincorporated Association."

Repeal of Present Code of Civil Procedure Section 388

Some members of CAJ raise the question whether the creditor's remedies against individual partners or members of an association which is the named defendant will be as broad as under existing Section 388 of the Code of Civil Procedure. Section 388 now provides that a judgment against an association binds the joint property of all of the associates and the individual property of the party or parties served with process. The enactment of the Commission's proposed statute will definitely change this law. This is clearly pointed out in the Comment to Section 24002. As pointed out in that Comment, if the association is the only named defendant, only the property of the association can be levied upon to satisfy the judgment. The individual property of the members is not subject to the judgment against the association. In order to proceed against the individual property of the members, the plaintiff must name the members individually as defendants and obtain judgments against them as individuals. CAJ suggests that the existing provision permitting a judgment against an association to bind the individual property of those members served with process avoids problems which often arise in serving all individual defendants. Usually, however, all individual defendants are not required to be served. If they are sued as joint obligors on a contractual liability of the association, Section 414

of the Code of Civil Procedure permits the action to proceed even though some of the joint obligors are not served. The remaining joint obligors can then be subjected to liability under the judgment through the procedure authorized in Code of Civil Procedure Sections 989-994.

CAJ recognizes that these sections take care of the joint contractual liability problem, but suggests that they do not take care of all joint obligation problems. If the joint obligation arises from statute, there is no provision permitting the action to proceed without service on all of the joint obligors. CAJ cites DeMartini v. I.A.C., 90 Cal. App.2d 139 (1949), in which it was held that several judgments could be entered against partners who were jointly liable for the workmen's compensation obligation created by statute. In the DeMartini case, however, all persons who were subjected to the liability were parties to the proceeding and there was no indication that a single joint obligor could be proceeded against in the absence of his co-obligors. If there is a problem in this regard, it is a problem that arises from Section 414 of the Code of Civil Procedure. If an adjustment should be made, it should be made by revising Section 414 to eliminate the requirement that the joint liability arise from contract before Section 414 is applicable.

Respectfully submitted,

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Assistant Executive Secretary

II

SUIT BY OR AGAINST UNINCORPORATED ASSOCIATION, INCLUDING A PARTNERSHIP.

GENERAL PURPOSE OF PROPOSED MEASURE: This study of the Law Revision Commission and its "tentative recommendation" (dated June 16, 1966), in part, would "clarify" existing California statutes, and, in part, add new provisions.

The Commission states, in support;

"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 name. 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." (Tentative Recommendation, p.1-2)

GENERAL FRAMEWORK OF PROPOSED MEASURE:

First, the "common name" statute permitting persons doing business under a common name to be sued, and permitting a judgment obtained and enforced against the "entity" and the associates served, would be repealed. See present CCP 388.

Second, "unincorporated association" would be defined as:

"388(a).....'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." (New CCP 388(a))*

Third, it would be provided that the "unincorporated association" (as so defined) "may sue and be sued in its common name." (New CCP 388(b)).

Fourth, it would be provided that an "unincorporated association" (excluding the government or a governmental agency) may file with the Secretary of State one or both of the following: 1- a statement designating an agent for the service of process; 2- a statement of its principal office or place of business within this State (new Corp. Code 24003).

Fifth, if the "unincorporated association" has filed the statement of principal office or place of business referred to above, then "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," and its principal place of business shall be as stated in the statement above mentioned (new CCP 395.2).

Sixth, present CCP 410, relating to the method of serving summons personally, would be amended to conform to the new concept of the "unincorporated association" (an "entity" capable of being sued), and to reflect the repeal of present CCP 388 (the common name statute).

Seventh, present CCP 411 would be amended to prescribe the manner of personally serving summons upon an "unincorporated association" (by delivery to enumerated persons: president or other head, vice president,

*The same definition appears in new Corp. Code 24000 but adds after "common name" the following: "but does not include a government or governmental subdivision or agency."

secretary, assistant secretary, general manager, general partner or a person designated as an agent for service of process under new Corp. Code 24003; if service cannot be made as above provided, then personal service may be made upon any one or more of the association's members and by mailing a copy of the process to the last known mailing address, if any, of the principal office or place of business of the association).*

In addition to the foregoing matters which are strictly procedural, the proposal would state in new Corp. C. 24001:

"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."

In the following section (proposed Corp. Code 24002), it would be provided:

"24002. The property of an unincorporated association may be levied upon under a writ of execution issued to enforce a judgment against the association."

COMMITTEE'S RECOMMENDATION

Both Sections of this committee approve the Commission's measure in the "tentative" form of June 16, 1966, subject, however, to the

*The service of process measure, recommended by this committee in tentative form in its 1966 Report (41 S.B.Jnl. p. 737-739 and Ex. A thereto, also would amend CCP 411.

following five comments:*

"First, it is submitted the application of the proposed Act to partnerships should be clearly set forth, to avoid later problems of interpretation. The reference to service upon a "general partner" in proposed subd. 2.1 of CCP 411 appears to be the only express reference to a partnership. Many statutes, state and federal, in their "definition" section, separately list "partnership" and "unincorporated association." The Bar is used to the distinction. The "definition" sections (proposed CCP 388 and proposed Corp. Code 24000) could be appropriately amended to state the Act's intent as to partnerships. Note: In this connection, is a limited partnership, with only one general partner, intended to be covered under the Act?

"Second, concern is expressed as to the possible effect of the new Act upon the Limited Partnership Act and other laws. This could occur in regard to substantive obligations or procedural matters. For example, in proposed BP Code 24001, the rule of liability for acts of an officer, etc., is stated only in terms of an "association". The words "except as otherwise provided by statute" may preserve and exclude other statutes, such as the Uniform Partnership Acts. However, the wording is very general, and does not save the common law. Again, by example, proposed Corp. Code 24002 permits levy upon property of an association under writ of execution to enforce a judgment against the association.

*These comments are those of the Northern Section. The South has concurred in them.

Will it be contended that Sec. 24002 impliedly repeals the general laws relating to attachments, and also present Corp. Code 15025 (Partnership Act) which expressly refers to attachment on a claim against the partnership? Also, is present Corp. C. 15700 (designation by foreign partnership of agent for service of process) impliedly repealed by proposed Corp. C. 24003 on the same subject?

"Third, the question is raised as to the omission of the exclusion of "a government or governmental subdivision or agency" (see wording of Corp. Code 24000) from proposed new CCP 388?

"Fourth, The question is also raised as to why the definition section in the Code of Civil Procedure (new CCP 388) confines the definition to "this section." Should it not be "this title" or other wording, or specific references to new CCP 395.2 (venue) and other sections being amended?

"Fifth, Repeal of present CCP 388. Some members of the Northern Section raise the question whether under the proposed Act, the creditor's remedies against individual partners or members of the "association" sued in the action will be as broad as under present CCP 388. If a substantial change in present law (CCP 388) is to be made in this regard, it is believed it should be clearly pointed out, and a question of policy may arise. Present CCP 388 provides for a judgment binding the "joint property of all the associates and the individual property of the party or parties served with process." There is no continuation of these provisions which presumably avoid problems which often arise in serving all individual defendants.

"The Commission comment under proposed Corp. Code 24002 refers to CCP 414 and the CCP 989-994. These sections may not take care

of all joint obligation cases; for example, CCP 414 refers to defendants "jointly or severally liable on a contract." An I.A.C. award results from statute. In DeMartini v. I.A.C., 90 C.A. 2d. 139, 151, it is said that several judgments may be entered for a compensation award based on joint (statutory) liability, where "all partners are parties to the proceeding and each is liable...for the entire amount." The question is therefore raised whether provisions similar to those quoted above from CCP 388 should not be included in the new Act. The foregoing comments are only directed to specific points and are not intended to derogate from the Section's approval of the Act as a whole."

The committee did not consider the question of whether this measure in part involved changes in substantive law upon which the State Bar could not, or as a matter of policy should not, express its views. Nor did it attempt to analyze changes of substantive law. It has proceeded upon the assumption that its views will be made known to the Commission as the views of the committee only and as not being binding upon the Board of Governors, as the governing body of the State Bar.*

Both Sections endorse the principle of permitting an "unincorporated association" (including a partnership) to sue as an "entity" as permitted by the Act. This eliminates the present need for suits filed, in some instances, by a member of an association as the representative of persons having a common interest.

*Also see the 1953 Act creating the Law Revision Commission which provides in part: The Board of Governors of the State Bar shall assist the commission in any manner the commission may request within the scope of its powers or duties. See Gov't Code 10307.

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Suit By or Against An Unincorporated Association

BACKGROUND

At common law, an unincorporated association could neither sue nor be sued in the association's name. If the association incurred an obligation—~~the association was not a party seeking to enforce the obligation~~—a party seeking to enforce the obligation had to proceed against all of the members of the association as parties defendant. ~~the association~~ If an unincorporated association desired to bring an action, all of the members of the association had to join as the parties plaintiff.

except a tort
obligation¹

As the purposes for which unincorporated associations are organized have increased, and as the activities of unincorporated associations have expanded, these 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 administration of litigation arising out 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.

1. Tort obligations were regarded as the joint and several obligations of the association members; a plaintiff could thus sue one associate severally or all the associates jointly on such an obligation.

RECOMMENDATIONS

The Law Revision Commission has concluded that existing procedural rules applicable to actions brought by or against unincorporated associations are not in harmony with modern conditions. Accordingly, the Commission recommends:

1. An unincorporated association should be able to sue in its own name. An unincorporated association frequently incurs obligations or acquires rights in its association name, and there is no valid reason why it should be denied access to the courts as an association to define such obligations or to enforce such rights.

It is possible that legislation permitting an unincorporated association to sue in its own name will merely clarify rather than change existing California law. In *Daniels v. Sanitarium Ass'n, 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 courts may well apply the same rule to other types of unincorporated associations. But whether a particular type of unincorporated association can sue in its own name under the rule in the *Daniels* case may remain uncertain for many years since a case involving that type of association must be tried and processed through the appellate courts before the law can be determined with certainty. Legislation will obviate the need for repeated appeals to determine how far the principle of the *Daniels* case extends.

The present uncertainty as to the right of an unincorporated association to sue in its own name results in the institution of actions in the names of individuals who, apart from their association membership, are not really interested in the action. Joining all of the members of the association as plaintiffs imposes an extremely onerous procedural burden upon the plaintiff association—both in preparing the complaint and in substituting parties when there is a change in membership—without any corresponding benefit to the defendant. If the defendant wishes to know who the members are, he may obtain that information expeditiously through the use of ordinary discovery procedures. Usually, however, the interests and identity of the individual members is irrelevant. Permitting an unincorporated association to sue in the association 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.

2. The limitation now contained in Code of Civil Procedure Section 388 that an unincorporated association must be engaged in "business" before it can be sued in the association's name serves no useful purpose and should be repealed. Repeal of this limitation will make no great change in existing law, for the courts have held that practically any activity in which an unincorporated association engages constitutes the transaction of business within the meaning of this section. See *Herald v. Glendale Lodge No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920).

3. Legislation should be enacted providing that an unincorporated association is responsible, to the same extent as if it were a natural person, for an act or omission of its officer, agent, or employee acting within the scope of his office, agency, or employment. Here, again, it seems likely that such legislation will clarify rather than change existing California law. Recent cases have held that certain associations are liable for the torts of their officers and employees. *Inglis v. Operating Engineers Local Union No. 13*, 58 Cal.2d 269, 23 Cal. Rptr. 403, 378 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 Commercial Code defines a "person" who may contract obligations thereunder to include unincorporated associations. Com. Code § 1201(28), (29), (30). Other statutes authorize certain kinds of associations to incur obligations under particular types of contracts. See, e.g., Corp. Code § 21200; Labor Code § 1126. Thus, the recommended legislation will remove any remaining uncertainty concerning the extent to which unincorporated associations are liable for actions taken on their behalf.

4. Under existing law, an unincorporated association may be sued in any county where any member of the association resides. *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*, 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. Thus, a plaintiff who desires to sue an unincorporated association may frequently "shop" for a favorable forum. Individuals and corporations are not subject to this sort of forum shopping. To provide unincorporated associations with equivalent protection, legislation should be enacted permitting an unincorporated association to file a designation of its principal place of business with the Secretary of State so that such information may be readily ascertainable. After such a designation is filed, the unincorporated association should be subject to suit only in the designated county, 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. Under this recommendation, an unincorporated association that had complied with the statute would be subject to the same venue rules as a corporation.

5. Under existing California law, service of process may be made upon an unincorporated association by serving any member thereof. Code Civ. Proc. § 388. There is no requirement that a plaintiff notify any of the responsible officers of the association of the pendency of the litigation. A plaintiff can, therefore, 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 despite the lack of any meaningful notice to the association.

To remedy this situation, legislation should be enacted permitting any unincorporated association to file with the Secretary of State a certificate designating an agent for service of process and stating the address at which such agent can be served. Service upon the association should be required to be made either by service upon a responsible officer of the association or by service upon the designated service agent. A party should be permitted to serve process upon an unincorporated association by service upon an individual member only if the officers of the association cannot be found in this state after diligent search and the agent for the service of process cannot be found at the address designated in the certificate filed with the Secretary of State. 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:

PROPOSED LEGISLATION

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

An act to amend Sections 388, 410, and 411 of, and to add Section 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:

CODE OF CIVIL PROCEDURE

Code of Civil Procedure Section 388 (amended)

SECTION 1. Section 388 of the Code of Civil Procedure is amended to read:

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.

(a) As used in this section:

(1) "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.

(2) "Person" includes a natural person, corporation, partnership or any other unincorporated organization, and a government or governmental subdivision or agency.

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

Comment. Under Section 388, any unincorporated association, whether engaged in business or not, may be sued in the association name. Under the prior law, only persons transacting business under a common name could be sued in that 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 No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920).

Section 388 also grants unincorporated associations the privilege of suing in the association name. The extent to which an unincorporated association could sue in its own name was unclear under prior law. Compare *Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963) (labor union could maintain action in

its own name), with *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946) (unincorporated cooperative association could not sue in its own name).

The provisions formerly contained in Section 388 dealing with service of process are superseded by Code of Civil Procedure Sections 410 and 411(2.1), and the provisions formerly contained in Section 388 dealing with the enforcement of judgments are superseded by Corporations Code Section 24002.

Code of Civil Procedure Section 395.2 (added)

SEC. 2. Section 395.2 is added to the Code of Civil Procedure, to read:

395.2. If an unincorporated association has filed a statement with the Secretary of State pursuant to Section 24003 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 and, for the purpose of determining such county, the principal place of business of the unincorporated association shall be deemed to be the principal office or place of business listed in the statement.

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. By statute, however, an unincorporated association may be sued in any county where the plaintiff can sue a member of the association. *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*, 37 Cal.2d 760, 235 P.2d 607 (1951) (construing Section 395 of the Code of Civil Procedure). 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 office or 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.

Code of Civil Procedure Section 410 (amended)

SEC. 3. 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 associates 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 associates*) 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~~ *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 associates*, 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 associates*. 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.

Comment. The amendments to Section 410 merely conform the section to the amended versions of Sections 388 and 411.

Code of Civil Procedure Section 411 (amended)

SEC. 4. 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, and 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 24003 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 statement 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 411 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 become 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.

CORPORATIONS CODE

Sec. 5. Part 4 (commencing with Section 24000) is added to Title 3 of the Corporations Code, to read:

PART 4. LIABILITY; LEVIES AGAINST PROPERTY; DESIGNATION OF AGENT FOR SERVICE AND OF PRINCIPAL OFFICE OR PLACE OF BUSINESS

Corporations Code Section 24000 (added)

24000. (a) 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.

(b) As used in this section, "person" includes a natural person, corporation, partnership or any other unincorporated organization, and a government or governmental subdivision or agency.

Comment. Section 24000 provides a definition that includes all private unincorporated associations of any kind and excludes all governmental entities, authorities, boards, bureaus, commissions, departments, and associations of any kind.

Although subdivision (a) provides that a governmental entity or agency is not an unincorporated association under this part, subdivision (b) provides that an unincorporated association is subject to this part even though its membership may include governmental entities or agencies.

Corporations Code Section 24001 (added)

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 the 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 prior 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, Inc.*, 72 Cal. App.2d 505, 164 P.2d 901 (1946); *Security-First Nat'l 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), (29), (30); CORP. CODE § 21200; LABOR CODE § 1126. Section 24001 eliminates whatever gaps may have remained in the previous statutory provisions making unincorporated associations responsible for their contractual obligations.

Corporations Code Section 24002 (added)

24002. Only the property of an unincorporated association may be levied upon under a writ of execution issued to enforce a judgment against the association.

Comment. Section 24002 permits the plaintiff to resort only to the assets of an unincorporated association to satisfy a judgment against the association. Of course, nothing in the section precludes the plaintiff from also resorting to the individual property of a member of the association to satisfy a judgment against the member in a case where the member was also a party defendant. The procedure provided by Code of Civil Procedure Sections 414 and 989-994 may also be available in a case where the members of the association are jointly liable with the association on a contract and are named as joint defendants.

Insofar as Section 24002 provides that the assets of the association may be levied upon to satisfy a judgment against the association, it restates the law formerly stated in Code of Civil Procedure Section 388. The former version of Section 388 also authorized satisfaction of the judgment against the association from the individual assets of a member who had been served with process in the action against the association. However, a 1959 amendment to Code of Civil Procedure Section 410 precluded this unless the summons served on the member indicated that service was being made upon him in his individual capacity. Under Section 24002, it is necessary not only to serve an individual member in his individual capacity but also to name him as a defendant before a judgment can be obtained that may be satisfied from his individual assets.

Corporations Code Section 24003 (added)

24003. (a) An unincorporated association may file with the Secretary of State on a form prescribed by him a statement containing either or both of the following:

(1) A statement designating the location and complete address of the association's principal office in this state or principal place of business in this state. Only one such place may be designated.

(2) A statement designating as agent of the association for service of process any natural person residing in this state or any corporation which has complied with Section 3301.5 or Section 6403.5 and whose capacity to act as such agent has not terminated.

(b) If a natural person is designated as agent for service of process, the statement shall set forth his complete business or residence address. If a corporate agent is designated, the statement shall set forth the state or place under the laws of which such agent was incorporated and the name of the city, town, or village wherein it has the office at which the association designating it as such agent may be served, as set forth in the certificate filed by such corporate agent pursuant to Section 3301.5, 3301.6, 6403.5, or 6403.6.

(c) An unincorporated association may at any time file with the Secretary of State a revocation of a statement filed by the association under this section. A statement designating either a new principal office or place of business or a new agent for the service of process, or both, is a revocation of any prior statement filed by the association under this section.

(d) A revocation becomes effective 30 days after it is received by the Secretary of State, except that:

(1) A revocation of a designation of a principal office or place of business is effective upon receipt of the revocation by the Secretary of State if the revocation is a statement that designates a new principal office or place of business.

(2) A revocation of a designation of an agent for the service of process is effective upon receipt of the revocation by the Secretary of State if the revocation is a statement that designates a new agent for the service of process.

(e) Delivery by hand of a copy of any process against the unincorporated association (1) to any natural person designated by it as agent, or (2) if the association has designated a corporate agent, at the office of such corporate agent, in the city, town, or village named in the statement filed by the association under this section to any person at such office named in the certificate of such corporate agent filed pursuant to Section 3301.5 or 6403.5 if such certificate has not been superseded, or otherwise to any person at such office named in the last certificate filed pursuant to Section 3301.6 or 6403.6, constitutes valid service on the association.

(f) For filing a statement as provided in this section, the Secretary of State shall charge and collect the fee prescribed

UNINCORPORATED ASSOCIATIONS—RECOMMENDATION

in Government Code Section 12185 for filing a designation of agent.

(g) The Secretary of State may destroy or otherwise dispose of any statement filed under this section:

(1) At any time one year after such statement has been revoked; or

(2) In the case of a statement that only designates an agent for the service of process, at any time one year after such designation has been revoked or such agent has resigned as provided in Section 24004.

Comment. Section 24003 provides a procedure whereby an unincorporated association may designate a principal office or 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 Comments to Code of Civil Procedure Sections 395.2 and 411.

Section 24003 is based largely upon Corporations Code Section 3301 except that designation of an agent is permissive rather than mandatory.

Corporations Code Section 24004 (added)

24004. An agent designated by an unincorporated association for the service of process may file with the Secretary of State a written statement of resignation as such agent which shall be signed and execution thereof shall be duly acknowledged by the agent. Thereupon the authority of the agent to act in such capacity shall cease and the Secretary of State forthwith shall give written notice of the filing of the statement by mail to the unincorporated association addressed to its last known principal office or principal place of business in this state.

Comment. Section 24004 permits an agent designated to receive service of process to resign. The section is based on Corporations Code Sections 3301.7 and 6405.