

Legis. Prog.

May 4, 2005

Memorandum 2005-14

2005 Legislative Program: Status of Bills

Attached is a chart showing the status of bills in the Commission's 2005 legislative program. We will update the information in the chart with any changes at the time of the Commission meeting.

This memorandum supplements the information in the chart with respect to selected matters.

AB 176 (BERMUDEZ) — CHAPTERED OUT GOV'T CODE § 71601 CHANGES

As part of the Commission's work on trial court unification, we have proposed technical cleanup of obsolete language in many statutes, including Government Code Section 71601. Twice the Legislature has enacted the Section 71601 cleanup language and twice the legislation has been chaptered out.

Chaptering out occurs when another bill affecting the same statute is enacted later in the same session. In that case, the later enacted bill takes effect and the earlier one does not. It is possible to address the problem by coordinating the language of the two bills. But in our case, the conflict arose in the closing days of the session and there was no opportunity for coordination.

This tiny matter does not merit a bill of its own. We decided to look for an appropriate vehicle to append it to. AB 176 (Bermudez) addresses unrelated aspects of Government Code Section 71601. One of our technical changes (eliminating the reference to the municipal court) has been amended into that bill. The other changes (correcting subordinate judicial officer terminology) are under review for possible inclusion in that bill.

We do not know the prospects for enactment of AB 176. It deals with court employment issues, and could be a cost item for some courts.

AB 770 (MULLIN) — CID OMBUDSPERSON

The status of this bill is addressed in a separate memorandum. See Memorandum 2005-17 [Study H-850].

AB 1133 (HARMAN) — WAIVER OF PRIVILEGE BY DISCLOSURE

The status of this bill is addressed in a separate memorandum. See Memorandum 2005-18 [Study K-301].

SB 551 (LOWENTHAL) — CID OMBUDSPERSON

The status of this bill is addressed in a separate memorandum. See Memorandum 2005-17 [Study H-850].

SB 702 (ACKERMAN) — UNINCORPORATED ASSOCIATIONS

Senate Bill 702 would implement two Commission recommendations: *Unincorporated Association Governance*, 33 Cal. L. Revision Comm'n Reports 231 (2004) and *Nonprofit Association Tort Liability*, 33 Cal. L. Revision Comm'n Reports 257 (2004). SB 702 was approved by the Senate Judiciary Committee on April 19 and approved by the full Senate on April 28. The bill has not yet been set for hearing in the Assembly.

Prior to the bill's approval, the staff of the Senate Judiciary Committee raised three concerns about SB 702. The bill was eventually amended to address those concerns. One of the amendments necessitates a revision of a Commission Comment. The amendments and the proposed Comment revision are discussed below.

The staff has also been working to resolve a concern raised by the California State Chapter of the American Automobile Association (CSAAA). CSAAA has agreed that a clarifying change to a Comment is sufficient to address its concern. An amendment of the bill is not necessary. The issue and the proposed Comment language are discussed below.

Merger of Unincorporated Association

Under existing law there is no statutory authority for an unincorporated association to merge with another entity. This does not prevent an unincorporated association from combining their operations with another group, but it requires that it do so using an ad hoc contractual arrangement. This may lead to uncertainty on important issues such as the effect of the "merger" on the rights of creditors of the disappearing entity. Statutory merger provisions would regularize the merger process and establish basic rules for the effect of a merger.

The proposed law includes basic provisions for the merger of an unincorporated association. See proposed Corp. Code §§ 18350-18400. The proposed merger provisions are based on similar provisions that govern the merger of other types of entities.

Despite the benefits of statutory merger, the Senate Judiciary Committee staff indicated a strong preference that an unincorporated association not be permitted to merge with another unincorporated association and that an “interspecies” merger between an unincorporated association and another type of entity not be permitted to result in an unincorporated association as the surviving entity. The Committee staff believes that it is better policy to encourage an unincorporated association to merge into a more formally organized type of entity.

The Commission’s staff consulted with the Commission Chair and with representatives of the State Bar and it was generally agreed that it would be better to narrow the new provision (providing the benefits of statutory merger provisions in some but not all merger situations) than it would be to force the issue and risk removal of the merger provisions altogether. SB 702 was amended on March 29 to revise proposed Section 18360 as follows:

18360. An unincorporated association may merge with any other unincorporated association, into a domestic corporation, foreign corporation, or other business entity that is authorized by law to effect a merger with an unincorporated association. As used in this section, the term “other business entity” has the meaning provided in Section 5063.5 limited partnership, general partnership, domestic limited liability company, or foreign limited liability company.

The list of entities added to the end of the section was drawn from Corporations Code Section 5063.5.

The staff recommends Commission approval of this change. The Comment to Section 18360 does not require revision as a result of the change. The Commission should also consider whether to revisit the issue of merger between unincorporated associations at a later date.

Standard of Care for Director of Unincorporated Association

Proposed Corporations Code Section 18300 would have established a standard of care for a director of an unincorporated association. That section was drafted to be substantively identical to similar provisions governing other types

of entities. *Cf.*, e.g., Corp. Code §§ 7231 (nonprofit mutual benefit corporation), 9241 (religious corporation).

The Senate Judiciary Committee staff expressed concern about the inclusion of language that authorizes a director to rely on the reliable and competent advice of an expert in his or her area of expertise and requested that such language be deleted from the section.

The proposed change could create the implication that a director of an unincorporated association may not rely on competent expert advice in carrying out the director's duties. Rather than make last minute changes of this importance, the staff concluded that it would be better to remove the provision from the bill. The Chair concurred.

The bill was amended on April 19 to delete Section 13800 and replace it with placeholder language reserving space in the law for the addition of a standard of care section at some time in the future. The Commission should consider whether to revisit this issue at a later date.

Nonprofit Association Tort Liability

Under existing law, a member, director, or agent of a nonprofit association is not liable for a tort of the association merely as a result of the person's status as a member, director, or agent. Corp. Code § 18605. However, this does not preclude liability based on conduct. Proposed Section 18620 provides a nonexclusive list of conduct-based grounds for liability.

Section 18620 was originally included in last year's SB 1746 (Ackerman). However, it was removed from that bill at the request of the Senate Judiciary Committee staff. They requested that it be revised to make more clear that the section does not preclude any other existing basis for liability.

The Commission approved a revised version, which the staff thought was acceptable to the Senate Judiciary Committee. As it turned out, the Committee staff still felt that the language should be made clearer. They proposed specific changes and SB 702 was amended accordingly on April 13 (after consultation with the Commission's Chair).

The effect of the amendment and the revised Comment language are set out below:

18620. (a) A member, director, officer, or agent of a nonprofit association is ~~not~~ shall be 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~~ if any of the following conditions is satisfied:

(a) ~~(1)~~ The member, director, officer, or agent expressly assumes liability for injury, damage, or harm caused by particular conduct and that conduct causes the injury, damage, or harm.

(b) ~~(2)~~ The tortious conduct of the member, director, officer, or agent causes injury, damage, or harm.

(c) ~~(3)~~ The member, director, officer, or agent is otherwise liable under another statute or under the common law. any other statute.

(b) This section codifies existing grounds for liability in a nonexclusive list, and does not foreclose other common law bases for liability.

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. See~~ provides a nonexclusive list of grounds for the tort liability of a member, director, officer, or agent of a nonprofit association. See also Section 18605 (no liability based solely on membership or agency status as member, director, or agent of nonprofit association).

A member, director, officer, or agent of a nonprofit association is may be liable for a tort of the association if that person expressly assumes liability or that person's own tortious conduct causes the injury. The term "tortious conduct" is intended to be construed broadly and includes such conduct 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 directing or authorizing an agent to engage in tortious conduct. See Cal. Jur. *Agency* § 136 (3d ed. 2004) (liability based on personal responsibility). See also *Orser v. George*, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) (nonprofit association member may be liable for "personal participation in an unlawful activity or setting it in motion").

Subdivision (c) (b) makes clear that the grounds for liability provided in ~~subdivisions (a) and (b)~~ subdivision (a) are not exclusive. Other grounds for liability may 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 is 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).

The staff recommends that the Commission approve the amendment and revised Comment language.

Reciprocal Insurers

The California State Chapter of the American Automobile Association (CSAAA) provides automotive insurance to its members through an unincorporated reciprocal insurance organization. CSAAA is concerned that the proposed provision on termination of membership within an unincorporated association (proposed Corp. Code § 18320) might supersede Insurance Code sections that govern the cancellation of a subscriber’s insurance policy in a reciprocal insurance organization.

That was not the Commission’s intent. Corporations Code Section 18060 (enacted last year on the Commission’s recommendation) expressly provides that the general law on unincorporated associations yields if it is inconsistent with a statute that governs a specific type of unincorporated entity. Because the Insurance Code specifically regulates reciprocal insurers and provides procedures for cancellation of policies, those procedures would supersede any inconsistent rules in the proposed law.

Nonetheless, CSAAA was still concerned about possible confusion on the point. The staff offered to add clarifying language to the Comment to proposed Section 18320:

Section 18060 provides that a statutory rule specific to a particular type of unincorporated association prevails over an inconsistent provision of this title. Thus, Section 18320 is superseded to the extent that another statute provides a rule for termination or suspension of membership in a particular type of

unincorporated association. For example, subscribers in an unincorporated reciprocal insurer could perhaps be characterized as members of an unincorporated association. Nonetheless, cancellation of a subscriber's insurance policy by the reciprocal insurer would be governed by the Insurance Code provisions on cancellation of policies and not by this section. See, e.g., Ins. Code § 660-669.5 (cancellation of automobile insurance policy).

CSAAA confirmed that this language would address its concern. The staff recommends that the Commission approve this addition to the Comment.

SB 853 (KEHOE) — PREEMPTION OF CID ARCHITECTURAL RESTRICTIONS

The status of this bill is addressed in a separate memorandum. See Memorandum 2005-17 [Study H-850].

SB 1104 (SEN. BANK., FIN. & INS. COMM.) — FINANCIAL PRIVACY

SB 1104 would implement the Commission's recommendations on financial privacy, made in response to a legislative directive. The bill primarily would seek to coordinate the new California Financial Information Privacy Act with narrower preexisting statutes. The bill would also direct the Commission to conduct further work on coordination, monitor the operation of the new law, and address federal preemption issues.

The bill is pending in Senate Judiciary Committee, but will not be heard before January, making it a two-year bill. The concern appears to be primarily that there could be unintended consequences of the statutory coordination, and absent compelling evidence that the conflict in the laws is causing real problems in practice, it is better to be cautious about any changes.

The staff has asked the State Bar Committee on Consumer Financial Services for further information about what, if any, problems have been arising in practice.

SCR 15 (MORROW/ESCUZIA/DUNN) — ORAL ARGUMENT IN CIVIL PROCEDURE

The Commission has received a request from the Chair and Vice Chair of the Senate Judiciary Committee to review the statutes governing hearings under the Code of Civil Procedure with the objective of clarifying the circumstances under which oral argument must be allowed.

The Commission has commenced work on this project under its general authority to propose technical and minor substantive revisions in the law. However, because of the possibility that the project could generate proposals for more significant changes to the law, the Commission has felt that this project should receive separate legislative sanction. SCR 15 would authorize the study.

The resolution is pending in Senate Judiciary Committee. There appears to be a consensus that this is an appropriate project for the Commission. However, there is also a sense that the project ought to be viewed in the context of other matters on the Commission's calendar of topics. How that will occur has not yet been determined.

EMERGENCY RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Commission's emergency rulemaking recommendation is a technical cleanup of an issue under the state Administrative Procedure Act. The proposal would make clear that, while the full-fledged APA process does not apply in an emergency rulemaking, the rule must still be published, it remains subject to judicial review, etc.

Because this is such a small recommendation it has been our intention not to introduce a separate bill on the matter, but simply to attach it as a rider to a more significant Administrative Procedure Act bill. There are a couple of potential vehicles that have been introduced and are pending in this legislative session.

Unexpectedly, however, the whole matter of emergency regulations has become a hot political issue in the Legislature. This is due to heavy use of the emergency rulemaking process by the Schwarzenegger administration.

It is likely that our cleanup proposal, while technical, would get caught up in the emergency regulation policy debate. In order to avoid politicizing what should be a nonpolitical bill, the staff has concluded we would do better to hold off this year and introduce the bill next year, when perhaps things will have settled down. Waiting another year is not critical; the existing ambiguity in the law has been there for a number of years.

ALSO OF INTEREST

AB 12 (DeVore) — Real Property TOD Deed

AB 12 (DeVore) as introduced would have created a form of deed for real property to enable transfer on death (TOD) of the property to a named beneficiary without probate. The bill was opposed by the California Judges Association, the State Bar Trusts and Estates Section, and the California Land Title Association. The bill is now being amended to instead direct the Law Revision Commission to study the matter.

This issue would not be new to the Commission. We have done a substantial amount of work in the area of nonprobate transfers. In fact, all the modern nonprobate transfer statutes were enacted on Commission recommendation, including a beneficiary designation in a bank account, securities registration, automobile title, trust, or other written instrument. (The classical forms of nonprobate transfer — joint tenancy and life insurance — obviously predate the Commission’s work on nonprobate transfers.)

The Commission has previously touched briefly on the concept of a real property TOD deed. However, we have moved it to our “probate back burner” due to the press of other higher priority matters.

SCR 42 (Campbell) — No Contest Clause

SCR 42 (Campbell) would direct the Commission to review the law governing no contest clauses in probate to determine whether the existing statutes should be repealed and replaced by alternative provisions awarding attorney’s fees and costs.

A no contest clause (also called an in terrorem clause) is a provision inserted in a will, trust, or other instrument of donative transfer. Such a clause typically provides that if any beneficiary under the instrument contests the disposition made in the instrument, that beneficiary will take nothing, or a nominal amount, under the instrument.

The existing statute governing no contest clauses makes them fully enforceable, but allows a beneficiary to get a court declaration whether a particular act of the beneficiary (e.g., objecting to the appointment of the person named as executor or trustee) would be a contest within the meaning of the clause. The Commission was involved in creation of this approach.

The existing scheme has proved problematic, generating extensive declaratory relief litigation. The State Bar Trusts and Estates Section has sponsored legislation to make a no contest clause unenforceable and to deter unmeritorious litigation by an award of attorneys fees. The proposal to refer the matter to the Commission grows out of this ferment.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Status of 2004 Commission Legislative Program

As of September 24, 2004

		AB 1836		AB 2376	AB 3081		SB 111	SB 1225	SB 1746		
	Introduced Last Amended	Jan 22		Feb 19	Mar 11		1/22/03	Feb 11	Feb 20		
		July 1		June 15	—		June 28	Apr 29	June 8		
First House	Policy Committee	Mar 24		Mar 24	Apr 13		Jan 13	Apr 27	Apr 13		
	Fiscal Committee	•May 4		•May 4	—		Jan 20	—	May 3		
	Passed House	May 20		May 20	Apr 19		Jan 28	May 6	May 10		
Second House	Policy Committee	June 7		June 21	June 1		June 8	June 1	June 1		
	Fiscal Committee	•July 1		—	—		Jun 23	—	Jun 23		
	Passed House	Aug 12		July 29	June 24		July 1	June 7	July 1		
Concurrence		Aug 17		Aug 12	July 1		July 12	June 7	July 12		
Governor	Received Approved	Aug 25		Aug 17	July 12		July 15	June 8	July 15		
		Sept 24		Aug 27	July 20		July 23	June 17	July 19		
Secretary of State	Date Chapter #	Sept 24		Aug 30	July 20		July 23	June 18	July 20		
		754		346	182		193	49	178		

Bill List: AB 1836 (Harman): Alternative Dispute Resolution in Common Interest Developments
 AB 2376 (Bates): Common Interest Development Law: Architectural Review and Decisionmaking
 AB 3081 (Judiciary): Civil Discovery: Nonsubstantive Reform
 SB 111 (Knight): Obsolete Reporting Requirements
 SB 1746 (Ackerman): Unincorporated Associations
 SB 1225 (Morrow): Authority of Court Commissioner/Subordinate Judicial Officers

KEY

Italics: Future or speculative
 “—”: Not applicable
 *: Double referral, not fiscal
 [date]: Deadline

Also of Interest:
 AB 286 (Dutra): Double Liability Problem in Home Improvement Contracts