

## First Supplement to Memorandum 2004-2

### 2004 Legislative Program: Unincorporated Associations

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R. Bradbury Clark, of the Nonprofit Committee of the Business Law Section of the California State Bar, has suggested some changes to the Commission's recommendation on *Unincorporated Associations* (September 2003). This memorandum discusses the points raised by Mr. Clark and recommends a number of minor changes to the recommendation. Because these changes are technical and self-evident, the staff does not intend to discuss them in detail at the meeting. The staff will assume that they are acceptable unless issues are raised. All statutory references are to the Corporations Code.

#### Continuation of Former Section

Proposed Section 18070 provides a rule of construction for interpreting a reference to a section that continues a repealed section. It is intended to apply only to the unincorporated associations title, rather than the entire Corporations Code. That application would be better expressed if the Section were revised as follows:

18070. A provision of this title, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be considered as a restatement and continuation thereof and not as a new enactment, and a reference in a statute to the provision of this code shall be deemed to include a reference to the previously existing provision unless a contrary intent appears.

#### Membership Interest

Proposed Section 18100 provides that the "interest of a member in an unincorporated association is personal property." This continues the substance of existing Section 20000, which was originally added to prevent a judgment against a member being enforced against the real property of the association.

At the Nonprofit Committee's suggestion, the following statement was added to the Comment to Section 18100:

If an association's assets are dedicated to a public or charitable purpose, a member may have no property interest in the association.

Mr. Clark now feels that the statement should be stronger. The staff recommends that it be revised to read:

A member has no property interest in association assets that are dedicated to a public or charitable purpose.

### **Authority to Acquire, Transfer, or Encumber Real Property**

Proposed Section 18115 restates and simplifies existing law governing the execution of a real property transaction on behalf of an unincorporated association. Mr. Clark suggests that the words "or person" be added, as follows:

18115. The acquisition, transfer, or encumbrance of an interest in real property by an unincorporated association shall be executed by its president and secretary or other comparable officers, or by a person specifically designated by a resolution adopted by the association, or by a committee or other body or person authorized to act by the governing principles of the association.

This would make clear that an association's governing principles may grant authority to a specific person, rather than to a committee or other group. For example, in a religious association, such power might reside in a single individual. The staff would also add the comma as indicated.

### **Execution of Real Property Transaction**

Proposed Section 18120 permits an unincorporated association to record, in any county in which it has real property, a statement of authority to acquire, transfer, or encumber real property on behalf of the association. Subdivision (c) of that section protects a bona fide purchaser or encumbrancer who relies on such a statement.

The ability to designate authority to *acquire* property is new — existing law speaks only of conveyance of property owned or held by the association. Logically, this improvement should extend to the protection of those who rely on a statement of authority. If a purchaser may rely on a statement of authority to convey, a transferor should be able to rely on a statement of authority to acquire. This would require the following changes to Section 18120:

18120. (a) An unincorporated association may record in a county in which it has an interest in real property a verified and

acknowledged statement of authority stating the name of the association, and the names, title, or capacity 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~~. For the purposes of this section, "statement of authority" includes a certified copy of a statement recorded in another county.

(b) An unincorporated association may revoke a statement of authority by recording either of the following documents in the county in which the statement of authority is recorded:

(1) A new statement of authority that satisfies the requirements of subdivision (a). The new statement supersedes the revoked statement.

(2) A verified and acknowledged document that expressly revokes the statement of authority.

(c) It shall be conclusively presumed in favor of a bona fide transferor, purchaser, or encumbrancer for value of real property of the association located in the county in which a statement of authority has been recorded pursuant to subdivision (a), that a person designated in the statement is authorized to acquire, transfer, or encumber real property on behalf of the association.

(d) The presumption provided in subdivision (c) does not apply if, before the acquisition, transfer, or encumbrance, either of the following occurs:

(1) The statement of authority is revoked by the unincorporated association.

(2) A person claiming to be a member, director, or officer of the unincorporated association records, in the county in which the property is located, a verified and acknowledged document stating that the statement of authority is erroneous or unauthorized.

### **Disposition of Assets on Dissolution**

Proposed Section 18130 governs disposition of the assets of an unincorporated association that is in the process of winding up its affairs. The provision was originally drafted as a default rule, but it has grown to include mandatory elements (relating to the priority of existing conditions and trusts). It should be revised as follows:

18130. After all of the known debts and liabilities of an unincorporated association in the process of winding up its affairs have been paid or adequately provided for, the assets of the association ~~may~~ shall be distributed in the following manner:

(a) Assets held upon a valid condition requiring return, transfer, or conveyance of the assets, which condition has occurred or will occur, shall be returned, transferred, or conveyed in accordance with the condition.

(b) After complying with subdivision (a), any remaining assets that are held in trust shall be distributed in accordance with the trust.

(c) After complying with subdivisions (a) and (b), any remaining assets shall be distributed in accordance with the governing principles of the association. If the governing principles do not provide the manner of distribution of the assets, the assets shall be distributed pro rata to the current members of the association.

## **Enforcement of Judgment**

In general, proposed Section 18270 requires that a judgment against both an association and a member, officer, or agent of the association be satisfied from the assets of the association first. Mr. Clark notes that we have used the term “director” in other sections dealing with the liability of an association’s officers and agents and suggests that Section 18270 should also include the term. The staff agrees and recommends that Section 18270 be revised as follows:

18270. (a) A judgment creditor of a member, director, officer, or agent of an unincorporated association may not levy execution against the assets of the member, director, officer, or agent to satisfy a judgment based on a claim against the unincorporated association unless a judgment based on the same claim has been obtained against the unincorporated association and any of the following conditions is satisfied:

(1) A writ of execution on the judgment against the unincorporated association has been returned unsatisfied in whole or in part.

(2) The unincorporated association is a debtor in bankruptcy.

(3) The member, director, officer, or agent has agreed that the creditor need not exhaust the assets of the unincorporated association.

(4) A court grants permission to the judgment creditor to levy execution against the assets of a member, director, officer, or agent based on a finding that the assets of the unincorporated association subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the unincorporated association is excessively burdensome, or that the grant of permission is an appropriate exercise of the court’s equitable powers.

(b) Nothing in this section affects the right of a judgment creditor to levy execution against the assets of a member, director, officer, or agent of an unincorporated association if the claim against the member, director, officer, or agent is not based on a claim against the unincorporated association.

## **Conclusion**

The changes described above would make minor improvements to the proposed law. The Commission's recommendation has not yet been printed in its final form, so any changes approved by the Commission could be included in the printed version of the recommendation. The changes would be made to the implementing legislation as the opportunity arises.

Respectfully submitted,

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