

First Supplement to Memorandum 2004-41

Uniform Unincorporated Nonprofit Association Act: Tort Liability

The Commission's recommendation on *Unincorporated Associations*, 33 Cal. L. Revision Comm'n Reports 729 (2003), was enacted into law as SB 1746 (Ackerman), 2004 Cal. Stat. ch. 178. Some amendments were made to address concerns raised during the legislative process. One of those amendments deleted proposed Corporations Code Section 18620, which stated the potential tort liability of a member, director, officer, or agent of a nonprofit association:

§ 18620. Tort liability

18620. A member, director, officer, or agent of a nonprofit association is not liable for injury, damage, or harm caused by an act or omission of the association or an act or omission of a director, officer, or agent of the association, unless one of the following conditions is satisfied:

(a) The member, director, officer, or agent expressly assumes liability for injury, damage, or harm caused by particular conduct and that conduct causes injury, damage, or harm.

(b) The tortious conduct of the member, director, officer, or agent causes injury, damage, or harm.

Comment. Section 18620 is new. It specifies the scope of liability of a member, director, officer, or agent of a nonprofit association for a tort of the association or of an officer or agent of the association. See also Sections 18005 ("director" defined), 18015 ("member" defined), 18020 ("nonprofit association" defined), 18025 ("officer" defined).

The Commission agreed to delete the section from SB 1746 in response to concerns that it might inadvertently change existing law.

This memorandum revisits Section 18620, to make certain that it does not make any inadvertent change to existing law (or appear to do so). A staff draft tentative recommendation is attached for the Commission's consideration. If the Commission approves the draft for circulation, the staff would recommend that it be circulated for about 45 days of public comment. That would allow for consideration of comments at the Commission's November meeting. If a final recommendation is approved in November, it would be possible to include Section 18620 in legislation introduced in 2005.

Revision of Section 18620

As originally recommended, Section 18620 reads as an exclusive list of the potential bases for liability. That construction requires that the section be exhaustive, in order to avoid inadvertently eliminating existing bases of liability.

Rather than attempt to reiterate the common law of torts, the section uses language that is intentionally broad, basing liability on a person's "tortious conduct." Tortious conduct would include acts that are the immediate cause of an injury (like driving a car into a pedestrian), but would also include cases where causation is less direct. For example, negligent entrustment of a vehicle could be understood to be tortious conduct. Directing or authorizing negligent conduct by an agent could also be construed as tortious conduct (e.g., "run every light in town to get this package to UPS before they close").

However, it may not be wise to load so much meaning into a single phrase. Some may construe it more narrowly, as applying only to conduct that directly causes an injury. That risk could be reduced by adding explanatory text to the Comment, but probably not entirely eliminated.

Another problem is that there are bases of liability that are even more indirect. For example, the members of an unincorporated homeowners association who own common area property as tenants in common might be individually liable for an injury arising in the common area, based on their status as tenants in common. See *Ruoff v. Harbor Creek Community Ass'n*, 10 Cal. App. 4th 1624, 13 Cal. Rptr. 2d 755 (1992); but see Civ. Code § 1365.9 (tort action arising from common ownership must be brought against association, and not against individual members, if specified liability insurance maintained). As originally drafted, Section 18620 might be read to override existing law with respect to the liability of tenants in common, at least with respect to property that is managed by a nonprofit association.

These problems can be avoided by recasting Section 18620 as a nonexclusive list of potential bases for liability. That provides some guidance, without risking inadvertent elimination of an existing basis for liability. That should provide comfort to those who worried that the original version of Section 18620 might inadvertently work a substantive change in the law of tort liability. If the Commission decides to seek reintroduction of Section 18620, the staff recommends that it be revised to read as follows:

§ 18620. Tort liability

18620. A member, director, officer, or agent of a nonprofit association is liable for injury, damage, or harm caused by an act or omission of the association or an act or omission of a director, officer, or agent of the association, if one of the following conditions is satisfied:

(a) The member, director, officer, or agent expressly assumes liability for injury, damage, or harm caused by particular conduct and that conduct causes injury, damage, or harm.

(b) The tortious conduct of the member, director, officer, or agent causes injury, damage, or harm.

Comment. Section 18620 is consistent with existing law. A member, director, officer, or agent of a nonprofit association is not vicariously liable for a tort of the association merely because of the person's status as a member, director, officer, or agent of the association. See Section 18605. A member, director, officer, or agent of a nonprofit association is liable for a tort of the association if that person expressly assumes liability or that person's own tortious conduct causes the injury. See, e.g., *Orser v. George*, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) (member of nonprofit association member may be liable for "personal participation in an unlawful activity or setting it in motion").

The term "tortious conduct" is intended to be construed broadly and includes such things as negligent entrustment of a vehicle. See, e.g., *Steuer v. Phelps*, 41 Cal. App. 3d 468, 116 Cal. Rptr. 61 (1974). Tortious conduct also includes a person directing or authorizing an agent to engage in tortious conduct. See Cal. Jur. *Agency* § 136 (3d ed. 2004) (liability based on personal responsibility).

The bases for liability stated in this section are not exclusive. Other common law bases for liability exist. For example, the members of an unincorporated homeowners association who own property as tenants in common may be liable in tort for an injury that results from negligent maintenance of that property, even if the members' own conduct was not responsible for the injury. Such liability derives from the law governing tenancy in common. See *Ruoff v. Harbor Creek Community Ass'n*, 10 Cal. App. 4th 1624, 13 Cal. Rptr. 2d 755 (1992); but see Civ. Code § 1365.9 (tort action arising from common ownership must be brought against association, and not against individual members, if liability insurance maintained in specified amount).

Other provisions of law may expressly limit the liability of a member, director, officer, or agent of a nonprofit association. See, e.g., Civ. Code § 1365.7 (limitation of liability of officer or director of homeowners association); Corp. Code § 24001.5 (limitation of liability of officer or director of nonprofit medical association). Nothing in this section affects the application of such law. See Section 18060 ("If a statute specific to a particular type of unincorporated association is inconsistent with a general provision

of this title, the specific statute prevails to the extent of the inconsistency.”).

See also Sections 18005 (“director” defined), 18015 (“member” defined), 18020 (“nonprofit association” defined), 18025 (“officer” defined).

Alternative

An alternative would be to simply set Section 18620 aside. Because it merely codifies existing case law principles, it is not crucial that it be enacted.

The most important policy regarding the potential liability of a member is expressed in Section 18605, which *was* successfully enacted:

§ 18605. No liability based solely on membership or agency

18605. A member, director, officer, or agent of a nonprofit association is not liable for a debt, obligation, or liability of the association solely by reason of being a member, director, officer, or agent.

Comment. Section 18605 codifies the general rule that a member of an unincorporated nonprofit association is not liable for the association’s debts, obligations, or liabilities solely by reason of membership. See *Security-First National Bank of Los Angeles v. Cooper*, 62 Cal. App. 2d 653, 667, 145 P.2d 722 (1944) (“Membership, as such, imposes no personal liability for the debts of the association”) (quoting 7 C.J.S. 78); *Orser v. George*, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) (“mere membership does not make all members liable for unlawful acts of other members without their participation, knowledge or approval.”).

The general rule is extended to directors, officers, and agents of an association. This is consistent with existing law providing that an agent is not liable for obligations of a disclosed principal or for torts of the principal, where the agent is personally innocent of wrongdoing. See 2 B. Witkin, *Summary of California Law Agency* § 145, at 141, § 151, at 145 (9th ed. 1987).

See also Sections 18005 (“director” defined), 18015 (“member” defined), 18020 (“nonprofit association” defined), 18025 (“officer” defined).

That section makes it clear that there is no vicarious liability based merely on one’s status as a member, director, officer, or agent of a nonprofit association. From that, one can infer that some sort of conduct (or other legal status) is required to establish liability. That may be guidance enough.

On the other hand, one of the goals of the Commission’s work on unincorporated association law has been to provide helpful guidance to laypersons. A layperson could misconstrue Section 18605 as providing complete

immunity from liability for a nonprofit association's tort. Section 18620 would help to prevent that misunderstanding, by making clear that there are circumstances in which a member might be personally liable.

Respectfully submitted,

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Assistant Executive Secretary

TORT LIABILITY IN A NONPROFIT ASSOCIATION

1 A member, director, officer, or agent of a nonprofit association is not vicariously
2 liable for a tort of the nonprofit association, merely because of the person's status
3 as a member, director, officer, or agent.¹

4 A member, director, officer, or agent of a nonprofit association is liable for a tort
5 of a nonprofit association if the person's own conduct causes the injury. For
6 example, if the member is driving a vehicle on association business and
7 negligently causes an accident, the member would be liable for any resulting
8 injuries. The association itself might be vicariously liable for an accident caused
9 by a member,² but that would not excuse the driver's liability for his or her own
10 tortious conduct.³

11 A person's conduct need not be the immediate cause of an injury in order to
12 result in tort liability. A person might also be liable if the person authorized or
13 ratified an agent's tortious conduct. For example, an association officer might be
14 liable if the officer directs an employee to drive at an unsafe speed and an accident
15 results.⁴

16 These principles are consistent with the holding in the main case on the liability
17 of a member of a nonprofit association, *Orser v. George*.⁵ The court held that a
18 member is not vicariously liable for a nonprofit association's tort merely as a
19 consequence of membership, but could be liable for "personal participation in an
20 unlawful activity or setting it in motion."⁶

21 The proposed law would codify those common law principles, without excluding
22 other common law bases for liability.⁷ This would clarify the law, without making
23 a substantive change, and would provide useful guidance to a layperson who is a
24 member, director, officer, or agent of a nonprofit association.

1. Corp. Code § 18605.

2. See Corp. Code § 18250 (unincorporated association liable to same extent as natural person).

3. See Civ. Code § 2343(3) (agent responsible for agent's own wrongful acts in the course of agency).

4. See generally Cal. Jur. *Agency* § 136 (3d ed. 2004) (liability based on personal responsibility).

5. 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967).

6. *Id.* at 670-71.

7. For example, the members of an unincorporated homeowners association may be liable as tenants in common for torts arising on jointly owned property. See *Ruoff v. Harbor Creek Community Ass'n*, 10 Cal. App. 4th 1624, 13 Cal. Rptr. 2d 755 (1992); but see Civ. Code § 1365.9 (tort action arising from common ownership must be brought against association, and not against individual members, if liability insurance maintained in specified amount).

1 Other law may expressly limit the liability of a director, officer, or agent of a
2 nonprofit association in specific circumstances.⁸ Nothing in the proposed law
3 would affect an express liability limitation.⁹

8. See, e.g., Civ. Code § 1365.7 (limitation of liability of officer or director of homeowners association); Corp. Code § 24001.5 (limitation of liability of officer or director of nonprofit medical association).

9. See Corp. Code § 18060 (“If a statute specific to a particular type of unincorporated association is inconsistent with a general provision of this title, the specific statute prevails to the extent of the inconsistency.”).

PROPOSED LEGISLATION

1 **§ 18620. Tort liability**

2 18620. A member, director, officer, or agent of a nonprofit association is liable
3 for injury, damage, or harm caused by an act or omission of the association or an
4 act or omission of a director, officer, or agent of the association, if one of the
5 following conditions is satisfied:

6 (a) The member, director, officer, or agent expressly assumes liability for injury,
7 damage, or harm caused by particular conduct and that conduct causes injury,
8 damage, or harm.

9 (b) The tortious conduct of the member, director, officer, or agent causes injury,
10 damage, or harm.

11 **Comment.** Section 18620 is consistent with existing law. A member, director, officer, or agent
12 of a nonprofit association is not vicariously liable for a tort of the association merely because of
13 the person's status as a member, director, officer, or agent of the association. See Section 18605.
14 A member, director, officer, or agent of a nonprofit association is liable for a tort of the
15 association if that person expressly assumes liability or that person's own tortious conduct causes
16 the injury. See, e.g., *Orser v. George*, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967)
17 (member of nonprofit association member may be liable for "personal participation in an
18 unlawful activity or setting it in motion").

19 The term "tortious conduct" is intended to be construed broadly and includes such things as
20 negligent entrustment of a vehicle. See, e.g., *Steuer v. Phelps*, 41 Cal. App. 3d 468, 116 Cal. Rptr.
21 61 (1974). Tortious conduct also includes a person directing or authorizing an agent to engage in
22 tortious conduct. See Cal. Jur. *Agency* § 136 (3d ed. 2004) (liability based on personal
23 responsibility).

24 The bases for liability stated in this section are not exclusive. Other common law bases for
25 liability exist. For example, the members of an unincorporated homeowners association who own
26 property as tenants in common may be liable in tort for an injury that results from negligent
27 maintenance of that property, even if the members' own conduct was not responsible for the
28 injury. Such liability derives from the law governing tenancy in common. See *Ruoff v. Harbor*
29 *Creek Community Ass'n*, 10 Cal. App. 4th 1624, 13 Cal. Rptr. 2d 755 (1992); but see Civ. Code
30 § 1365.9 (tort action arising from common ownership must be brought against association, and
31 not against individual members, if liability insurance maintained in specified amount).

32 Other provisions of law may expressly limit the liability of a member, director, officer, or agent
33 of a nonprofit association. See, e.g., Civ. Code § 1365.7 (limitation of liability of officer or
34 director of homeowners association); Corp. Code § 24001.5 (limitation of liability of officer or
35 director of nonprofit medical association). Nothing in this section affects the application of such
36 law. See Section 18060 ("If a statute specific to a particular type of unincorporated association is
37 inconsistent with a general provision of this title, the specific statute prevails to the extent of the
38 inconsistency.").

39 See also Sections 18005 ("director" defined), 18015 ("member" defined), 18020 ("nonprofit
40 association" defined), 18025 ("officer" defined).