

## Second Supplement to Memorandum 2002-6

### **Uniform Unincorporated Nonprofit Association Act (Discussion of Issues)**

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R. Bradbury Clark of the Nonprofit Organizations Committee of the Business Law Section of the State Bar has provided additional comments regarding the proposed law. His comments are discussed below. Except as otherwise indicated, all statutory references in this memorandum are to the Corporations Code.

#### **Application of Proposed Law**

The First Supplement to Memorandum 2002-6 discusses the scope of application of the proposed law and sets out proposed Section 18060. That section would provide that an entity-specific statute prevails over the generally applicable provisions of the proposed law, where the two are inconsistent. Mr. Clark suggests that the provision be revised to make it clearer that the entity-specific statute prevails only to the extent of any inconsistency, thus:

#### **§ 18060. Relation to other law**

18060. If a statute that is specific to a particular type of unincorporated association is inconsistent with a provision of this title, the specific statute prevails to the extent of the inconsistency.

**Comment.** Section 18060 is new. It makes clear that the general provisions of this title are subordinate to entity-specific statutes. For example, Section 18105 authorizes an unincorporated association to own property. Insurance Code Section 9089 provides a more restrictive property ownership rule specific to fraternal fire insurers. A fraternal fire insurer can be unincorporated, in which case it would be subject to both sections. To the extent they are inconsistent, Insurance Code Section 9089 would prevail.

Mr. Clark's proposed revision is consistent with the staff's intention in drafting the provision. **The staff has no objection adding the clarifying language.**

#### **Definition of "Person"**

Proposed Section 18025(c) defines "person" for the purpose of defining "unincorporated association" (as an "unincorporated organization of two or more persons joined by mutual consent for a common purpose and operating

under a common name”). As originally drafted, the definition concludes with a catch-all — “or any other legal or commercial entity.” The First Supplement to Memorandum 2002-6 noted Mr. Clark’s suggestion that the words “or commercial” be deleted from that phrase. He now suggests that the word “legal” also be deleted, leaving “or any other entity.” There are existing statutes that define person to include an “entity” without specifying that it is a “legal entity.” See, e.g., Bus. & Prof. Code § 14204; Civ. Code § 81(a). **The staff has no objection to the proposed change.**

### **Limit on Assertion of Unauthorized Action**

With certain exceptions, Section 18120 protects third parties from an assertion that an unincorporated association’s property transaction is unauthorized. One of the exceptions allows such an assertion in a “proceeding to enjoin an unauthorized act, or the continuation of an unauthorized act, where a third party has not yet acquired rights that would be adversely affected by the injunction.” Section 18120(a). As noted in the First Supplement to Memorandum 2002-6, Mr. Clark believes this exception needs some refinement. There may be a situation where an injunction would adversely affect the interests of a third party, but should be permitted anyway because the third party actually knew that the transaction was unauthorized from the outset. The First Supplement included a proposed revision to address the issue. Mr. Clark correctly points out that the proposed revision could be confusing. He proposes that it be revised to read as follows:

18120. No limitation on the power of an unincorporated association to acquire, hold, manage, pledge, encumber, or transfer an interest in real or personal property, or the manner of exercise of those powers, shall be asserted as between the unincorporated association or a member of the unincorporated association and a third person, except in the following proceedings:

(a) A proceeding to enjoin an unauthorized act, or the continuation of an unauthorized act, where a third party has not yet acquired rights that would be adversely affected by the injunction, or where, at the time of the unauthorized act, the third party had actual knowledge that the act was unauthorized.

**The staff believes this draft is clearer and recommends that it be used if the Commission decides to address this issue.**

## **Ownership of Property**

Mr. Clark suggests that it would be helpful to add a section providing that “property acquired by an unincorporated association is property of the association and not of the members individually.” This would be consistent with the concept that an unincorporated association is an entity separate from its members. A similar provision applies to partnerships. See Section 16203. The staff will explore this suggestion in a future memorandum.

## **Recorded Statement of Authority**

Proposed Section 18115 provides for recording of a statement of authority stating the “titles and capacities of its officers and other persons who are authorized on its behalf to acquire, transfer, or encumber real property owned or held by the association.” This would continue existing law. See Section 20002. Mr. Clark wonders whether it is necessary to make a conforming change to the law governing what types of documents are recordable.

As a general matter, a county recorder is required to accept for recordation “any instrument, paper, or notice that is authorized or required by statute or court order to be recorded.” Gov’t Code § 27201(a). Government Code Section 27280 authorizes recordation of “any instrument or judgment affecting the title to or possession of real property.” As used in that provision, “instrument” means “a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty.” Gov’t Code § 27279(a). Under that definition, the document described in proposed Section 18115 (and existing Section 20002) would not be an instrument authorized for recordation by Government Code Section 27280.

However, a statute may specifically authorize recordation of a particular type of instrument. Miller & Starr contains a non-exhaustive list of recordable documents, many of which are authorized pursuant to specific statutes. See 5 Miller & Starr, Cal. Real Estate § 11:6 (3d ed. 2000). Although Miller & Starr does not list a statement of authority of an unincorporated association, it does list a statement of partnership authority. Such a statement may specify the authority or limitations on the authority of partners to enter into transactions on behalf of the partnership. See Sections 16105(b), 16303(b) & (d)(2). The statement of authority of an unincorporated association is analogous to a statement of partnership authority with respect to transfers of real property. Furthermore, Section 20002 (and proposed Section 18115) expressly authorize that a statement of authority of

an unincorporated association may be recorded. **The staff does not believe that any additional authority for recordation is required.**

Mr. Clark also questions whether it is necessary to require that the statement of authority include the names of an association's officers. He believes it might be adequate to clearly state the offices that are authorized without naming the persons who occupy those offices. **The staff prefers to include the names of officers.** If the names are not included, then a person's authority will depend on facts that are not recorded, which may be problematic for title insurers. Requiring inclusion of specific names is more burdensome to the association, because statements will need to be updated and re-recorded to reflect changes in leadership, but the staff feels the additional certainty justifies the burden.

On a related point, Mr. Clark suggests that a provision be added authorizing recordation of a later statement, revoking or revising an earlier one, to reflect changes in those authorized to execute documents. **This seems reasonable,** and if the Commission approves of the change the staff will draft appropriate implementing language.

#### **Disposition of Assets of Dissolved Association**

Proposed Section 18125 provides rules for disposition of the assets of an unincorporated association on dissolution. Mr. Clark makes two suggestions regarding the section:

(1) The proposed dollar limit for disposal of personal property of small value should perhaps be an aggregate value for all personal property subject to disposal. **In considering the rule for disposal of personal property, the Commission should keep this alternative in mind.**

(2) As drafted, proposed Section 18125 is limited to distribution of assets "after determining that all the known debts and liabilities of an unincorporated association in the process of winding up its affairs have been paid or adequately provided for." Mr. Clark suggests that there should perhaps also be a provision permitting recovery of assets distributed to members, up to the amount distributed, if valid claims are made after dissolution and distribution.

However, the issue raised by Mr. Clark may already be adequately addressed by the Uniform Fraudulent Transfer Act. See Civ. Code §§ 3439-3439.12. The Uniform Act provides remedies for a creditor where a debtor has transferred property to a third party while insolvent. If the creditor's claim arises before the transfer occurs, then intent to defraud need not be shown to recover the property

— if the debtor is insolvent and does not receive reasonable value for the transferred property, the transfer is deemed “fraudulent” and can be avoided or the property can be attached. Civ. Code §§ 3439.05, 3439.07. A transfer that is completed before a claim arises may be considered constructively fraudulent if the debtor does not receive reasonably equivalent value and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Civ. Code § 3439.04(b).

The staff has not had time to research the applicability of the Uniform Fraudulent Transfers Act in the context of distribution of assets on dissolution, but it may be that the Uniform Act provides an adequate remedy for recovery of distributed assets by creditors of a dissolved unincorporated association. The staff will conduct further research and report its findings in a future memorandum.

Respectfully submitted,

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