

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

*relating to*

**Fictitious Business Names**

October 1969

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California 94305

# THE CALIFORNIA LAW REVISION COMMISSION

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## NOTE

This pamphlet begins on page 601. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 9 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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STANFORD, CALIFORNIA 94305



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Ex Officio

October 4, 1969

To HIS EXCELLENCY, RONALD REAGAN  
*Governor of California* and  
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the law relating to the use of fictitious names should be revised.

The Commission herewith submits its recommendation and a study relating to this subject. The study was prepared by Mr. Gordon E. McClintock, formerly a member of the Commission's legal staff. Only the recommendation (as distinguished from the research study) expresses the views of the Commission.

Respectfully submitted,

SHO SATO  
Chairman



# CONTENTS

	Page
RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION .....	607
BACKGROUND .....	607
RECOMMENDATIONS .....	609
Persons Subject to the Statute .....	609
Fictitious Business Name Statements .....	610
Place of Filing of Statements .....	610
Publication Requirement .....	611
Furnishing Summaries of Filings .....	611
Abandonment of Use of Name; Withdrawal From Partnership .....	611
Expiration of Statement .....	612
Maintenance of Fictitious Business Name Records .....	612
Operative Date .....	613
Relocation of Statute .....	613
Miscellaneous Revisions .....	613
PROPOSED LEGISLATION .....	614
Business and Professions Code § 7540 (amended) .....	614
Business and Professions Code § 10159.5 (amended) .....	615
Business and Professions Code § 10522.5 (amended) .....	615
Business and Professions Code §§ 17900-17930 (added) .....	615
§ 17900. Fictitious business name defined .....	616
§ 17901. General partner defined .....	617
§ 17902. Person defined .....	617
§ 17903. Registrant defined .....	617
§ 17910. Person transacting business in fictitious business name to file statement .....	617
§ 17911. Nonprofit associations .....	618
§ 17912. Real estate investment trusts .....	618
§ 17913. Contents of statement .....	618
§ 17914. Execution of statement .....	619
§ 17915. Filing with county clerk .....	620
§ 17916. What constitutes filing .....	620
§ 17917. Publication of fictitious business name statements .....	620
§ 17918. Compliance with chapter required in order to maintain action .....	621
§ 17919. Compliance with chapter after bankruptcy, incompetency, or death .....	622

## CONTENTS—Continued

	Page
§ 17920. Expiration of statement.....	622
§ 17921. Notice of impending expiration.....	623
§ 17922. Abandonment of use of fictitious business name .....	624
§ 17923. Withdrawal from partnership operating under fictitious business name.....	624
§ 17924. Furnishing of forms.....	625
§ 17925. Index of fictitious business name information .....	626
§ 17926. Certified copies of statements .....	627
§ 17927. Retention and destruction of statements....	628
§ 17928. Summaries or compilations of filings.....	629
§ 17929. Fees for filing statements.....	629
§ 17930. Penalty for false statements.....	629
Civil Code §§ 2466-2471 (repealed).....	629
Financial Code § 12300.2 (amended).....	631
Government Code § 26848 (repealed).....	631
Operative Date .....	631
<b>RESEARCH STUDY</b> .....	<b>633</b>

(A detailed Table of Contents for the study begins on page 633)



# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

## Fictitious Business Names

### BACKGROUND

Since its enactment in 1872, the California Civil Code has contained provisions regulating the use of "fictitious" names<sup>1</sup> for business purposes. Although the filing and publication requirements imposed by the so-called fictitious name statute—Civil Code Sections 2466-2471—have undergone minor changes over the years, the essential features of the system have endured for almost a century.

The statute requires every person<sup>2</sup> or partnership transacting business in a fictitious name, or a designation not showing the names of the persons interested in the business, to file a certificate with the clerk of the county in which the principal place of business is located and subsequently to publish the certificate in a newspaper in that county once a week for four successive weeks. The certificate must show the names and residences of the persons transacting business in the fictitious name. A new certificate must be filed and published on each change of membership in the firm. If a person fails to file and publish the certificate required by the statute, neither he nor his assignees may "maintain" an action on any contract made or any transaction had in the

<sup>1</sup> A "fictitious" name is one that does not include the names of all the partners or the name of the individual owner of the business. A name is not "fictitious" if it includes the surname of each partner or of the individual owner. See *Flora v. Hankins*, 204 Cal. 351, 268 P. 331 (1928) (partners doing business under the name "Flora & Mahedy"); *Pendleton v. Cline*, 85 Cal. 142, 24 P. 659 (1890) (partners doing business under name "Pendleton & Williams"); *Kohler v. Stephenson*, 39 Cal. App. 374, 178 P. 970 (1919) (individual doing business as "Kohler Steam Laundry"). The cases are not completely consistent, but it appears that a name is not a fictitious name merely because it includes the word "company." Compare *Wetenhall v. Chas. S. Mabrey Constr. Co.*, 209 Cal. 293, 286 P. 1015 (1930) (individual doing business as "W. S. Wetenhall Company" is not using a fictitious name); *Vagim v. Brown*, 63 Cal. App.2d 504, 146 P.2d 923 (1944) (individual doing business as "Vagim Packing Company" is not using a fictitious name); with *Andrews v. Glick*, 205 Cal. 699, 272 P. 587 (1928) ("Andrews-Cordano Plumbing Company"); *Collection Service Corp. v. Conlin*, 98 Cal. App. 686, 277 P. 749 (1929) ("Alles Printing Company"). See 3 WITKIN, SUMMARY OF CALIFORNIA LAW *Partnership* § 3 at 2265 (7th ed. 1960).

<sup>2</sup> The term "person" includes a corporation doing business under a name other than the one set forth in its articles of incorporation. *Berg Metals Corp. v. Wilson*, 170 Cal. App.2d 559, 339 P.2d 869 (1959).

The statute does not apply to foreign commercial or banking partnerships established and transacting business outside the United States. CIVIL CODE § 2467. Nor does it apply to persons not maintaining a place of business in this state. *Moon v. Martin*, 185 Cal. 361, 197 P. 77 (1921).

fictitious name until the certificate has been filed and published.<sup>3</sup> The "plea in abatement"<sup>4</sup> thus afforded to the defendant in such an action is the only statutory sanction to enforce compliance with the statute.<sup>5</sup>

The fictitious name statute does not inhibit adoption of business or trade names, nor does it prevent use of duplicate or deceptively similar trade names. Rather, the courts uniformly have said that the single purpose of the statute is to prevent fraud or deception in commerce by providing sources of information—the certificate on file in the county clerk's office and, to a limited and transient extent, the newspaper publication—from which persons can learn with whom they are dealing.<sup>6</sup>

After assessing the views of interested persons and organizations, the Commission has concluded that, admitting its obvious shortcomings, the fictitious name statute continues to serve a useful purpose. Suggestions that the statute be repealed, on analysis, are based on the ineffectiveness and awkwardness of the existing provisions rather than on any question as to the desirability of a ready source of information concerning the realities obscured by business or trade names.

<sup>3</sup> Lack of compliance merely abates the action; filing and publication pending trial is sufficient. *Rudneck v. Southern Calif. Metal & Rubber Co.*, 184 Cal. 274, 193 P. 775 (1920); *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946). If the defense is upheld and the action abated, the judgment for the defendant is not res judicata in a subsequent action on the same cause of action. *Folden v. Lobrovich*, 153 Cal. App.2d 32, 314 P.2d 56 (1957). See also Civil Code Section 2468, which permits filing and publication by a trustee in bankruptcy, guardian, conservator, executor, or administrator for the purpose of maintaining an action to recover any sums due the bankrupt, incompetent, or deceased person or partnership that should have filed and published the certificate but failed to do so.

<sup>4</sup> The defense of noncompliance is waived if the defendant fails to raise it. *Bryant v. Wellbanks*, 88 Cal. App. 144, 263 P. 332 (1927). Moreover, the trial judge has discretion to refuse to permit amendment of the defendant's pleading to raise the defense. *Stewart v. San Fernando Ref. Co.*, 22 Cal. App.2d 661, 71 P.2d 1118 (1937).

<sup>5</sup> Nothing precludes entering into contracts and transactions in the fictitious name; the sanction is limited to maintaining actions on such contracts or transactions. See note 3, *supra*. The sanction does not apply to tort actions. *Ralph v. Lockwood*, 61 Cal. 155 (1882); *Grant v. Weatherholt*, 123 Cal. App.2d 34, 266 P.2d 185 (1954); *Thompson v. Byers*, 116 Cal. App. 214, 2 P.2d 496 (1931).

Compliance with the statute is not a prerequisite to obtaining local business or other licenses in the fictitious name, nor in general is such compliance required to conduct in a fictitious name one of the businesses or professions licensed by the state. However, compliance is necessary to obtain a license as a real estate broker or salesman (Business and Professions Code Section 10159.5), mineral, oil, and gas broker (Business and Professions Code Section 10522.5), or check seller and cashier (Financial Code Section 12300.2). See also Business and Professions Code Section 7540 (private investigators, private patrol operators, insurance adjusters, and repossessioners must comply with the statute before conducting business under a fictitious name).

<sup>6</sup> See *Andrews v. Glick*, 205 Cal. 699, 272 P. 537 (1928); *J. C. Wattenbarger & Sons v. Sanders*, 216 Cal. App.2d 495, 30 Cal. Rptr. 910 (1963); *Hixson v. Boren*, 144 Cal. App.2d 547, 301 P.2d 615 (1956); *Bank of America v. National Funding Corp.*, 45 Cal. App.2d 320, 114 P.2d 49 (1941). See also 3 WITKIN, SUMMARY OF CALIFORNIA LAW *Partnership* § 2 at 2264 (7th ed. 1960) ("The purpose of the requirement is to make a public record of the individual members of firms for the benefit of those who deal with them.").

## RECOMMENDATIONS

### Persons subject to the statute

The existing statute does not apply to all persons doing business in California under a fictitious name. Civil Code Section 2467 specifically exempts commercial and banking partnerships established and transacting business in a place without the United States, and the courts have construed the act generally as exempting any person who does not maintain a place of business within this state.<sup>7</sup>

Coverage of the statute should basically be coextensive with those persons who "regularly transact business" in California<sup>8</sup> under a fictitious business name even though they may have no established places of business within the state. The need for information concerning the identity of a person who does business in California but does not have an established place of business in California seems at least as great as the need for information concerning the identity of a person doing business from a fixed location within the state.

The exemption for "foreign" commercial and banking partnerships should be eliminated. The exemption was provided in 1872 and has remained in the code with only a minor modification in 1873. The reference to banking partnerships is now obsolete as only a corporation may carry on the business of banking in California.<sup>9</sup> Foreign commercial partnerships should be required to comply with the statute. Persons in California normally would have greater difficulty in obtaining information concerning foreign partnerships than in obtaining information concerning local business enterprises. Since both foreign and domestic enterprises would be treated equally, there would be no discrimination against foreign commerce. The exemption originally was based on a similar provision of New York law<sup>10</sup> which has since been repealed.

It is apparently assumed by California practitioners,<sup>11</sup> perhaps incorrectly, that a business trust need not comply with the existing fictitious business name statute. However, the need for information concerning a business trust is generally as great as that for any other type of unincorporated business association. Accordingly, the fictitious

<sup>7</sup> See *Moon v. Martin*, 185 Cal. 361, 197 P. 77 (1921).

<sup>8</sup> The Commission has considered whether the phrase "regularly transacts business" should be defined by statute and has concluded that it should not. Any uncertainty is not likely to cause injustice under the sanctions imposed by the statute. Moreover, the determination as to what constitutes regularly transacting business can best be made judicially as the issue arises. It should be noted, however, that the decision whether compliance with the fictitious business name statute is required should be made in light of the particular purpose served by *this* statute. Accordingly, application of the statutory and case law from other fields of law is not necessarily appropriate here.

<sup>9</sup> FIN. CODE § 102.

<sup>10</sup> See Section 2467 in 2 CIVIL CODE OF CALIFORNIA 109 (C. Haymond & J. Burch ann. 1872); compare 3 REVISED STATUTES OF NEW YORK 978 (Banks & Bros. 5th ed. 1859) with N. Y. GEN. BUS. LAW § 130 (McKinney 1968).

<sup>11</sup> See Letter From Harold Marsh, Jr., Los Angeles attorney, dated May 27, 1969, on file in office of Law Revision Commission. Compare *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946) (business trust required to comply with statute because creators retained control over trustees and business was treated as a copartnership).

business name statute should make clear that a business trust is generally required to comply with the statute. However, all real estate investment trusts must be organized as business trusts, primarily because of the requirements of the federal tax law.<sup>12</sup> In recognition of their unique nature, a real estate investment trust should not be required to meet the requirements of the fictitious business name statute if the trust complies with Sections 856, 857, and 858 of the Federal Internal Revenue Code, has obtained a permit from the California Commissioner of Corporations under Section 23002 of the Corporations Code,<sup>13</sup> and has filed a statement with the Secretary of State (pursuant to Section 24003 of the Corporations Code) designating an agent for service of process.

Although the law is not entirely clear,<sup>14</sup> the existing statute probably does not apply to nonprofit corporations or associations such as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and similar organizations. This matter should be made clear by adding to the statute an express provision exempting nonprofit corporations and associations.

### **Fictitious business name statements**

Every person covered by the statute should be required to file a fictitious business name statement within 40 days after he begins regularly to transact business in this state under a fictitious business name. The statement should include all the information required by existing law and, in addition, the address of the principal place of business of the person filing the statement. Although not presently required by the statute, the address of the principal place of business is customarily included in a fictitious name certificate.

A provision should be added to the statute making it a misdemeanor to execute, file, or publish any fictitious business name statement, knowing that such statement is false, in whole or in part; and the present inconvenient and unnecessary requirement that the statement be made under oath before a notary should be eliminated.

### **Place of filing of statements**

A person required to comply with the statute should continue to file his statement in the office of the county clerk of the county in which he has his principal place of business in this state or, in the

<sup>12</sup> See Sections 856-858 of the Federal Internal Revenue Code of 1954, as amended. See also CORP. CODE §§ 23001, 23002 (limiting liability of shareholders or beneficiaries of a real estate investment trust).

<sup>13</sup> If such a permit is obtained, it is conclusive evidence that the shareholders or beneficiaries are not personally liable for any of the obligations of the real estate investment trust. See CORP. CODE §§ 23001, 23002.

<sup>14</sup> *Athens Lodge No. 70 v. Wilson*, 117 Cal. App.2d 322, 255 P.2d 482 (1953) (unincorporated fraternal benefit society not required to comply with statute). *Compare Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946).

absence of such a principal place of business, in the office of the county clerk of Sacramento County.<sup>15</sup>

### Publication requirement

Since 1872, each person filing a fictitious name certificate has been required to publish the certificate in a newspaper once a week for four successive weeks. A new publication is required each time the membership of a partnership changes.

The Commission has considered suggestions that publication be eliminated or that drastic changes be made in the publication system.<sup>16</sup> However, in view of the controversial nature of the publication requirement, the Commission has decided not to recommend any substantial changes in existing law. Accordingly, no change in the number of publications is recommended. The material published should remain simply that filed with the county clerk. The substance of the provision of existing law<sup>17</sup> that prescribes the county where the statement must be published should be retained; but, subject to this requirement, the statute should direct that the statement be published in a newspaper that circulates in the area where the business is conducted.

### Furnishing summaries of filings

In view of the inherent shortcomings of publication, it is desirable to authorize another, supplemental notice-giving procedure. Accordingly, the county clerk should be authorized to furnish to any person who so requests daily or less frequent summaries or compilations of filings under the statute. Thus, where this procedure is adopted, any interested person can secure from one source complete and current information concerning all filings within the county. A somewhat similar provision for the furnishing of compilations of financing statements is found in Section 9407 of the Commercial Code. The person making the request should, of course, be required to reimburse the county clerk for the cost of furnishing this information.

### Abandonment of use of name; withdrawal from partnership

Under existing law, a person who has filed a fictitious name certificate may, upon ceasing to use the name, file and publish a "certificate of abandonment." This provision should be continued without substantive change in the new statute.

<sup>15</sup> The Commission has given serious consideration to the suggestion that a central filing system be established in some state office in Sacramento. See, e.g., McClintock, *Fictitious Business Name Legislation—Modernizing California's Pioneer Statute*, 19 HASTINGS L.J. 1349, 1372-1375 (1968). The benefits to be achieved by central filing of all types of business and corporate information are significant and, no doubt, such a system may ultimately be adopted. However, the availability of fictitious business name information in the offices of the county clerks is of great convenience to many persons. Accordingly, it appears that, at the present time, it would be necessary to retain filing at the county level even if a central filing system were established; and the Commission has concluded that the benefits to be achieved by a dual filing at the state and county level would not, at this time, outweigh the additional costs such a requirement would impose on the persons covered by the statute.

<sup>16</sup> For a discussion of the considerations involved, see McClintock, *Fictitious Business Name Legislation—Modernizing California's Pioneer Statute*, 19 HASTINGS L.J. 1349, 1384-1389 (1968).

<sup>17</sup> CIVIL CODE § 2466.

Many states either require or permit a withdrawing partner to file a certificate of withdrawal so that his interests will not be prejudiced if the remaining partners fail to file a new certificate. The California statute does not presently provide for filing a certificate of withdrawal, but the partnership is required to file a new fictitious name certificate when there has been a change in its membership. A provision should be included in the new statute to permit a withdrawing partner to file and publish a statement of withdrawal so that his interests may be effectively protected.<sup>18</sup>

### **Expiration of statement**

To ensure that the information on file with the county clerk is kept current and to provide a means whereby the county clerk can dispose of obsolete statements in his files:

(1) The fictitious business name statement should be renewed at least once every five years. This retains the substance of existing law. The county clerk should be required, however, to give notice of the impending expiration of the statement.

(2) The statement should expire and a refiling be required whenever any change occurs that renders the facts set forth in the statement inaccurate. The only exceptions to the latter rule should be that (a) a mere change in the residence address of an individual or general partner should not cause the statement to expire and (b) where the change involves merely the withdrawal of one or more partners, the filing and publication of a statement of withdrawal should prevent expiration of the original fictitious name statement. Under existing law, a new certificate must be filed only when there is a change in the members of a partnership.

### **Maintenance of fictitious business name records**

The statute should continue to require that the county clerk maintain indices of fictitious business name statements that will permit determination of whether: (1) any business using a fictitious business name has on file a fictitious business name statement; (2) any individual, general partner, or corporation is listed in any fictitious business name statement; (3) a statement of abandonment of the use of a fictitious business name or withdrawal from partnership is on file.<sup>19</sup>

The statute should set forth only the function of these indices. This will permit each county clerk to use the system best suited to the resources and needs of his county. Generally, in the smaller counties, relatively simple alphabetical indices will satisfy the requirement; however, the statute should also permit the use of automatic data processing equipment where available.

In 1966, Civil Code Section 2469.2 was enacted to permit the removal of obsolete fictitious name certificates from the files after a stated period of time. A similar procedure should be adopted permitting the destruction of (1) fictitious business name statements, (2) statements

<sup>18</sup> For further discussion, see McClintock, *Fictitious Business Name Legislation—Modernizing California's Pioneer Statute*, 19 HASTINGS L. J. 1349, 1381-1382 (1968).

<sup>19</sup> Civil Code Section 2470 presently requires each county clerk to keep a "register" of certain of the information contained in the fictitious name certificates. This requirement would be superseded by the requirements recommended in the text.

of abandonment of use of a fictitious business name and statements of withdrawal from partnership, and (3) the entries in the indices relating to these statements.

### **Operative date**

The operative date of the proposed statute should be July 1, 1971. The date should be deferred: (1) to allow those persons who must comply with the statute a reasonable time in which to familiarize themselves with its new requirements and (2) to give the county clerk sufficient time in which to establish the necessary procedures. All persons, including those who are in compliance with Civil Code Sections 2466-2471, would become subject to the act on its operative date—July 1, 1971.<sup>20</sup> However, a person should be permitted to file a statement in compliance with the new act at any time after January 1, 1971, and the statement so filed should be deemed to have been filed on July 1, 1971.

### **Relocation of statute**

The provisions dealing with fictitious business names should be moved to Part 3 of Division 7 of the Business and Professions Code which imposes "General Business Regulations" relating to "Representations to the Public." Fictitious business name legislation is a type of business regulation. The present location in the Civil Code in the title on "Partnerships" is inappropriate as the statute deals with corporations and individuals as well as with partnerships. Furthermore, the other sections dealing with partnerships and limited partnerships have been moved to other codes.

### **Miscellaneous revisions**

In addition to the major changes discussed above, the Commission recommends other technical and relatively minor changes in existing legislation in the interest of clarity and precision. These changes are indicated in the Comments to the proposed statutory provisions that follow:

<sup>20</sup> Civil Code Section 2469.2, as amended at the 1969 Regular Session, provides that all fictitious name certificates that were filed prior to January 1, 1967, expire on January 1, 1972, and that a renewal certificate must be filed on or before December 31, 1971, to continue compliance with the statute. This requirement will be superseded by the requirement that a fictitious business name statement be filed not later than July 1, 1971. Thus, although it is recommended that a new filing be required by all persons doing business under a fictitious name, many, if not most, of such persons would otherwise be required to make a new filing under Civil Code Section 2469.2.

## PROPOSED LEGISLATION

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

*An act to amend Sections 7540, 10159.5, and 10522.5 of, and to add Chapter 5 (commencing with Section 17900) to Part 3 of Division 7 of, the Business and Professions Code, to repeal Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code, to amend Section 12300.2 of the Financial Code, and to repeal Section 26848 of the Government Code, relating to fictitious business names.*

*The people of the State of California do enact as follows:*

### **Business and Professions Code § 7540 (amended)**

SECTION 1. Section 7540 of the Business and Professions Code is amended to read:

7540. No licensee shall conduct a business under a fictitious *business* name unless and until he has obtained the written authorization of the bureau so to do.

The bureau shall not authorize the use of a fictitious *business* name which is so similar to that of a public officer or agency or of that used by another licensee that the public may be confused or misled thereby.

The authorization shall require, as a condition precedent to the use of such name, ~~the filing of a certificate of doing business under a fictitious name with the county clerk of the county where the licensee's principal place of business is located, in the manner provided in Chapter 2 of Title 10 of Part 4 of Division 3 of the Civil Code that the licensee comply with Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of this code.~~

A licensee desiring to conduct his business under more than one fictitious *business* name shall obtain the authorization of the bureau in the manner prescribed in this section for the use of each such name.

The licensee shall pay a fee of ten dollars (\$10) for each authorization to use an additional fictitious *business* name and for each change in the use of a fictitious *business* name. If the original license is issued in a nonfictitious name and authorization is requested to have the license reissued in a fictitious *business* name the licensee shall pay a fee of ten dollars (\$10) for such authorization.

**Comment.** Section 7540, which relates to private investigators, private patrol operators, insurance adjusters, and repossessioners, is amended to conform to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes



Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

### **Business and Professions Code § 10159.5 (amended)**

SEC. 2. Section 10159.5 of the Business and Professions Code is amended to read:

10159.5. Every person applying for a license under this chapter who desires to have such license issued under a fictitious *business* name shall file with his application a certified copy of ~~both the entry of the county clerk and the affidavit of publication made pursuant to the provisions of Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code~~ *his fictitious business name statement filed with the county clerk pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of this code.*

**Comment.** Section 10159.5, which relates to real estate salesmen and brokers, is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

### **Business and Professions Code § 10522.5 (amended)**

SEC. 3. Section 10522.5 of the Business and Professions Code is amended to read:

10522.5. Every person applying for a license under this chapter who desires to have such license issued under a fictitious *business* name shall file with his application a certified copy of ~~both the entry of the county clerk and the affidavit of publication made pursuant to the provisions of Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code~~ *his fictitious business name statement filed with the county clerk pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of this code.*

**Comment:** Section 10522.5—which relates to mineral, oil, and gas brokers—is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

### **Business and Professions Code §§ 17900–17930 (added)**

SEC. 4. Chapter 5 (commencing with Section 17900) is added to Part 3 of Division 7 of the Business and Professions Code, to read:

## CHAPTER 5. FICTITIOUS BUSINESS NAMES

## § 17900. Fictitious business name defined

17900. (a) As used in this chapter, "fictitious business name" means:

(1) In the case of an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners.

(2) In the case of a partnership or other association of persons, a name that does not include the surname of each general partner or a name that suggests the existence of additional owners.

(3) In the case of a corporation, any name other than the corporate name stated in its articles of incorporation.

(b) A name that suggests the existence of additional owners within the meaning of subdivision (a) is one which includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted.

**Comment.** Subdivision (a) of Section 17900 codifies the definition of "fictitious name" developed by the courts in interpreting former Civil Code Section 2466. See *Vagim v. Brown*, 63 Cal. App.2d 504, 146 P.2d 923 (1944) (individual); *Andrews v. Glick*, 205 Cal. 699, 272 P. 587 (1928) (partnership); *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946) (unincorporated cooperative association); *Berg Metals Corp. v. Wilson*, 170 Cal. App.2d 559, 339 P.2d 869 (1959) (corporation).

The subdivision refers to "general partners" as defined in Section 17901 in order to omit limited partners of partnerships formed under the Uniform Limited Partnership Act (Corporations Code Sections 15501-15531). As a general rule, a limited partner's name may not appear in the firm name without subjecting the limited partner to liability as a general partner. CORP. CODE § 15505. See also the Comment to Section 17913.

Subdivision (b) removes an inconsistency in the prior law in defining "a name that suggests the existence of additional owners." Under prior interpretations, the use of such terms as "& Co.," "& Sons," and "Bros." subjected a business to the requirements of the statute. See *Schwarz & Gottlieb, Inc. v. Marcuse*, 175 Cal. 401, 165 P. 1015 (1917); *North v. Moore*, 135 Cal. 621, 67 P. 1037 (1902); *Byers v. Bourret*, 64 Cal. 73, 28 P. 61 (1883). But a distinction was drawn between "Jones Company" and "Jones & Company," and the former was not required to comply with the statute. Contrast *Wetenhall v. Chas. S. Mabrey Constr. Co.*, 209 Cal. 293, 286 P. 1015 (1930), with *Byers v. Bourret, supra*. As a practical matter, few businessmen were aware of the distinction and both terms suggest the existence of additional owners. This distinction is therefore eliminated and both names now require a filing under this chapter. An individual proprietor can still conduct business under a name such as "Kohler Steam Laundry," however, without being required to register under this chapter. See *Kohler v. Stephenson*, 39 Cal. App. 374, 178 P. 970 (1919).

**§ 17901. General partner defined**

17901. As used in this chapter, "general partner" means:

- (a) In the case of a partnership, a general partner.
- (b) In the case of an unincorporated association other than a partnership, a person interested in such business whose liability with respect to the business is substantially the same as that of a general partner.

**§ 17902. Person defined**

17902. As used in this chapter, "person" includes individuals, partnerships and other associations, and corporations.

**Comment.** The term "other associations" as used in Section 17902 includes such unincorporated associations as a joint venture or a business trust.

**§ 17903. Registrant defined**

17903. As used in this chapter, "registrant" means a person who is filing or has filed a fictitious business name statement.

**§ 17910. Person transacting business in fictitious business name to file statement**

17910. Every person who regularly transacts business in this state for profit under a fictitious business name shall:

- (a) File a fictitious business name statement in accordance with this chapter not later than 40 days from the time he commences to transact such business; and
- (b) File a new statement in accordance with this chapter on or before the date of expiration of the statement on file.

**Comment.** Section 17910 requires every person—individual, partnership or other association of persons, or corporation—that regularly transacts business for profit in this state under a fictitious name to file a fictitious business name statement. The language of the section ("person who regularly transacts business in this state for profit") excludes from the coverage of the statute any person who only occasionally transacts business in California. In addition, nonprofit associations are exempted by Section 17911 and real estate investment trusts are exempted by Section 17912 if they have met certain requirements.

Two exemptions from the filing requirement that were recognized under prior law are not continued under this chapter. See former Civil Code Section 2467 (commercial or banking partnership established and transacting business in a foreign country) and *Moon v. Martin*, 185 Cal. 361, 197 P. 77 (1921) (person not maintaining a place of business in this state).

The 40-day period provided for filing the initial fictitious business name statement parallels the 40-day period provided in Corporations Code Section 15700 for designating an agent to receive process on behalf of a foreign partnership.

See Section 17920 and the Comment to that section for a description of the circumstances under which a fictitious business name statement

expires. Filing a new statement also extends the effective period of registration from the date of the new filing. See Section 17920.

§ 17911. **Nonprofit associations**

17911. This chapter does not apply to a nonprofit corporation or association, including, but not limited to, organizations such as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and similar organizations.

*Comment.* Section 17911 probably codifies former case law. See *Athens Lodge No. 70 v. Wilson*, 117 Cal. App.2d 322, 255 P.2d 482 (1953) (unincorporated fraternal benefit society). Compare *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946) (unincorporated agricultural cooperative organized as business trust but treated as a copartnership).

§ 17912. **Real estate investment trusts**

17912. This chapter does not apply to a real estate investment trust that has obtained a permit under Section 23002 of the Corporations Code and has a statement on file, pursuant to Section 24003 of the Corporations Code, designating an agent for service of process.

*Comment.* Section 17912 exempts certain real estate investment trusts. Such trusts are defined in Section 23000 of the Corporations Code. The permit referred to is conclusive evidence that the shareholders or beneficiaries of the trust are not personally liable for any of its obligations. CORP. CODE §§ 23001, 23002.

§ 17913. **Contents of statement**

17913. (a) The fictitious business name statement shall be substantially in the following form:

FICTITIOUS BUSINESS NAME STATEMENT

The following person (persons) is (are) doing business  
 as \*-----  
 at \*\*-----  
 \*\*\*-----  
 -----  
 -----  
 -----

This business is conducted by \*\*\*\*-----  
 Signed -----  
 Statement filed with the County Clerk of -----  
 County on -----

(b) The statement shall contain the following information set forth in the manner indicated in the form provided by subdivision (a):

(1) Where the asterisk (\*) appears in the form, insert the fictitious business name.

(2) Where the two asterisks (\*\*) appear in the form: If the registrant has a place of business in this state, insert the street address of his principal place of business in this state.

If the registrant has no place of business in this state, insert the street address of his principal place of business outside this state.

(3) Where the three asterisks (\*\*\*) appear in the form: If the registrant is an individual, insert his full name and residence address. If the registrant is a partnership or other association of persons, insert the full name and residence address of each general partner. If the registrant is a business trust, insert the full name and residence address of each trustee. If the registrant is a corporation, insert the name of the corporation as set out in its articles of incorporation and the state of incorporation.

(4) Where the four asterisks (\*\*\*\*) appear in the form, insert whichever of the following best describes the nature of the business: (i) "an individual," (ii) "a general partnership," (iii) "a limited partnership," (iv) "an unincorporated association other than a partnership," (v) "a corporation," (vi) "a business trust."

*Comment.* Section 17913 continues the requirements of prior law under former Civil Code Sections 2466-2471 insofar as it requires that the statement include the fictitious business name and the name and address of individuals doing business under that name. The address of the principal place of business was not explicitly required by the Civil Code sections superseded by this chapter, but the prevailing practice under prior law was to provide this information. It should be noted that a post office box number does not satisfy the requirement of this section that the "street address" of the principal place of business and the "residence address" of each person doing business be given in the statement.

Prior law did not require that the statement indicate the "type of person" registering. This new requirement will enable interested persons to secure further information from the Secretary of State or other sources concerning the registrant.

Section 17913 does not require the listing of limited partners. The names and addresses of all limited partners are required to be stated in the certificate of limited partnership recorded with the recorder of any county in which the limited partnership has a place of business. See CORP. CODE § 15502. Since the fictitious business name statement must indicate whether the business is a limited partnership, the remaining information can be secured from the recorder.

See also Section 17924 (forms provided by county clerk).

#### § 17914. Execution of statement

17914. If the registrant is an individual, the statement shall be signed by the individual; if a partnership or other association of persons, by a general partner; if a business trust, by a trustee; if a corporation, by an officer.

*Comment.* Section 17914 eliminates the requirement of former Civil Code Section 2468 that the fictitious business name statement be acknowledged. However, a penalty for executing a false statement is provided in Section 17930. Moreover, the statement must be signed

by the individual or, in the case of a partnership or other association, by one of the general partners; execution by an agent—permitted under former Civil Code Section 2468—is no longer permitted. Section 17914 also specifies who may execute the statement on behalf of a business trust or a corporation—matters not covered by prior law. See also Section 17919 (compliance with chapter after bankruptcy, incompetency, or death of person doing business in fictitious name).

**§ 17915. Filing with county clerk**

17915. The fictitious business name statement shall be filed with the clerk of the county in which the registrant has his principal place of business in this state or, if he has no place of business in this state, with the clerk of Sacramento County.

*Comment.* Section 17915 continues the requirement of former Civil Code Section 2466 that the fictitious business name information be filed with the county clerk of the county in which the person's principal place of business is located and further provides for filing in Sacramento County if the registrant has no place of business in California.

**§ 17916. What constitutes filing**

17916. Presentation for filing of a fictitious business name statement and one copy, tender of the filing fee, and acceptance of the statement by the county clerk constitute filing under this chapter. The county clerk shall note on the copy the file number and the date of filing the original and shall certify and deliver or send the copy to the registrant.

*Comment.* Section 17916 is based on subdivision (c) of Corporations Code Section 24003 which relates to the filing of statements by unincorporated associations designating a principal office in this state or an agent for service of process or both.

**§ 17917. Publication of fictitious business name statements**

17917. (a) Within 30 days after a fictitious business name statement has been filed pursuant to this chapter, the registrant shall cause a statement substantially in the form prescribed by subdivision (a) of Section 17913 to be published pursuant to Government Code Section 6064 in a newspaper of general circulation in the county in which the principal place of business of the registrant is located or, if there is no such newspaper in that county, then in a newspaper of general circulation in an adjoining county. If the registrant does not have a place of business in this state, the notice shall be published in a newspaper of general circulation in Sacramento County.

(b) Subject to the requirements of subdivision (a), the newspaper selected for the publication of the statement should be one that circulates in the area where the business is to be conducted.

(c) Where a new statement is required because the prior statement has expired under subdivision (a) of Section 17920, the new statement need not be published unless there has been a change in the information required in the expired statement.

(d) An affidavit showing the publication of the statement shall be filed with the county clerk within 30 days after the completion of the publication.

**Comment.** Section 17917 is substantively similar to the provisions of former Civil Code Sections 2466–2471 that required publication of the fictitious business name statement. As under former law, four publications are required to be made in the county where the principal place of business of the registrant is located. However, since the statute requires a fictitious business name statement to be filed by some persons who will not have a place of business in this state, Section 17917 requires publication by those persons in Sacramento County. Subdivision (b) is a directory—not mandatory—provision that was not found in prior law. See Section 17918 (second sentence). The published statement is required to be the same as that filed with the county clerk. See Section 17913 (form of statement).

§ 17918. Compliance with chapter required in order to maintain action

17918. No person transacting business under a fictitious business name contrary to the provisions of this chapter, or his assignee, may maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by this chapter. For the purposes of this section, the failure to comply with subdivision (b) of Section 17917 does not constitute transacting business contrary to the provisions of this chapter.

**Comment.** Section 17918 retains the sanction provided under former Civil Code Section 2468. Lack of compliance merely abates the action; filing and publication pending trial is sufficient. *Rudneck v. Southern Calif. Metal & Rubber Co.*, 184 Cal. 274, 193 P. 775 (1920); *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946). This sanction does not apply to tort actions. *Ralph v. Lockwood*, 61 Cal. 155 (1882); *Grant v. Weatherholt*, 123 Cal. App.2d 34, 266 P.2d 185 (1954); *Thompson v. Byers*, 116 Cal. App. 214, 2 P.2d 496 (1931). Moreover, an individual businessman who also uses a fictitious business name is not precluded from maintaining an action arising out of a business transaction consummated under his own name. *Dennis v. Overholtzer*, 178 Cal. App.2d 766, 3 Cal. Rptr. 193 (1960); *Messick v. Houx Bros.*, 105 Cal. App. 637, 288 P. 434 (1930). The defense of noncompliance is waived if the defendant fails to raise it. *Bryant v. Wellbanks*, 88 Cal. App. 144, 263 P. 332 (1927). Moreover, the trial judge has discretion to refuse to permit amendment of the defendant's pleading to raise the defense. *Stewart v. San Fernando Ref. Co.*, 22 Cal. App. 2d 661, 71 P.2d 1118 (1937). If the defense is upheld and the action abated, the judgment for the defendant is not res judicata in a subsequent action on the same cause of action. *Folden v. Lobrovich*, 153 Cal. App.2d 32, 314 P.2d 56 (1957). See generally McClintock, *Fictitious Business Name Legislation—Modernizing California's Pioneer Statute*, 19 HASTINGS L. J. 1349, 1390 (1968). See also Section 17919 (permitting trustee in bankruptcy, guardian, conservator, executor, or

administrator to comply with chapter for purpose of maintaining action to recover any sums due to bankrupt, incompetent, or deceased person).

§ 17919. **Compliance with chapter after bankruptcy, incompetency, or death**

17919. (a) A fictitious business name statement may be executed, filed, and published by the trustee in bankruptcy at any time after bankruptcy where a failure to comply with the provisions of this chapter would otherwise preclude the maintenance of an action to recover any sums due to the bankrupt or the partnership of which the bankrupt was a member.

(b) A fictitious business name statement may be executed, filed, and published by the guardian, conservator, executor, or administrator at any time after the incompetency or death of any individual or partner where a failure to comply with the provisions of this chapter would otherwise preclude the maintenance of an action to recover any sums due the incompetent or deceased person or the partnership of which he was a member.

*Comment.* Section 17919 retains the substance of a portion of former Civil Code Section 2468.

§ 17920. **Expiration of statement**

17920. (a) Unless the statement expires earlier under subdivision (b) or (c), a fictitious business name statement expires at the end of five years from December 31 of the year in which it was filed in the office of the county clerk.

(b) Except as provided in Section 17923, a fictitious business name statement expires 40 days after any change in the facts set forth in the statement pursuant to Section 17913, except that a change in the residence address of an individual, general partner, or trustee does not cause the statement to expire.

(c) A fictitious business name statement expires when the registrant files a statement of abandonment of the fictitious business name described in the statement.

*Comment.* Section 17920 is designed to ensure that the information on file with the county clerk (see Section 17925) is kept current and to provide a means whereby the county clerk can dispose of obsolete certificates in his files (see Section 17927).

*Subdivision (a).* The period provided by this subdivision parallels the period provided in subdivision (d) of Corporations Code Section 24003 for a statement filed by an unincorporated association designating its principal office or agent for service of process or both. Subdivision (a) substantially restates prior law under former Civil Code Section 2469.2.

*Subdivision (b).* Under former law, a new certificate was required to be filed only when there was a change in the membership of the partnership transacting business. However, in order that the fictitious business names index will contain current information concerning the registrant, subdivision (b) requires that a new statement be filed, with two exceptions, whenever a change occurs in the facts required to be



set forth by Section 17913 that renders the statement on file inaccurate. For example, when either the registrant changes his principal place of business in this state or, in a case where he had none previously, the registrant acquires a place of business in this state, a new statement must be filed. In this regard, subdivision (b) is comparable to Corporations Code Sections 3301 (domestic corporations) and 6403.3 (foreign corporations) (new statement required when domestic or foreign corporation changes location or address of its principal office).

Subdivision (b) also requires a corporation to file a new statement if it continues to transact business regularly under a fictitious business name after a change in its corporate name. Whether former law required a new certificate in this case was uncertain.

The general requirement of former Civil Code Section 2469 that a new statement be filed upon a change in the membership of a partnership is continued by subdivision (b) but, as limited partners need not be named in the statement (see Section 17913), the subdivision requires a new filing only upon a change in general partners. Moreover, where the change involves merely the withdrawal of one or more partners, the filing and publication of a statement of withdrawal prevents expiration of the original statement under subdivision (b). See Section 17923.

*Change in residence address of individual, partner, or trustee.* Although Section 17913 requires that a fictitious business name statement include the residence address of the individual registrant, of each partner of a partnership registrant, or each trustee of a business trust, Section 17920 does not require that a new statement be filed each time there is a change in the residence address of the individual, partner, or trustee. Of course, when a new statement is filed because the previous statement has expired under Section 17920, it must contain the address of the individual or each partner or trustee as of the date of the new statement and must be republished if there is a change of address. See Section 17917(c).

*Subdivision (c).* A registrant is no longer in compliance with Section 17910 if he continues to do business under his fictitious business name after filing a statement of abandonment under Section 17922.

#### § 17921. Notice of impending expiration

17921. (a) Not later than the first day of December immediately preceding the expiration date of a fictitious business name statement as determined under subdivision (a) of Section 17920, the county clerk shall send a notice to the principal place of business of the registrant. The notice shall be sent by regular mail. It shall indicate the date on which the statement will expire and the file number assigned to the statement.

(b) Neither the failure of the county clerk to mail the notice as provided in this section nor the failure of the notice to reach the person to whom it is sent continues the fictitious business name statement in effect after its expiration date. Neither the county nor any officer or employee of the county is liable for damages for failure to mail the notice required by this section.

*Comment.* Section 17921 is included to minimize the danger that the registrant will be unaware of the impending expiration of the statement. The section is based in part on Corporations Code Section 24006.

§ 17922. **Abandonment of use of fictitious business name**

17922. (a) A person who has filed a fictitious business name statement may, upon ceasing to transact business in this state under that fictitious business name, file a statement of abandonment of use of fictitious business name. The statement shall be executed in the same manner as a fictitious business name statement and shall be filed with the county clerk of the county in which the person has filed his fictitious business name statement. The statement shall be published in the same manner as a fictitious business name statement and an affidavit showing its publication shall be filed with the county clerk after the completion of publication.

(b) The statement shall include:

(1) The name being abandoned and the street address of the principal place of business.

(2) The date on which the fictitious business name statement relating to the fictitious business name being abandoned was filed and the county where filed.

(3) In the case of an individual, the full name and address of the individual.

(4) In the case of a partnership or other association of persons, the full names and residence addresses of all the general partners.

(5) In the case of a corporation, the name of the corporation as set forth in its articles of incorporation.

(6) In the case of a business trust, the full name and residence address of each of the trustees.

*Comment.* Section 17922, which supersedes former Civil Code Section 2469.1, continues the substance of the prior law. The manner of publication is prescribed in Section 17917.

§ 17923. **Withdrawal from partnership operating under fictitious business name**

17923. (a) Any person who is a general partner in a partnership that is or has been regularly transacting business in a fictitious business name may, upon withdrawing as a general partner, file a statement of withdrawal from partnership operating under fictitious business name. The statement shall be executed by the person filing the statement in the same manner as a fictitious business name statement and shall be filed with the county clerk of the county where the partnership filed its fictitious business name statement.

(b) The statement shall include:

(1) The fictitious business name of the partnership.

(2) The date on which the fictitious business name statement for the partnership was filed and the county where filed.

(3) The street address of its principal place of business in this state or, if it has no place of business in this state, the

street address of its principal place of business outside this state, if any.

(4) The full name and residence of the person withdrawing as a partner.

(c) Unless a notice of the dissolution of the partnership has been published pursuant to Section 15035.5 of the Corporations Code, the statement of withdrawal from partnership operating under a fictitious business name shall be published in the same manner as the fictitious business name statement and an affidavit showing the publication of the statement shall be filed with the county clerk after the completion of the publication.

(d) The withdrawal of a general partner does not cause a fictitious business name statement to expire if the withdrawing partner files a statement of withdrawal in accordance with subdivisions (a) and (b) and the requirement of subdivision (c) is satisfied.

**Comment.** Section 17923 permits a withdrawing partner to file a statement of withdrawal so that his interests will not be prejudiced by failure of the remaining partners to file a new fictitious business name statement. This type of statement is new to California but similar provisions are found in a number of other states. See McClintock, *Fictitious Business Name Legislation—Modernizing California's Pioneer Statute*, 19 HASTINGS L.J. 1349, 1381-1382 n.229 (1968). Under some circumstances, the fictitious business name statement may be evidence that would support a partner's responsibility for the obligations of the partnership. See Section 17926(c)(3). Cf. *People v. Pinkus*, 256 Cal. App.2d Supp. 941, 63 Cal. Rptr. 680 (1967) (fictitious name certificate evidence against defendant in criminal case to show ownership of store selling obscene films); *Katschinski v. Keller*, 49 Cal. App. 406, 193 P. 587 (1920) (fictitious name certificate filed by defendant introduced by plaintiff in unfair competition case as evidence of use of name by defendant). The execution and filing of the statement (and publication if a notice of dissolution has not been published under Section 15035.5 of the Corporations Code) should rebut the presumption under Section 17926(c) that the facts contained in the fictitious business name statement are true and thereby will effectually protect the withdrawing partner. Cf. McClintock, *Fictitious Business Name Legislation—Modernizing California's Pioneer Statute*, 19 HASTINGS L.J. 1349, 1382 (1968). Filing and publication of a statement of withdrawal in compliance with this section will also prevent expiration of the fictitious name statement where no other change has taken place (see Sections 17923(b), 17920(b)).

#### § 17924. Furnishing of forms

17924. (a) The county clerk shall furnish without charge a form satisfying the requirements of subdivision (a) of Section 17913. The form prepared by the county clerk, or the material provided by him with the form, shall include statements substantially as follows:

(1) "Your fictitious business name statement must be published in a newspaper once a week for four successive weeks

and an affidavit of publication filed with the county clerk when publication has been accomplished. The statement should be published in a newspaper of general circulation in the county where the principal place of business is located and in the area where the business is to be conducted (Business and Professions Code Section 17917).”

(2) “Any person who executes, files, or publishes any fictitious business name statement, knowing that such statement is false, in whole or in part, is guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed five hundred dollars (\$500) (Business and Professions Code Section 17930).”

These statements do not constitute a part of the fictitious business name statement and are not required to be published pursuant to Section 17917.

(b) The county clerk may furnish without charge forms meeting the requirements for a statement of abandonment of use of fictitious business name and a statement of withdrawal from partnership operating under fictitious business name.

*Comment.* The former statute did not require that the county clerk furnish forms without charge but this was the practice in some counties.

#### § 17925. Index of fictitious business name information

17925. (a) The county clerk shall maintain one or more indices which permit the determination of at least the following information:

(1) Whether any business using a specific fictitious business name has on file a fictitious business name statement setting forth such name and, if so, the file number of the statement.

(2) Whether any individual, general partner, or corporation is listed in any fictitious business name statement on file and, if so, the file number of the statement.

(3) Whether a statement of abandonment of use of a specific business name is on file and, if so, the file number of the statement of abandonment.

(4) Whether a statement of withdrawal from a partnership operating under fictitious business name is on file and, if so, the file number of the statement of withdrawal.

(b) Four years after a fictitious business name statement has expired, the county clerk may delete the information concerning that statement from the index. Four years after a statement of abandonment of use of fictitious business name has been filed, the county clerk may delete from the index all reference to the use of that name by the person filing the statement.

*Comment.* Section 17925 requires the county clerk to maintain and keep current indices of fictitious business name statements. This section supersedes former Civil Code Section 2470. The indices required are merely those that facilitate supplying the information required by Section 17925. Generally, in the counties not using automatic data processing equipment, one index will contain in alphabetical order each ficti-

tious business name in use in the county together with the file number of the statement relating to that name so that the other information contained in the statement can be ascertained. A second index will contain in alphabetical order the name of each person doing business under a fictitious name in the county together with the file number or numbers of each statement on file in which that person is listed. Once the file number of the statement is known, a copy of the statement can be easily secured. Section 17925 is drafted, however, to permit the use of any system that will enable a satisfactory records search. In some counties, this will be aided significantly by use of automatic data processing equipment.

Paragraph (3) of subdivision (a) retains the substance of former Civil Code Section 2470 insofar as it requires the fact of abandonment of use of a fictitious business name and the date of filing a statement of such abandonment to be entered in the indices.

Subdivision (b) authorizes the county clerk to purge the fictitious business name index of obsolete entries after four years. The four-year period parallels that provided by Section 17927. The subdivision permits the county clerk to delete from the index any reference to a statement of withdrawal from partnership operating under fictitious business name four years after the expiration of the fictitious business statement filed by the partnership from which the partner is withdrawing.

#### § 17926. Certified copies of statements

17926. (a) As used in this section, "statement" means a fictitious business name statement, a statement of abandonment of use of fictitious business name, or a statement of withdrawal from partnership operating under fictitious business name.

(b) For a fee of two dollars (\$2), the county clerk shall provide any person who so requests a certified copy of any statement on file in his office.

(c) A copy of a statement, when certified as provided in subdivision (b), establishes a rebuttable presumption of all of the following:

- (1) The existence of the original statement.
- (2) The execution of the statement by the person by whom it purports to have been executed.
- (3) The truth of the information required by Sections 17913, 17922, or 17923 that is contained in the statement.
- (d) The presumptions established by subdivision (c) are presumptions affecting the burden of producing evidence.

*Comment.* Section 17926 provides for the furnishing of certified copies of statements on file and gives a presumptive effect to the certified copy. The presumption is classified as one affecting the burden of producing evidence. Evidence Code Section 604 provides:

604. The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the

presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

§ 17927. Retention and destruction of statements

17927. (a) The county clerk shall mark each fictitious business name statement with a consecutive file number and the date of filing and shall retain the original statement for his file. He may destroy or otherwise dispose of such statement four years after the statement expires.

(b) The county clerk shall mark each statement of abandonment of use of fictitious business name or statement of withdrawal from partnership operating under fictitious business name with a consecutive file number and the date of filing. He may destroy or otherwise dispose of any such statement nine years after the statement is filed.

(c) In lieu of retaining the original statement on file, the county clerk may retain a copy of the statement in accordance with Section 69844.5 of the Government Code.

*Comment.* Insofar as Section 17927 requires the county clerk to retain current fictitious business name statements and statements of abandonment, it continues the substance of former Civil Code Sections 2469.2 and 2469.3. The provisions of the section are also made applicable to statements of withdrawal from partnership.

Statements are to be filed consecutively according to file numbers to be assigned to them when they are presented for filing. The statements may then be located by the use of indices prepared by the county clerk. See Section 17925.

Subdivision (a) further authorizes the county clerk to destroy fictitious business name statements four years after they expire. To this extent, it is based on subdivision (a) of Corporations Code Section 24004. However, under the prior law, a statement could be destroyed only if microfilm copies were made and filed; this requirement is not continued.

Subdivision (b) makes similar provision for statements of abandonment and statements of withdrawal and authorizes destruction of such statements nine years after they are filed. The longer period provided for these statements will ensure that they will be retained at least as long as the fictitious business name statements to which they are related. No equivalent provision existed under prior law. Taken together, subdivisions (a) and (b) provide a procedure for purging the files of obsolete statements. Subdivision (c) also authorizes the county clerk to retain microfilm or other photographically reproduced copies of the current statements.

The county clerk is required to file any statement that meets the requirements of this chapter and is accompanied by the required filing fee. He is not authorized to reject a statement on the ground that the particular fictitious business name is already in use or that the statement was not presented for filing within the time specified in Section 17910. In this respect, Section 17927 continues prior law.

**§ 17928. Summaries or compilations of filings**

17928. (a) Upon prepayment of the fee established pursuant to subdivision (b), the county clerk may furnish to any person who so requests daily or less frequent summaries or compilations of filings under this chapter.

(b) The fee for furnishing information under this section shall be fixed by the county clerk with the approval of the county board of supervisors and shall be sufficient to pay at least the actual cost of furnishing such information.

**Comment.** Section 17928 authorizes—but does not require—the county clerk to furnish daily or less frequent summaries or compilations of filings. A comparable provision is included in Section 9407 of the Commercial Code. Nothing in this section, of course, affects the right of any person to personally inspect the public records.

**§ 17929. Fees for filing statements**

17929. (a) The fee for filing a fictitious business name statement is ten dollars (\$10). This fee covers the cost of filing and indexing the statement (and any affidavit of publication), furnishing one certified copy of the statement to the person filing the statement, and mailing the notice of expiration of the statement.

(b) The fee for filing a statement of abandonment of use of a fictitious business name is two dollars (\$2). This fee covers the cost of filing and indexing the statement and any affidavit of publication.

(c) The fee for filing a statement of withdrawal from partnership operating under fictitious business name is five dollars (\$5). This fee covers the cost of filing and indexing the statement and any affidavit of publication.

**Comment.** Section 17929 supersedes former Government Code Section 26848. The fees are intended to compensate the county clerks for their duties under this chapter.

**§ 17930. Penalty for false statements**

17930. Any person who executes, files, or publishes any statement under this chapter, knowing that such statement is false, in whole or in part, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars (\$500).

**Civil Code §§ 2466–2471 (repealed)**

SEC. 5. Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code is repealed.

**Comment.** Chapter 2, consisting of Sections 2466–2471, is superseded by Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code.

**Note.** The sections repealed read as follows:

2466. Except as otherwise provided in the next section every person transacting business in this State under a fictitious name and every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must

file with the clerk of the county in which his or its principal place of business is situated, a certificate subscribed and acknowledged in the manner provided in Section 2468 of the Civil Code, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence.

Such subscribed and acknowledged certificate must be published subsequent to the filing thereof with the county clerk pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate as in this section provided shall be filed with the county clerk within 30 days after the completion of such publication, but in no event shall such publication be made prior to the filing of such certificate with the county clerk.

2467. A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate or making the publication prescribed in the last section, use in this State the partnership name used by it there, although it be fictitious, or do not show the names of the persons interested as partners in such business.

2468. The certificate filed with the clerk as provided in Section 2466 must be signed by the person therein referred to, or by the partners, as the case may be, and acknowledged before some officer, authorized to take the acknowledgment of conveyances of real property, by personally appearing before such officer, notwithstanding the provisions of Section 1195 of the Civil Code. Such certificates may be executed on behalf of any such person or partner by an agent, or at any time after the bankruptcy, incompetency, or death of such a person or partner, by the trustee in bankruptcy or the guardian, conservator, executor or administrator of such person or partner for the purpose of maintaining an action to recover any sums due the bankrupt, incompetent, or deceased person or facilitating the maintenance of an action by the partnership, of which the bankrupt, incompetent, or deceased partner was a member, to recover sums due such partnership. Where a business is hereafter commenced by a person under a fictitious name or a partnership is hereafter formed, the certificate must be filed and the publication designated in that section must be made within one month after the commencement of such business, or after the formation of the partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership. Where the business has been heretofore conducted under a fictitious name or where the partnership has been heretofore formed, the certificate must be filed and the publication made within six months after the passage of this act. No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required.

2469. On every change in the members of a partnership transacting business in this State under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned in section twenty-four hundred and sixty-seven, a new certificate must be filed with the County Clerk, and a new publication made as required by this Article on the formation of such partnership.

2469.1. Every person and every partnership transacting business in this State under a fictitious name, or designation not showing the names of the persons interested as partners in such business, who has filed a certificate and caused the publication and filing of the affidavit of publication thereof according to the provisions of this chapter, may, upon ceasing to use that name, file a certificate of abandonment of name, stating the name in full and the place of residence of such person, and stating the names in full of all the members of such partnership and their places of residence. Such certificate shall be signed by the person therein referred to, or by one or more of the partners, as the case may be.

Such certificate must be published pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate shall be filed subsequent to the certificate with the county clerk within 30 days after the completion of such publication.

2469.2. Every certificate of fictitious name filed under the authority of this chapter shall expire and be of no further force and effect at the end of five years following the first day of January next after the filing of a certificate of fictitious name with the county clerk in accordance with Section 2466, unless at any time within 12 months immediately preceding said date of expiration a renewal certificate containing all information required in the original certificate and subscribed and acknowledged as required by that section is filed with the county



clerk with whom said original is on file. No such renewal certificate need be published unless there has been a change in the information required in the original certificate, in which event publication shall be made as provided for the original certificate.

Every certificate of fictitious name filed before January 1, 1967, with the county clerk pursuant to Section 2466 shall expire and be of no further force and effect on and after January 1, 1972, unless at any time on or after January 1, 1971, but not later than December 31, 1971, a renewal certificate in accordance with this section is filed with said county clerk.

2469.3. Upon the filing of a certificate of abandonment pursuant to Section 2469.1 or upon the expiration of a certificate of fictitious name pursuant to Section 2469.2 and following the making of the entry required by Section 2470 the county clerk may destroy the certificate of fictitious name the use of which was so abandoned or which has expired, provided that microfilm copies are taken of the certificates and subsequently filed before they are destroyed.

2470. Every county clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him pursuant to this article, entering in alphabetical order the name of every such person who does business under a fictitious name, and the fictitious name, and the name of every such partnership, and of each partner therein.

Upon the abandonment of the use of a fictitious name, or upon the expiration of the certificate of fictitious name, the clerk shall enter the fact of abandonment or expiration in the register.

2471. Copies of the entries of a County Clerk, as herein directed, when certified by him, and affidavits of publication, as herein directed, made by the printer, publisher, or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.

### Financial Code § 12300.2 (amended)

SEC. 6. Section 12300.2 of the Financial Code is amended to read:

12300.2. Every person engaging in the business of a check seller or cashier shall conduct such business under his true name unless he has complied with ~~the provisions of Chapter 2, Title 10, Part 4, Division 3 of the Civil Code Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code.~~

*Comment.* Section 12300.2 is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

### Government Code § 26848 (repealed)

SEC. 7. Section 26848 of the Government Code is repealed.

~~26848. The fee for filing and indexing a certificate of fictitious name, including affidavit of publication, and the fee for filing and indexing a renewal certificate of fictitious name, is two dollars (\$2).~~

*Comment.* Section 26848 of the Government Code is superseded by Business and Professions Code Section 17929.

### Operative date

SEC. 8. (a) This act becomes operative on July 1, 1971, except that at any time after January 1, 1971, a fictitious business name statement may be filed and published as provided in Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code, and the

certificate so filed shall be deemed to have been filed on July 1, 1971.

(b) The county clerks shall, until July 1, 1975, retain all certificates of fictitious name and certificates of abandonment of fictitious names and the registers relating thereto, as provided in the Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code that is repealed by this act. After July 1, 1975, the county clerks may destroy or otherwise dispose of such certificates and registers. No certificate shall be accepted for filing by the county clerks under Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code after June 30, 1971.

*Comment.* The new fictitious business name requirements (Business and Professions Code Sections 17900-17930) are made effective on July 1, 1971, but statements are permitted to be filed and published at any time after January 1, 1971, so that the persons covered by the new requirements will be in compliance on July 1, 1971.

A person who has complied with Civil Code Sections 2466-2471 (the former so-called fictitious name statute) is required to make a new filing under Business and Professions Code Sections 17900-17930 not later than July 1, 1971, if he is regularly transacting business in California. See Business and Professions Code Section 17910.

Subdivision (b) provides for retention of the fictitious name certificates and the registers relating thereto for a limited period following the enactment of the new statute so that the information will be available to persons who have claims arising before July 1, 1971, against firms operating under a fictitious business name.

**A STUDY RELATING TO FICTITIOUS BUSINESS NAME  
LEGISLATION—MODERNIZING CALIFORNIA'S  
PIONEER STATUTE \***

**CONTENTS**

	Page
Background .....	635
Persons and Firms Affected .....	640
In General .....	640
Individual Proprietors .....	643
Partnerships .....	644
Problems of Statutory Construction .....	647
Partnerships Established and Transacting Business in a Foreign Country .....	649
Law or Other Professional Partnerships .....	650
Limited Partnerships .....	652
Corporations .....	653
Foreign Corporations Qualified to Transact Business in California .....	655
Persons Not Regularly Transacting Business in California .....	656
Recommendation .....	657
Place of Filing .....	658
Information Required in Certificates .....	661
Indexing Requirements .....	664
Updating the Files .....	666
Purging the Files .....	668
Expiration .....	668
Destruction of Outdated Certificates .....	669
The Publication Requirement .....	670
Sanctions .....	675
Evidentiary Effect .....	679
Conclusion .....	679

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# FICTITIOUS BUSINESS NAME LEGISLATION— MODERNIZING CALIFORNIA'S PIONEER STATUTE

By GORDON E. McCLINTOCK\*

**A**DOPTION of the California Civil Code in 1872 was a triumph of the effort to reduce the unwritten law to positive legislative form. Nonetheless, even as originally enacted, that code contained significant fragments of social or regulatory legislation. Development and modernization of this aspect of the code has, of course, become a burden of the legislature that as long since overshadowed the effort to codify the common law. One of the first "fictitious business name statutes" adopted in this country was included in the Civil Code of 1872. That statute remains largely unchanged to this day. Presumably on the suspicion that the statute (Civil Code sections 2466-71) is no longer attuned to modern commercial life, the legislature has authorized the California Law Revision Commission to study the question whether the law relating to the use of fictitious names should be revised. This article was written to assist the Commission in this assignment.

## Background

The common law permitted a sole proprietor<sup>1</sup> or partnership<sup>2</sup> to adopt and use an assumed business or trade name in transacting business. In most jurisdictions, a corporation also may do business under a name other than the one stated in its articles of incorpora-

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This article was prepared to provide the California Law Revision Commission with background information for its study of this subject. The opinions, conclusions, and recommendations contained in the article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

<sup>1</sup> Wray v. Wray [1905] 2 Ch. 349 (C.A.); Burchell v. Wilde [1900] 1 Ch. 551 (C.A.); Maugham v. Sharpe, 144 Eng. Rep. 179 (1864); California Packing Corp. v. Kandarian, 62 Cal. App. 729, 217 P. 805 (1923); Swanson Auto. Co. v. Stone, 187 Iowa 309, 174 N.W. 247 (1919); Smith v. Williams, 152 La. 948, 94 So. 859 (1922); Lipman v. Thomas, 143 Me. 270, 61 A.2d 130 (1948) (dicta); Crompton v. Williams, 216 Mass. 184, 103 N.E. 298 (1913); Robinovitz v. Hamill, 44 Okla. 437, 144 P. 1024 (1914). See generally Annot., 45 A.L.R. 198, 200-03 (1926); Annot., 42 A.L.R.2d 516, 519-21 (1955); 38 AM. JUR. NAME § 13, n.8 (1941).

<sup>2</sup> 1 J. BARRETT & E. SEAGO, PARTNERS AND PARTNERSHIPS 159, n.18 (1956); 38 AM. JUR. NAME § 13, n.8 (1941).

tion.<sup>3</sup> Although transactions and contracts entered into under an assumed business name are valid and enforceable at common law,<sup>4</sup> the use of a particular name may be enjoined if such usage misleads or perpetrates a fraud on the public<sup>5</sup> or infringes a trademark or trade name.<sup>6</sup>

Forty-two states,<sup>7</sup> including California, have adopted statutes<sup>8</sup> to regulate the use of "fictitious" business names. Similar statutes have been enacted in the United Kingdom,<sup>9</sup> in most of the Canadian pro-

<sup>3</sup> Colorado Milling & Elev. Co. v. Proctor, 58 Idaho 578, 76 P.2d 438 (1938); Standard Distilling & Distrib. Co. v. Springfield Coal Mining & Tile Co., 146 Ill. App. 144, *aff'd sub nom.* Standard Distilling & Distrib. Co. v. Jones & Adams Co., 239 Ill. 600, 88 N.E. 236 (1909); Melledge v. Boston Iron Co., 59 Mass. (5 Cush.) 158 (1849); Philadelphia School of Beauty Culture v. Haas, 78 Pa. D. & C. 97 (C.P. Dauphin Cty. 1949); Seattle Ass'n of Credit Men v. Green, 45 Wash. 2d 139, 273 P.2d 513 (1954); *see* Berg Metals Corp. v. Wilson, 170 Cal. App. 2d 559, 339 P.2d 869 (1959). *See also* notes 140-44 *infra* and accompanying text. *Contra*, 1915 MICH. OPS. ATT'Y GEN. 257; 1962 MINN. OPS. ATT'Y GEN. 920-d; 1955 MINN. OPS. ATT'Y GEN. 92-A-16. *See generally* 6 W. FLETCHER, CYCLOPEDIA CORPORATIONS § 2442, at 87 (perm. ed. 1950); Annot., 56 A.L.R. 450-51 (1928).

<sup>4</sup> Cases and authorities cited notes 1-3 *supra*.

<sup>5</sup> 38 AM. JUR. Name § 13, n.8 (1941).

<sup>6</sup> *Id.*

<sup>7</sup> ALA. CODE tit. 14, § 230 (1958); ARIZ. REV. STAT. §§ 29-102 to -103 (Supp. 1967); ARK. STAT. ANN. §§ 70-401 to -405 (1947); CAL. CIV. CODE §§ 2466-71; COLO. REV. STAT. ANN. §§ 141-2-1 to 141-2-2 (1963); CONN. GEN. STAT. REV. § 35-1 (1961), *as amended* No. 84 [1967] Conn. Pub. Acts 112; DEL. CODE ANN. tit. 6, §§ 3101-07 (1953); FLA. STAT. § 865.09 (1965); GA. CODE ANN. §§ 106-301 to -304 (1956); IDAHO CODE ANN. §§ 53-501 to -507 (Supp. 1967); ILL. REV. STAT. ch. 96, §§ 4-8a (1965); IND. ANN. STAT. §§ 50-201 to -203 (Supp. 1967); IOWA CODE §§ 547.1 to 547.5 (1966); KY. REV. STAT. § 365.010 (1960); LA. REV. STAT. §§ 51:281 to 284 (1965); ME. REV. STAT. ANN. tit. 31, §§ 1-5 (1964); MD. ANN. CODE art. 2, §§ 18-20 (1957); MASS. GEN. LAWS ch. 110, §§ 5-6 (1932); MICH. COMP. LAWS §§ 333.01-.06 (Supp. 1967); MO. REV. STAT. §§ 417.200-.230 (1959); MONT. REV. CODES ANN. §§ 63-601 to -605 (1962); NEB. REV. STAT. §§ 87-201 to -207 (1966); NEV. REV. STAT. §§ 602.010-.090 (1957); N.H. REV. STAT. ANN. §§ 349:1 to 349:11 (1966); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); N.C. GEN. STAT. §§ 66-68 to 66-71 (Supp. 1967); N.D. CENT. CODE §§ 45-11-01 to 45-11-08 (1960); OHIO REV. CODE ANN. §§ 1777.02-.99 (Page 1964); OKLA. STAT. tit. 54, §§ 81-86 (1961); ORE. REV. STAT. §§ 648.005-.990 (1965); PA. STAT. tit. 54, §§ 28.1-.13, 81-104 (Supp. 1966); R.I. GEN. LAWS ANN. §§ 6-1-1 to 6-1-4 (Supp. 1966); S.C. CODE ANN. §§ 48-1 to 48-4 (1962); S.D. CODE §§ 49.0801-.0803, 49.9901 (1939); TEX. PEN. CODE arts. 1067-70 (1948); TEX. REV. CIV. STAT. arts. 5924-27 (1948); UTAH CODE ANN. §§ 42-2-5 to 42-2-10 (Supp. 1967); VT. STAT. ANN. tit. 11, §§ 1621-34 (Supp. 1967); VA. CODE ANN. §§ 50-74 to -78 (1967), 59-169 to -176 (1950); WASH. REV. CODE §§ 19.80.010-.040 (1958); W. VA. CODE ANN. §§ 47-8-2 to 47-8-5 (1966).

Several states also prohibit the assumption of any semblance of a corporate name in any sign or advertisement by an unincorporated association. 1 J. BARRETT & E. SEAGO, *supra* note 2, at § 2, at 160.

<sup>8</sup> As used in this article, "fictitious business name statute" includes any fictitious or assumed business name statute.

<sup>9</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, *as amended* Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 38, 116(3).

vinces and territories,<sup>10</sup> and in each of the eight Australian states and territories.<sup>11</sup> Although their provisions vary, these statutes generally require that individual proprietors and certain business entities file statements containing specified information if the name under which the business is operated does not adequately inform the public as to the ownership of the business. The information required usually includes the name under which the business is operated and the name and address of each of the owners. The statement is filed with a central state agency, or in the city or county where the business is operated, or in both places. California and nine other states also require that the statement be published in a newspaper. A variety of sanctions is imposed in an effort to obtain compliance with the statutory requirements.

The purpose of the California statute is to prevent fraud and deceit in business practices by providing a public source of information as to the identity and addresses of the owners of a business operated under a fictitious name.<sup>12</sup> This information is especially

<sup>10</sup> ALTA. REV. STAT. c. 230, §§ 68-72 (1955); B.C. REV. STAT. c. 277, §§ 67-81 (1960); MAN. REV. STAT. c. 196, §§ 48-60 (1954); N.B. REV. STAT. c. 168 (1952); N.S. REV. STAT. c. 213 (1954); ONT. REV. STAT. c. 289 (1960); QUE. REV. STAT. c. 272 (1964); SASK. REV. STAT. c. 387, §§ 47-64 (1965); YUKON TER. REV. ORD. c. 84, §§ 47-58 (1958).

<sup>11</sup> The Australian states and territories have adopted with minor variations, a Uniform Registration of Business Names Act. Act No. 11 of 1962 (N.S.W.); Act No. 12 of 1962 (Queensl.); Act No. 57 of 1963 (S. Austl.); Act No. 44 of 1962 (Tasm.); Act No. 6853 (Vict. 1962); Act No. 8 of 1962 (W. Austl.); Business Names Ord. of 1963 (Austl. Cap. Ter.); Ord. No. 37 of 1963 (N. Ter. of Austl.) [hereinafter referred to as Uniform Business Names Act (Victoria 1962)].

The text of the Victoria version of the act is reprinted in P. HIGGINS, *THE LAW OF PARTNERSHIP IN AUSTRALIA AND NEW ZEALAND* 295-323 (1963).

<sup>12</sup> *Andrews v. Glick*, 205 Cal. 699, 272 P. 587 (1928); *Meads, Seaman & Co. v. Lasar*, 92 Cal. 221, 28 P. 935 (1891); *Levelon Builders, Inc. v. Lynn*, 194 Cal. App. 2d 657, 15 Cal. Rptr. 582 (1961); *Hunter v. Croysdill*, 169 Cal. App. 2d 307, 337 P.2d 174 (1959); *Taylor v. Clarke*, 60 Cal. App. 2d 438, 140 P.2d 985 (1943); *Bank of America v. Nat'l Funding Corp.*, 45 Cal. App. 2d 320, 114 P.2d 49 (1941). See also *J & J Builders Supply v. Caffin*, 248 Cal. App. 2d 292, 56 Cal. Rptr. 365 (1967) (primary purpose to protect creditors); *Bank & Trust Co. v. Gearhart*, 45 Cal. App. 421, 187 P. 989 (1920) (primary purpose to protect creditors); *accord*, *Sagal v. Fylar*, 89 Conn. 293, 93 A. 1027 (1915); *Rerick v. Ireland*, 76 Ind. App. 139, 131 N.E. 527 (1921); *Ambra Advertising Agency v. Speed-Way Mfg. Co.*, 211 Iowa 276, 233 N.W. 499 (1930); *Hayes v. Providence Citizens' Bank & Trust Co.*, 218 Ky. 128, 290 S.W. 1028 (1927); *Lipman v. Thomas*, 143 Me. 270, 61 A.2d 130 (1948); *Bankers Trust Co. v. Bradfield*, 324 Mich. 116, 36 N.W.2d 870 (1949); *Canonica v. St. George*, 64 Mont. 200, 208 P. 607 (1922); *Zimmerman v. Erhard*, 83 N.Y. 74 (1880); *Price v. Edwards*, 178 N.C. 493, 101 S.E. 33 (1919); *In re Clark & Snyder*, 7 Ohio N.P. 613, 8 Ohio Dec. 685 (C.P. Logan Cty. 1900); *Magnolia Petroleum Co. v. Galloway*, 183 Okla. 432, 83 P.2d 174 (1938); *Rowland v. Canuso*, 329 Pa. 72, 196 A. 823 (1938); *Cooper Cotton Co. v. First State Bank*, 37 S.W.2d 805 (Tex. Civ. App. 1931); *Tate v. Atlanta Oak Flooring Co.*, 179 Va. 365, 18 S.E.2d 903 (1942). See generally *Annot.*, 45 A.L.R. 198, 203-06 (1926); *Annot.*, 42 A.L.R.2d 516, 521-23 (1955).

useful to potential creditors of such a business.<sup>13</sup> For example, many commercial credit agencies in California use the information in ascertaining the solvency of those behind a particular firm before extending credit or submitting a credit report.<sup>14</sup> The information also is useful in determining the persons who may be liable on claims against the business entity and in effecting service of process on those persons.<sup>15</sup> Although the same information might be obtained through "Doe pleading" and discovery, its availability in the public files saves considerable time and expense.<sup>16</sup> Finally, the business name information may be used for collection purposes.

In most states, compliance or noncompliance with the fictitious business name statute is unrelated to the protection of trade names. Compliance usually confers no priority in the right to use a particular name and, of itself, does not protect against use of the same name by another person.<sup>17</sup> Similarly, failure to comply with the statute does not bar the common law right to enjoin use of the same name as

<sup>13</sup> Some courts, especially in earlier decisions, have indicated that this is the only purpose of the statute. *Johnston v. Ellis*, 49 Idaho 1, 285 P. 1015 (1930); *Wolfe v. Joubert*, 45 La. Ann. 1100, 13 So. 806 (1893); *Brenard Mfg. Co. v. Gibbs*, 4 La. App. 312 (1926); *Mundon v. Taxicab Co.*, 151 Md. 449, 135 A. 177 (1926); *Crompton v. Williams*, 216 Mass. 184, 103 N.E. 298 (1913); *Rutkowsky v. Bozza*, 77 N.J.L. 724, 73 A. 502 (Sup. Ct. 1909); *Donner v. Parker Credit Corp.*, 10 N.J. Super. 350, 76 A.2d 277 (Ch. Div. 1950); *Gay v. Seibold*, 97 N.Y. 472 (1884); *Leckie v. Seal*, 161 Va. 215, 170 S.E. 844 (1933); *Seattle Ass'n of Credit Men v. Green*, 45 Wash. 2d 139, 273 P.2d 513 (1954); *Bacon v. Gardner*, 38 Wash. 2d 299, 229 P.2d 523 (1951). See generally 38 AM. JUR. NAMES § 14, n.14 (1941).

To implement this purpose, the Washington statute made failure to file a required fictitious name certificate presumptive evidence of fraud in procuring credit. WASH. REV. CODE § 19.80.040 (1958).

<sup>14</sup> Letter from R.C. Kopriva, Legislative Chairman of the Associated Credit Bureaus of California to Cal. Law Revision Comm'n, June 24, 1966; Letter from Dun & Bradstreet, Inc. to Cal. Law Revision Comm'n, March 15, 1966.

<sup>15</sup> One Washington case states that the primary purpose of the statute is to prevent partners from concealing the partnership relationship in an attempt to avoid liability for partnership debts. *Bowman v. Harrison*, 59 Wash. 56, 109 P. 192 (1910); accord, *Bacon v. Gardner*, 38 Wash. 2d 299, 229 P.2d 523 (1951). See also *Rerick v. Ireland*, 76 Ind. App. 139, 131 N.E. 527 (1921); *Canonica v. St. George*, 64 Mont. 200, 208 P. 607 (1922).

<sup>16</sup> At least one court has stated that this is the primary policy in enacting fictitious name legislation. *Cor-Gal Builders, Inc. v. Southard*, 136 So. 2d 244 (Fla. Ct. App. 1962). See also *Rowland v. Canuso*, 329 Pa. 72, 196 A. 823 (1938); *Leckie v. Seal*, 161 Va. 215, 170 S.E. 844 (1933).

<sup>17</sup> *Tomsky v. Clark*, 73 Cal. App. 412, 238 P. 950 (1925); *Caserta v. Manhasset Real Estate, Inc.*, 201 N.Y.S.2d 355 (Sup. Ct. 1960); *McCarley v. Welch*, 170 S.W.2d 330 (Tex. Civ. App. 1943); *Russ v. Duff*, 49 S.W.2d 905 (Tex. Civ. App. 1932); *Foss v. Culbertson*, 17 Wash. 2d 610, 136 P.2d 711 (1943); *Union Trust Co. v. Quigley*, 145 Wash. 176, 259 P. 28 (1927); *Gluck v. Kaufman*, 117 W. Va. 685, 186 S.E. 615 (1936). Contra, *National Brands Stores, Inc. v. Muse & Associates*, 183 Ga. 88, 187 S.E. 84 (1936). See also *Franklin Sav. & Loan Co. v. Riddle*, 216 S.C. 367, 57 S.E.2d 910 (1950); *Annot.*, 47 A.L.R. 1129 (1929).



unfair competition.<sup>18</sup> In several states, however, fictitious business name filings are at least partially coordinated with trademark and trade name protection systems.<sup>19</sup> The provisions of these statutes vary according to purpose. Some, such as the Australian Uniform Act, provide only that the registrar may refuse to register "undesirable" names.<sup>20</sup> Other states, such as Oregon, provide a comprehensive system of registration of assumed names and authorize cancellation or suspension for similarity or misuse.<sup>21</sup> Thus, in such states the filings may also provide a means of obtaining exclusive use of a particular name.<sup>22</sup>

Although there seems to be some misconception in the minds of businessmen about the effect of the California statute,<sup>23</sup> it is clear that it does not provide a means for obtaining exclusive use of a business name.<sup>24</sup> Related California statutes provide for trademark protection<sup>25</sup> and for the registration and protection of specific types of names such as farm names.<sup>26</sup> However, there are no general provisions for registering and obtaining exclusive use of trade names. The person who first adopts and uses a trade name, whether within or beyond the limits of the state, is its original owner.<sup>27</sup> He is offered a measure of protection by common law doctrines relating to protection of trade names and by various theories of unfair competition.<sup>28</sup> A showing that one has complied with the fictitious business name statute might be some evidence of first adoption and use of a particular name, but there appears to be no California appellate decision in which such evidence influenced the court in reaching its

<sup>18</sup> See, e.g., *Mundon v. Taxicab Co.*, 151 Md. 449, 135 A. 177 (1926); *Bagby v. Blackwell*, 240 Mo. App. 574, 211 S.W.2d 69 (1948).

<sup>19</sup> Other statutes require the application to contain a brief description of the kind of business to be conducted. COLO. REV. STAT. ANN. § 141-2-1 (1963); GA. CODE ANN. § 106-301 (1956); NEB. REV. STAT. § 87-202 (1966); N.H. REV. STAT. ANN. § 349:5 (1966); ORE. REV. STAT. § 648.050 (1963); Uniform Business Names Act § 9 (Victoria 1962). This information is only useful in connection with unfair business practices.

<sup>20</sup> See Uniform Business Names Act § 9 (Victoria 1962); MICH. STAT. ANN. § 19.822 (1964); N.H. REV. STAT. ANN. § 349:1 (1966).

<sup>21</sup> ORE. REV. STAT. §§ 648.005-.990 (1965).

<sup>22</sup> See ORE. REV. STAT. § 648.050 (1963); *Potter v. Osgood*, 69 Pitts. 856 (Pa. 1921).

<sup>23</sup> See *Benioff v. Benioff*, 64 Cal. App. 745, 749-50, 222 P. 835, 837-38 (1923). The California Law Revision Commission has received several letters expressing a fear that a revised statute would "no longer" protect the use of a trade name by prior filing.

<sup>24</sup> *Tomsky v. Clark*, 73 Cal. App. 412, 238 P. 950 (1925) (filing of co-partnership certificate to operate business in family name of another did not give exclusive right to the name).

<sup>25</sup> CAL. BUS. & PROF. CODE §§ 14200-325.

<sup>26</sup> CAL. BUS. & PROF. CODE §§ 14460-65.

<sup>27</sup> CAL. BUS. & PROF. CODE § 14400.

<sup>28</sup> See Comment, *Protection of Trade Names in California*, 29 S. CAL. L. REV. 488 (1956).

decision.<sup>29</sup>

Some persons believe that fictitious business name legislation is ineffective because many of the statutes fail to include important types of business organizations and because the sanctions often are not sufficient to obtain compliance. Nevertheless, the enactment of such legislation by the great majority of states and by many foreign jurisdictions indicates that the statutes provide a useful source of information. Federal,<sup>30</sup> state,<sup>31</sup> and local agencies,<sup>32</sup> as well as commercial enterprises,<sup>33</sup> use the fictitious business name information filed under the California statute. In Los Angeles County, 77,417 index searches, including both fictitious and corporate names, were made during 1965.<sup>34</sup>

The difficulty with the California statute is not its lack of a useful purpose but rather its inadequacy in relation to modern business conditions. This article compares the California statute with the statutes of other jurisdictions and suggests changes that would make the statute more useful and effective and, at the same time, minimize the burden imposed upon those required to comply.

## Persons and Firms Affected

### In General

The California statute applies to "every person transacting business in this State under a fictitious name and every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business."<sup>35</sup> A corporation is a "person" under the

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<sup>29</sup> In *Lutz v. Western Iron & Metal Co.*, 190 Cal. 554, 213 P. 962 (1923), the court alluded to the certificate that was filed but did not seem to give any particular weight to it in reaching its decision. Cf. *People v. Pinkus*, 256 A.C.A. Supp. 175, 63 Cal. Rptr. 680 (1967) (fictitious name certificate evidence against defendant in criminal case to show ownership of store selling obscene films); *Katschinski v. Keller*, 49 Cal. App. 406, 193 P. 587 (1920) (fictitious name certificate filed by defendant introduced by plaintiff in unfair competition case as evidence of use of name by defendant).

<sup>30</sup> The County Clerk of Los Angeles County reports that both the United States Post Office and the United States Treasury Department use this information. Letter from William G. Sharp, Los Angeles County Clerk, to Cal. Law Revision Comm'n, March 17, 1966.

<sup>31</sup> Letter from Milton G. Gordon, Commissioner, California Division of Real Estate, to Cal. Law Revision Comm'n, March 9, 1966; Letter from Jerald S. Schutzbank, Commissioner, California Division of Corporations, to Cal. Law Revision Comm'n, March 15, 1966; Letter from Hans A. Mattes, Assistant Commissioner, California Division of Corporations, to Cal. Law Revision Comm'n, April 1, 1966.

<sup>32</sup> Letter from William G. Sharp, *supra* note 30.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Los Angeles County had 345,000 separate business names on file in 1965. *Id.*

<sup>35</sup> CAL. CIV. CODE § 2466.

statute and must comply if it transacts business under a name other than the one stated in its articles.<sup>36</sup> Commercial or banking partnerships established and transacting business in a foreign country are specifically excepted,<sup>37</sup> and it has been held that persons not maintaining a place of business in California are not included.<sup>38</sup>

The statutes in six other states emulate the California provision and apply to firms transacting business under a "fictitious name" or "a designation not showing the names of the persons interested as partners in the business."<sup>39</sup> In 12 states, the statute applies to firms conducting or transacting business under an "assumed name" or under "any designation, name, style, corporate or otherwise, other than the real name of the individual conducting or transacting such business."<sup>40</sup> Most of the remaining states require registration by any firm doing business under a name or title "other than the real name or names of the person or persons conducting or transacting such business."<sup>41</sup>

<sup>36</sup> *Berg Metals Corp. v. Wilson*, 170 Cal. App. 2d 559, 339 P.2d 869 (1959).

<sup>37</sup> CAL. CIV. CODE § 2467.

<sup>38</sup> *Moon v. Martin*, 185 Cal. 361, 197 P. 77 (1921).

<sup>39</sup> ARIZ. REV. STAT. ANN. § 29-102 (Supp. 1967); MONT. REV. CODES ANN. § 63-601 (1962); NEV. REV. STAT. § 602.010 (1957); N.D. CENT. CODE § 45-11-01 (1960); OHIO REV. CODE ANN. § 1777.02 (Page 1964); OKLA. STAT. tit. 54, § 81 (1961). See also DEL. CODE ANN. tit. 6, § 3101 (1953) ("trade name or title which does not disclose the Christian and surname of such person"); GA. CODE ANN. § 106-301 (1956) ("which does not disclose the individual ownership of the trade, business, or profession"); MINN. STAT. § 333.01 (1965) ("designation, name, or style, which does not set forth the full individual name of every person interested in such business").

<sup>40</sup> ARK. STAT. ANN. § 70-401 (1947); CONN. GEN. STAT. REV. § 35-1 (1960), as amended No. 84 [1967] Conn. Pub. Acts 112; IDAHO CODE ANN. § 53-501 (1957); ILL. REV. STAT. ch. 96, § 4 (1965); KY. REV. STAT. § 365.010 (1962); LA. REV. STAT. § 51:281 (1950); MICH. STAT. ANN. § 19.821 (1964), as amended No. 138 [1967] Mich. Pub. Acts; N.J. REV. STAT. ANN. § 56:1-2 (1964); R.I. GEN. LAWS ANN. § 6-1-1 (1956); TEX. PEN. CODE art. 1067 (1948), TEX. REV. CIV. STAT. art. 5924 (1948); WASH. REV. CODE § 19.80.010 (1961); W. VA. CODE § 47-8-2 (1966). See also ALA. CODE tit. 14, § 230 (1958) ("under any assumed name, or under any designation other than the real name or names"); IOWA CODE § 547.1 (1966) ("under any trade name, or any assumed name of any character other than the true surname of each person or persons owning or having an interest in such business"); MO. REV. STAT. § 417.210 (1959) ("fictitious name or under any name other than the true name of such person"); N.C. GEN. STAT. § 66-68 (1963) ("under any assumed name or under any designation, name or style other than the real name of the owner or owners thereof"); ORE. REV. STAT. § 648.005 (1963) ("under any assumed name or under any designation, name or style, other than the real and true name of each person conducting the business or having an interest therein").

<sup>41</sup> IND. ANN. STAT. § 50-201 (Supp. 1967). Similar wording is used in the following statutes: COLO. REV. STAT. ANN. § 141-2-1 (1963) ("under any other name than the personal name or names of his or its constituent members"); FLA. STAT. § 865.09 (1965) ("other than the proper name or known called names of those persons engaged in such business"); ME. REV. STAT. ANN. tit. 31, § 2 (1964) ("other than his own name exclusively"); MD. ANN. CODE art.

The generality of the language used in the statutes to describe the persons and firms covered leaves important questions of interpretation to the courts. For example, decisions vary on the effect of inclusion in a firm name of "Co.," "& Co.," "Bros.," "& Son," or similar words or symbols. The Oregon statute is unique in that it deals with this particular problem by requiring compliance if the name suggests the existence of additional owners. It further provides that, "Words which suggest the existence of additional owners . . . include such words as 'Company,' '& Company,' '& Son,' '& Associates' and the like."<sup>42</sup>

In addition, the question whether a particular type of business is covered by a given statute is often litigated. Although most of the statutes use similar language in describing the firm names that must be registered, the actual types of entities covered differ because of specific statutory inclusions and exceptions and because of court construction of the statute. Fictitious business name statutes generally are strictly construed; they are said to be in derogation of the common law<sup>43</sup> or to be penal in nature.<sup>44</sup> As a result, few courts

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2, § 18 (1957) ("other than his or their own names"); MASS. ANN. LAWS ch. 110, § 5 (Supp. 1967) ("any title other than the real name of the person conducting the business"); NEB. REV. STAT. § 87-201 (1966) ("other than the true name of such person"); N.H. REV. STAT. ANN. § 349:1 (1966) ("any other name than his own"); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967) ("other than his real name"); VT. STAT. ANN. tit. 11, § 1621 (Supp. 1967) ("under any name other than his own").

Three states use only the term "assumed name" or "fictitious name" or both. PA. STAT. tit. 54, § 28.1 (Supp. 1967) ("assumed or fictitious name, style or designation"); UTAH CODE ANN. § 42-2-5 (Supp. 1967) ("assumed name"); VA. CODE ANN. § 59-169 (1950) ("any assumed or fictitious name").

<sup>42</sup> ORE. REV. STAT. § 648.010(1) (1963): "No person or persons shall carry on, conduct or transact business in this state under any assumed name or under any designation, name or style, other than the real and true name of each person conducting the business or having an interest therein, standing alone or coupled with words which merely describe the business carried on and do not suggest the existence of additional owners, unless the person or all the persons conducting the business or having an interest therein sign and cause to have filed a verified application for registration with the Corporation Commissioner. Words which suggest the existence of additional owners within the meaning of this section include such words as 'Company,' '& Company,' '& Sons,' '& Associates,' and the like." (emphasis added)

<sup>43</sup> *Humphrey v. City Nat'l Bank*, 190 Ind. 293, 130 N.E. 273 (1921); *Lipman v. Thomas*, 143 Me. 270, 61 A.2d 130 (1948).

<sup>44</sup> *Sinclair Refining Co. v. Smith*, 13 F.2d 68 (5th Cir. 1926) (construing Texas statute); *In re Richard Bros.*, 206 F. 932 (E.D. Mich. 1913); *Donner v. Parker Credit Corp.*, 10 N.J. Super. 350, 76 A.2d 277 (Ch. Div. 1950); *Security Fin. Co. v. Hendry*, 189 N.C. 549, 127 S.E. 629 (1925); *Jennette v. Coppersmith*, 176 N.C. 82, 97 S.E. 54 (1918); *K.B. Co. v. Batie*, 2 Ohio C.C.R. (n.s.) 358, 15 Ohio C.D. 482 (Cir. Ct. 1903); *Hughes & Dier v. McClure*, 77 Pa. Super. 325 (1921) (construing [1917] Pa. Pub. Law 645); *Tate v. Atlanta Oak Flooring Co.*, 179 Va. 365, 18 S.E.2d 903 (1942). *But see Cochran v. Hirsch Bros.*, 4 Ohio N.P. 34, 6 Ohio Dec. 41 (Ct. C.P. 1896); *Colbert v. Ashland Constr. Co.*, 176 Va. 500, 11 S.E.2d 612 (1940).

have been willing to extend their coverage by construction.<sup>45</sup> However, this rule has not been followed in California. Its statute, for example, has been expansively interpreted to include a corporation operating under a name other than its actual corporate name.<sup>46</sup>

### Individual Proprietors

The California statute specifically includes individuals. Only four states—those that limit application of their fictitious business name statute to partnerships—do not include individuals.<sup>47</sup> The only significant problem in applying the statutes to individuals lies in determining when a firm name is such that it requires registration.

As a general rule, registration is not required if a sole proprietor's surname appears in the designation accompanied by words descriptive of the business. For example a California court has held that the firm name "Kohler Steam Laundry" need not be registered.<sup>48</sup> However, where the word "company" is used, the courts differ from jurisdiction to jurisdiction. The California Supreme Court has ruled that an individual trading under the name "W.S. Wetenhall Company" does not have to register.<sup>49</sup> This construction appears to be based on a view that the single object of the legislation is to require disclosure of the proprietorship of the business and that the sole proprietor who uses his personal name in the business designation is not withholding from customers any information regarding the person with whom they are dealing.<sup>50</sup> However, this view is not universally shared. Pennsylvania, for example, has held that the name "Hagerling Motor Car Company" as used by an individual is fictitious because the word "company" implies that there are other owners of the business.<sup>51</sup> In addition,

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<sup>45</sup> The Pennsylvania statute was held inapplicable to an unincorporated association because it purported to cover only "individuals" carrying on business under a fictitious name. *Chester Progressive Club v. Rossin*, 75 Pa. D. & C. 413 (C.P. Delaware Cty. 1950). See also *Talbot v. Ephrata Nest No. 1805*, Order of Owls, 40 Lanc. L. Rev. 105 (Pa. C.P. 1926).

<sup>46</sup> *Berg Metals Corp. v. Wilson*, 170 Cal. App. 2d 559, 339 P.2d 869 (1959).  
<sup>47</sup> ARIZ. REV. STAT. ANN. § 29-102 (Supp. 1967); N.D. CENT. CODE § 45-11-01 (1960); OHIO REV. CODE ANN. § 1777.02 (Page 1964); OKLA. STAT. tit. 54, § 81 (1961).

<sup>48</sup> *Kohler v. Stephenson*, 39 Cal. App. 374, 178 P. 970 (1919).

<sup>49</sup> *Wetenhall v. Chas. S. Mabrey Constr. Co.*, 209 Cal. 293, 286 P. 1015 (1930); accord, *Vagin v. Brown*, 63 Cal. App. 2d 504, 146 P.2d 923 (1944) ("*Vagin Packing Company*"); *Patterson Furniture Co. v. Byers*, 17 Okla. 633, 89 P. 1114 (1907) ("*Patterson Furniture Company*"); *Tate v. Atlanta Oak Flooring Co.*, 179 Va. 365, 18 S.E.2d 903 (1942) ("*A.E. Tate Lumber Co.*"); *McCreery v. Graham*, 121 Wash. 466, 209 P. 692 (1922) ("*McCreery Machinery Co.*").

<sup>50</sup> *Wetenhall v. Chas. S. Mabrey Constr. Co.*, 209 Cal. 293, 286 P. 1015 (1930).

<sup>51</sup> *Hagerling Motor Car Co. v. Palmer*, 3 Pa. D. & C. 650 (C.P. Dauphin

it is fairly clear in California and most other jurisdictions that use of such terms as "& Co." and "& Company" by an individual proprietor necessitates filing.<sup>52</sup> Such addenda imply additional owners and thus make the name fictitious as well as misleading.<sup>53</sup>

This uncertainty should be eliminated by adding a provision similar to the previously mentioned section of the Oregon statute.<sup>54</sup> Adoption of the provision in California would expand coverage of the existing statute only to the extent of including sole proprietors who use the terms "Co." and "Company." In other words, the provision would eliminate the distinction now drawn between "Jones Company" and "Jones & Company." As a practical matter, few businessmen probably are aware of this technical distinction. Further, individual proprietorships could still be conducted under a name such as "Kohler Steam Laundry." Only those persons insisting upon the use of the word "company" or a variant of that term would be required to file.

### Partnerships

The California statute specifically covers "partnerships" that transact businesses under a "fictitious name" or a "designation not showing the names of the persons interested as partners in such business."<sup>55</sup> This provision has been construed to include unincorporated

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Cty. 1923); *accord*, *Alleman v. Lowengart*, 63 Pa. D. & C. 430 (C.P. Franklin Cty. 1948) ("J.J. Alleman Electric Company"). *But see* *Stevens v. Meade*, 13 Pa. D. & C. 9 (C.P. Delaware Cty. 1930) ("Albert Stevens Hardwood Flooring Company" does not have to register).

<sup>52</sup> See *Prater v. Larabee Flour Mills Co.*, 180 Ga. 581, 180 S.E. 235 (1935) ("A.J. Prater & Co." must be registered).

<sup>53</sup> In *Wetenhall v. Chas. S. Mabrey Constr. Co.*, 209 Cal. 293, 295, 286 P. 1015, 1016-17 (1930), the court said: "We have been unable to discover any case in which a single individual who was doing business under a name not his own, but one which was not fictitious, was required to comply with said section 2466 . . ." (emphasis added). A name such as John Doe & Co.—as opposed to John Doe Co.—should be held to be a fictitious name rather than a designation showing the owner's name because there is an implication of additional owners, and therefore should not come within the *Wetenhall* reasoning. See *Doob & Bro. v. Lovell Mfg. Co.*, 3 Ohio N.P. 169, 4 Ohio Dec. 188 (C.P. Hamilton Cty.), *aff'd* 12 Ohio C. Dec. 722 (1890) ("Doob & Bro." is fictitious because there are three—as opposed to two—brothers in the partnership). See also *Birdwell v. Watson*, 268 App. Div. 642, 53 N.Y.S.2d 77 (Sup. Ct. 1945) (clerk properly refused to register "Russell Birdwell and Associates" because it is misleading to public where Birdwell had no associates); *accord*, *Proctor v. Watson*, 2 Misc. 2d 881, 149 N.Y.S.2d 100 (Sup. Ct. 1956). *But see* *Willey v. Crocker-Woolworth Nat'l Bank*, 141 Cal. 508, 513, 75 P. 106, 108 (1904) (no presumption of additional owners from use of "& Company" in estoppel case).

<sup>54</sup> ORE. REV. STAT. § 648.010(1) (1965).

<sup>55</sup> CAL. CIV. CODE § 2466.

cooperative associations,<sup>56</sup> joint stock companies,<sup>57</sup> and business trusts.<sup>58</sup> It does not include unincorporated fraternal benefit societies<sup>59</sup> or trustees transacting business as a finance company.<sup>60</sup> Although the statute is not entirely clear in this respect, a partnership must file if its firm name includes the surnames of some, but not all, of the partners.<sup>61</sup>

The statutes in 25 other states specifically apply to partnerships.<sup>62</sup> Ten of these states preclude a construction that would exclude unincorporated business associations, such as joint ventures, by referring to a partnership or association,<sup>63</sup> a firm or partnership,<sup>64</sup> or a firm or association.<sup>65</sup> Thirteen states provide only that "persons" or "individuals" must comply,<sup>66</sup> and three additional states include only individuals and corporations.<sup>67</sup> However, most of these

<sup>56</sup> Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946).

<sup>57</sup> Old River Farms Co. v. Roscoe Haegelin Co., 98 Cal. App. 331, 276 P. 1047 (1929).

<sup>58</sup> Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946).

<sup>59</sup> Athens Lodge No. 70 v. Wilson, 117 Cal. App. 2d 322, 255 P.2d 482 (1953).

<sup>60</sup> Wright v. Schaaf, 111 Cal. App. 87, 295 P. 373 (1931).

<sup>61</sup> See Flora v. Hankins, 204 Cal. 351, 268 P. 331 (1928); Pendleton v. Cline, 85 Cal. 142, 24 P. 659 (1890).

<sup>62</sup> ARIZ. REV. STAT. ANN. § 29-102 (Supp. 1967); COLO. REV. STAT. ANN. § 141-2-1 (1963); DEL. CODE ANN. tit. 6, § 3101 (1953); FLA. STAT. § 865.09 (1965); GA. CODE ANN. § 106-301 (1956); IDAHO CODE ANN. § 53-504 (1957); IND. ANN. STAT. § 50-201 (Supp. 1967); IOWA CODE § 547.1 (1966); ME. REV. STAT. ANN. tit. 31, § 1 (1964); MASS. ANN. LAWS ch. 110, § 5 (Supp. 1967); MICH. STAT. ANN. § 19.821 (1964) (as amended by No. 138 [1967] Mich. Pub. Acts); MONT. REV. CODES ANN. § 63-601 (1962); NEV. REV. STAT. § 602.010 (1957); N.H. REV. STAT. ANN. § 349:1 (1966); N.J. STAT. ANN. § 56:1-1 (1964); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); N.C. GEN. STAT. § 66-68 (1963); N.D. CENT. CODE § 45-11-01 (1960); OHIO REV. CODE ANN. § 1777.02 (Page 1964); OKLA. STAT. tit. 54, § 81 (1961); S.C. CODE ANN. § 48-1 (1962); S.D. CODE § 49.0801 (1939); UTAH CODE ANN. § 42-2-5 (Supp. 1967); VT. STAT. ANN. tit. 11, § 1621 (Supp. 1967); VA. CODE ANN. § 50-74 (1967).

<sup>63</sup> COLO. REV. STAT. ANN. § 141-2-1 (1963); ME. REV. STAT. ANN. tit. 31, § 1 (1964); N.H. REV. STAT. ANN. § 349:1 (1966); UTAH CODE ANN. § 42-2-5 (Supp. 1967); VT. STAT. ANN. tit. 11, § 1621 (Supp. 1967).

<sup>64</sup> FLA. STAT. § 865.09 (1965); GA. CODE ANN. § 106-301 (1956); IND. ANN. STAT. § 50-201 (Supp. 1967); NEV. REV. STAT. § 602.010 (1957).

<sup>65</sup> DEL. CODE ANN. tit. 6, § 3101 (1953).

<sup>66</sup> ALA. CODE tit. 14, § 230 (1958); ARK. STAT. ANN. § 70-401 (1947); ILL. REV. STAT. ch. 96, § 4 (1965); KY. REV. STAT. § 365.010 (1960); LA. REV. STAT. § 51:281 (1950); MD. ANN. CODE art. 2, § 18 (1957); MINN. STAT. § 333.01 (1965); MO. REV. STAT. § 417.210 (1959); NEB. REV. STAT. § 87-201 (1966); R.I. GEN. LAWS ANN. § 6-1-1 (1956); TEX. PEN. CODE art. 1067 (1948), TEX. REV. CIV. STAT. art. 5924 (1948); WASH. REV. CODE § 19.80.010 (1958); W. VA. CODE ANN. § 47-8-2 (1966).

<sup>67</sup> CONN. GEN. STAT. REV. § 35-1 (1960), as amended No. 84, [1967] Conn. Pub. Acts 112; ORE. REV. STAT. §§ 648.005-.010 (1963); PA. STAT. tit. 54, §§ 28.1, 85 (Supp. 1966).

statutes are construed to include partnerships.<sup>68</sup> In only two states are partnerships either expressly or impliedly exempted.<sup>69</sup>

Seven states specifically require registration of a partnership name that does not include the surnames of all of the partners.<sup>70</sup> This appears to be the rule in states without such an express provision,<sup>71</sup> and it is the statutory rule in the United Kingdom<sup>72</sup> and the Australian states.<sup>73</sup> A second group, consisting of five states, requires registration unless the surname of at least one partner appears in the firm name.<sup>74</sup> An additional provision in some states requires compliance if the business uses the terms "& Co." or "and Company."<sup>75</sup> As a variation, the Arizona statute provides that use of these terms without displaying a sign indicating the names of the owners subjects the business assets to full liability for the debts of the person ostensibly conducting the business.<sup>76</sup>

The exception as to partnership names should be limited to those firm names that include the surnames of all the partners. Any broader exception tends to defeat the purpose of the legislation generally and is inconsistent with the objective of preventing concealment of the names of responsible partners.<sup>77</sup> There is no assurance that a named partner has assets or a substantial interest in the business. Further, until the litigation stage is reached, there is no feasible means of requiring the named partner to divulge the identity of his copartners. Even in litigation, the plaintiff must resort to discovery to determine the names of the other partners. This runs counter to the view, stated by some courts, that the

<sup>68</sup> See, e.g., *Arnold Barber & Beauty Supply Co. v. Provance*, 221 Ark. 385, 253 S.W.2d 367 (1952); *Johnston v. Ellis*, 49 Idaho 1, 285 P. 1015 (1930); 1962 MINN. OPS. ATT'Y GEN. 920-D.

<sup>69</sup> W. VA. CODE ANN. § 47-8-4 (1966); *Chester Progressive Club v. Rossin*, 75 Pa. D. & C. 413 (C.P. Delaware Cty. 1950). The exception in Michigan for all partnerships organized in that state has been repealed. MICH. COMP. LAWS § 445.4 (1948) (repealed 1967).

<sup>70</sup> ARIZ. REV. STAT. ANN. § 29-103 (Supp. 1967); IDAHO CODE ANN. § 53-504 (1957); ILL. REV. STAT. ch. 96, § 7 (1965); IND. ANN. STAT. § 50-202 (Supp. 1967); N.J. REV. STAT. § 56:1-5 (1937); S.D. CODE § 49.0801 (1939); WASH. REV. CODE § 19.80.020 (1958).

<sup>71</sup> See, e.g., *Cruse v. Wilson*, 92 So. 2d 270 (Fla. Sup. Ct. 1957).

<sup>72</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 1, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).

<sup>73</sup> Uniform Business Names Act § 5 (Victoria 1962).

<sup>74</sup> CONN. GEN. STAT. REV. § 35-1 (1960), as amended by No. 84, [1967] Conn. Pub. Acts 112; KY. REV. STAT. § 365.010(2) (1960); LA. REV. STAT. § 51:283 (1950); MASS. ANN. LAWS ch. 110, § 6 (Supp. 1967); R.I. GEN. LAWS ANN. 6-1-3 (1956). See also 1962 MINN. OPS. ATT'Y GEN. 920-D.

<sup>75</sup> E.g., COLO. REV. STAT. ANN. § 141-2-1 (1963); N.J. STAT. ANN. § 56:1-1 (1964).

<sup>76</sup> Compare N.C. GEN. STAT. § 66-72 (1966) with ARIZ. REV. STAT. ANN. § 29-101 (1956).

<sup>77</sup> See note 15 *supra*.



statute is meant to require disclosure of the name of the real party in interest.<sup>78</sup> The problem could be particularly acute when the named partner has died, a certificate has not been filed to show that the name is now fictitious, and the name of the firm has not been changed. To avoid such problems, the California statute should codify the existing rule that a filing must be made if the name of the firm does not contain the surnames of all of the partners.

### *Problems of Statutory Construction*

California follows the general rule that use of the word "and" or the use of an ampersand between the surnames of all of the partners does not make the name fictitious.<sup>79</sup> It is clear that use of the term "& Co." subjects a partnership to the requirements of the statute. The California Supreme Court held in an early decision that the firm name "J.D. Byers & Co." did not show the names of all of the persons interested in the business.<sup>80</sup> In addition, it would appear that any partnership using the term "Company" as a part of its firm name must comply with the California statute since the reasoning of the *Wetenhall*<sup>81</sup> case does not apply where there is more than one owner.<sup>82</sup> The California Supreme Court has also held that the business names "Abrams Bros."<sup>83</sup> and "P.H. Murphy & Son"<sup>84</sup> do not show the persons interested as partners and therefore must be registered.

Authority from other states provides no uniform rule as to when

<sup>78</sup> See note 16 *supra*.

<sup>79</sup> *Flora v. Hankins*, 204 Cal. 351, 268 P. 331 (1928); *Lamberson v. Bashore*, 167 Cal. 387, 139 P. 817 (1914); *Pendleton v. Cline*, 85 Cal. 142, 24 P. 659 (1890); *accord*, *Smith v. Stubbs*, 16 Colo. App. 130, 63 P. 955 (1901); *Cruse v. Wilson*, 92 So. 2d 270 (Fla. Sup. Ct. 1957); *Johnston v. Ellis*, 49 Idaho 1, 285 P. 1015 (1930); *Walker & Korthorf v. Stimmel*, 15 N.D. 484, 107 N.W. 1081 (1906); *Mangan v. Schuylkill County*, 273 Pa. 310, 116 A. 920 (1922); *Bovee v. De Jong*, 22 S.D. 163, 116 N.W. 83 (1908); *Bowman v. Harrison*, 59 Wash. 56, 109 P. 192 (1910). *See also* *Andrews v. Glick*, 205 Cal. 699, 272 P. 587 (1928); *McLean v. Crow*, 88 Cal. 644, 26 P. 596 (1891).

<sup>80</sup> *Byers v. Bourret*, 64 Cal. 73, 28 P. 61 (1883); *accord*, *Nicholson & Co. v. Auburn Gold Mining & Milling Co.*, 6 Cal. App. 547, 92 P. 651 (1907).

<sup>81</sup> 209 Cal. 293, 286 P. 1015 (1930).

<sup>82</sup> The California courts carefully distinguish between sole proprietors and partnerships, and in the latter case require registration if the term "Company" appears in the name. *Compare* *Wetenhall v. Chas. S. Mabrey Constr. Co.*, 209 Cal. 293, 286 P. 1015 (1930) (individual d.b.a. "W.S. Wetenhall Company" need not register), *and* *Vagim v. Brown*, 63 Cal. App. 2d 504, 146 P.2d 923 (1944) (individual d.b.a. "Vagim Packing Company" need not register), *with* *Andrews v. Glick*, 205 Cal. 699, 272 P. 587 (1928) (partnership d.b.a. "Andrews-Cordano Plumbing Company" must register despite fact partners named Andrews and Cordano), *and* *Messick v. Houx Bros., Inc.*, 105 Cal. App. 637, 288 P. 434 (1930) (*dicta*).

<sup>83</sup> *North v. Moore*, 135 Cal. 621, 67 P. 1037 (1902).

<sup>84</sup> *Swartz & Gottlieb, Inc. v. Marcuse*, 175 Cal. 401, 165 P. 1015 (1917).

a partnership name must be registered.<sup>85</sup> For example, the Supreme Judicial Court of Maine held that three men named Lipman doing business as "Lipman Poultry Co." were required to register the firm name,<sup>86</sup> but the Florida Attorney General has ruled that the name "Jones & Co." need not be registered where both partners are named Jones.<sup>87</sup> The partnership designation "Cohick's Meat Market" was held by a Pennsylvania court not to be fictitious because all of the partners were named Cohick<sup>88</sup> although it appears that the opposite result would have been reached if the word "Company" had appeared in the name.<sup>89</sup> The Michigan courts have gone so far as to hold the name "David S. Zemon & Co." need not be registered despite the fact that Zemon's partner had a different surname.<sup>90</sup>

The general rule in states other than California is that the use of "Bros." following the partners' surname does not make the firm name fictitious because the name affords a reasonable and sufficient guide to correct knowledge about the owners of the business.<sup>91</sup> The reasoning of these cases is equally applicable where "& Son" is used. Most courts hold that use of such a name does not render the designation fictitious.<sup>92</sup>

Any uncertainty in the California statute would be eliminated by a provision similar to the Oregon statute noted above.<sup>93</sup> Adoption of that language would not change existing law. As indicated above, California law differs from the majority rule where the term "Bros." or "& Son" is used and already requires the firm to file a fictitious business name certificate.

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<sup>85</sup> See generally Annot., 45 A.L.R. 198, 260-63 (1926); Annot., 42 A.L.R. 2d 516, 560-63 (1955).

<sup>86</sup> Lipman v. Thomas, 143 Me. 270, 61 A.2d 130 (1948).

<sup>87</sup> 1946 FLA. ATT'Y GEN. BIENNIAL REP. 735.

<sup>88</sup> Williams v. Cohick, 1 Lycoming 47 (Pa. C.P. Lycoming Cty. 1949).

<sup>89</sup> See Alleman v. Lowengart, 63 Pa. D. & C. 430 (C.P. Franklin Cty. 1948); Commonwealth v. Palmer, 3 Pa. D. & C. 650 (C.P. Dauphin Cty. 1923).

<sup>90</sup> Zemon v. Trim, 181 Mich. 130, 147 N.W. 540 (1914).

<sup>91</sup> Cross v. Leonard, 181 Mich. 24, 147 N.W. 540 (1914) ("Cross Bros."); Guiterman v. Wishon, 21 Mont. 458, 54 P. 566 (1898) ("Guiterman Bros."); Jennette v. Coppersmith, 176 N.C. 82, 97 S.E. 54 (1918) ("Jennette Bros."); Cochran v. Hirsch Bros., 4 Ohio N.P. 34, 6 Ohio Dec. 41 (1896) ("Hirsch Bros."). *Contra*, Wilson Bros. Garage v. Tudor, 89 Vt. 522, 95 A. 794 (1915); Doob & Bro. v. Lovell Mfg. Co., 3 Ohio N.P. 169 (C.P. Hamilton Cty.), *aff'd* 12 Ohio C.D. 722 (1896). See generally Annot., 45 A.L.R. 198, 264-66 (1926); Annot., 42 A.L.R.2d 516, 564 (1955).

<sup>92</sup> Axe v. Tolbert, 179 Mich. 556, 146 N.W. 418 (1914); M.A. Hartle & Son v. Carlson, 70 Pitts. Legal J. 223 (Pa. C.P. Alleghany Cty. 1920). See generally Annot., 45 A.L.R. 198, 263-64 (1926); Annot., 42 A.L.R.2d 516, 563 (1955).

<sup>93</sup> ORE. REV. STAT. § 648.010(1) (1965).

*Partnerships Established and Transacting Business in a Foreign Country*

California Civil Code section 2467 provides:

A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate or making the publication prescribed in the last section, use in this State the partnership name used by it there, although it be fictitious, or do not show the names of the persons interested as partners in such business.

This exception was included in the 1872 Civil Code and has remained, with only a minor modification in 1873.<sup>94</sup> The exception was taken from the New York act of 1833,<sup>95</sup> as amended in 1849,<sup>96</sup>—the first fictitious business name statute enacted in the United States. Six other states also adopted this exception.<sup>97</sup> Three of these states copied the California statute, including this exception, when they first enacted their fictitious business name statutes.<sup>98</sup> One of the six states, South Dakota, has since eliminated it,<sup>99</sup> as has New York, its original source.<sup>100</sup>

Civil Code section 2467, the California exception for commercial and banking partnerships established and transacting business in a foreign country, should be repealed. The reference to banking partnerships is now obsolete since only a corporation may carry on the business of banking in California.<sup>101</sup> Foreign commercial partnerships should be required to comply with the statute. Persons in California have greater difficulty in obtaining information concerning such partnerships than in obtaining information concerning local partnerships.<sup>102</sup> Since both foreign and domestic partnerships would be treated equally, there would be no discrimination against foreign

<sup>94</sup> Cal. Stats. 1873-1874 (Code Amendments), ch. 612, § 232, at 253.

<sup>95</sup> Ch. 281, [1833] N.Y. Laws 96.

<sup>96</sup> Ch. 347, § 1, [1849] N.Y. Laws 502.

<sup>97</sup> ARIZ. REV. STAT. ANN. § 29-103 (Supp. 1967); FLA. STAT. § 865.09 (1965); N.D. CENT. CODE § 45-11-03 (1960); OHIO REV. CODE ANN. § 1777.02 (Page 1964); OKLA. STAT. tit. 54, § 83 (1961); S.D. Rev. Code of 1919 § 1334 (repealed ch. 155, [1933] Laws of S.D. 160). See also VT. STAT. ANN., tit. 11, § 1632 (1958) (exempts foreign investment companies, foreign building and loan associations, and foreign creamery companies).

<sup>98</sup> North Dakota, Ohio, and Oklahoma. See, e.g., Baker v. L.C. Van Ness & Co., 25 Okla. 34, 105 P. 660 (1909).

<sup>99</sup> Ch. 155, [1933] Laws of S.D. 160.

<sup>100</sup> Compare 3 REVISED STATUTES OF NEW YORK 978 (Banks & Brothers 5th ed. 1859), with N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967).

<sup>101</sup> CAL. FIN. CODE § 102.

<sup>102</sup> For many years the United Kingdom statute on business names required a statement as to the nationality of the owners of the business if they were not British. Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 18. One of the recognized purposes of the statute was to aid British traders in their dealings with foreign enterprises doing business in the United Kingdom. *Current Topics*, 61 SOL. J. 177, 178 (1917). Although the provision has been eliminated, the British statute still requires the registration of foreign firms.

commerce. Information concerning the partnerships covered by section 2467 will be especially useful because such partnerships are the only foreign partnerships not covered by Corporations Code section 15700 which requires foreign partnerships doing business in California to designate an agent for service of process if the partnership does not have a regular place of business in this state.<sup>103</sup> Whatever the reason for including it in the 1872 statute, the exception is no longer justifiable. This conclusion is strengthened by the fact that the exception has been eliminated in the state where it originated, New York, and by the failure of most of the recent fictitious business name statutes to include it.

### *Law or Other Professional Partnerships*

California has no special provision in its fictitious business name statute regarding law partnerships or other professional partnerships. Some states have made special provisions for professional firms. The Georgia statute<sup>104</sup> excepts all professional partnerships, and the New York<sup>105</sup> and Arizona<sup>106</sup> acts specifically exempt law partnerships. A similar result has been reached in Minnesota where a law partnership is not considered a commercial enterprise within the meaning of the statute.<sup>107</sup>

There are many provisions in the California Business and Professions Code regarding the use of fictitious names by licensed persons.<sup>108</sup> The most significant of these is section 2393, which requires

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<sup>103</sup> No reason is perceived for this exception to CAL. CORP. CODE § 15700 except that it conformed that section to CAL. CIV. CODE § 2467. The exception should be eliminated. Section 15700 is based on former Civil Code § 2472, Cal. Stats. 1909, ch. 696, § 1, at 1065, which described the partnerships not required to designate an agent for service of process by reference to CAL. CIV. CODE § 2467, when the service of process provisions were part of the chapter on fictitious names.

<sup>104</sup> GA. CODE ANN. § 106-304 (1956).

<sup>105</sup> N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967).

<sup>106</sup> ARIZ. REV. STAT. ANN. § 29-103 (Supp. 1967).

<sup>107</sup> 1948 MINN. OPS. ATT'Y GEN. 920-D; cf. Southwestern Bell Tel. Co. v. Texas State Optical, 253 S.W.2d 877 (Tex. Civ. App. 1952).

<sup>108</sup> CAL. BUS. & PROF. CODE § 1000-10 (no chiropractor shall practice under an assumed or misleading name); § 1680 (use of any false, assumed or fictitious name by a dentist other than licensed name is unprofessional conduct); § 2393 (requires physicians to obtain permit to operate under fictitious name); § 3125 (no optometrist may practice under a false or assumed name); §§ 5072-74 (require fictitious name information when accountancy partnership registers); § 5668 (use of assumed or fictitious or corporate name by landscape architect is grounds for disciplinary action); § 6875 (collection agencies must furnish fictitious name information to get license, and license may be refused for similarity); § 7067 (registration of contractors' partnership contains same information as fictitious name statement); § 7540 (private detective must have fictitious name certificate to get a license); § 7629 (mortician may not use misleading name); § 8936.1 (yacht or ship builder cannot use a fictitious name unless licensed under that name); § 9830 (electronic repair dealer cannot carry on business under fictitious name unless stated on ap-

physicians to obtain a permit from the Board of Medical Examiners before opening a clinic or similar establishment under a fictitious name. Only certain specified names may be used<sup>109</sup> and violation of the section is punishable both as unprofessional conduct<sup>110</sup> and as a misdemeanor.<sup>111</sup> Such permits must be renewed either every year or every 2 years depending upon the particular type of medicine practiced by the partnership.<sup>112</sup> These fictitious-name permits apparently must be filed with the county clerk and indexed by him under provisions requiring every person authorized to practice medicine in this state to file a certificate in the office of the county clerk in every county in which he is practicing.<sup>113</sup>

The provisions concerning use of fictitious names by physicians are adequate to protect the public from fraud and deceit and to give the creditors of the partnership sufficient information about the particular firm. There is no significant reason to include physicians within the terms of the general fictitious name statute and therefore a special exception should be made for medical partnerships that come within the provisions of section 2393. To assure that the information will be available to the public, section 2340 should be amended to require expressly the filing of fictitious name permits issued by the Medical Examiner's Board with the county clerk, and section 2341 should be amended to require the county clerk to maintain an alphabetical index of the information.

Law partnerships should also be excepted from the business name legislation.<sup>114</sup> Canon 33 of the American Bar Association Canons of Professional Ethics provides in part that "in the selection of a firm name, no false, misleading, assumed or trade name should be used." Thus, the use of "& Co.,"<sup>115</sup> "Associates,"<sup>116</sup> "and Co.,"<sup>117</sup> "Northern

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plication for permit); § 10159.5 (real estate broker must prove compliance with the fictitious name statute before license will issue in fictitious name). See also CAL. INS. CODE § 1724.5 (all fictitious names must be listed and Commissioner may screen for similarity and misleading names); CAL. FIN. CODE § 12300.2 (check seller or cashier must conduct business under true name unless he has complied with the fictitious name statute).

<sup>109</sup> CAL. BUS. & PROF. CODE § 2393(c) provides that the name must include at least one of the following designations: "Medical Group," "Medical Clinic," "Podiatrists' Group," or "Podiatrists' Clinic."

<sup>110</sup> CAL. BUS. & PROF. CODE § 2393.

<sup>111</sup> CAL. BUS. & PROF. CODE § 2429.

<sup>112</sup> CAL. BUS. & PROF. CODE § 2393.

<sup>113</sup> CAL. BUS. & PROF. CODE § 2340 requires filing by the physician. Section 2341 requires the county clerk to keep an alphabetical register of the certificates.

<sup>114</sup> See discussion of problem in *Business Names*, 105 SOL. J. 1114 (1961).

<sup>115</sup> N.Y. CITY BAR COMM. OP. 776 (1941), in *OPINIONS ON PROFESSIONAL ETHICS* No. 587 (Cromwell Foundation ed. 1956).

<sup>116</sup> *ABA Comm. on Professional Ethics, Opinion No. 219*, in H. DRINKER, *LEGAL ETHICS*, app. A, nos. 373, 374 (1953).

<sup>117</sup> H. DRINKER, *LEGAL ETHICS*, app. A, no. 377 (1953).

Law Clinic,"<sup>118</sup> "McCarrus Claim Service,"<sup>119</sup> "Veterans' Legal Service,"<sup>120</sup> "Legal Bureau,"<sup>121</sup> and "Legal Writing Associates"<sup>122</sup> has been held improper.<sup>123</sup>

Attorneys practicing in California are registered with the State Bar although no record of members of partnerships is required to be kept. Firm nameplates and letterheads customarily include the names of all interested partners, and the names of the members of law firms are listed in the various unofficial legal registers, such as Martindale-Hubbell.<sup>124</sup> In addition, partnerships between lawyers and members of other professions or nonprofessional persons are generally not allowed where any part of the partnership's activities consists of the practice of law.<sup>125</sup> It seems clear therefore that the purpose of the fictitious name statute will be fully achieved without requiring law partnerships to file statements.

### *Limited Partnerships*

At present, California has no exception for limited partnerships. A substantial overlap in filing requirements results from the registration provisions of the Uniform Limited Partnership Act which was enacted in 1929<sup>126</sup> and is now codified as Corporations Code sections 15501 to 15531.

Corporations Code section 15502 requires persons forming a limited partnership to sign and acknowledge a certificate setting forth the name of the partnership, the character of the business, the location of the principal place of business, the name and place of residence of each member, the term of the partnership, the capital contribution of each limited partner, and other information. The certificate must be filed in the office of the recorder of the county in which the principal place of business is located as well as in the recorder's office in each county where the partnership has a place of business or holds title to real property.<sup>127</sup>

Section 15505 provides that the surname of a limited partner cannot appear in the firm name unless it is also the surname of a

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<sup>118</sup> *Id.* no. 376.

<sup>119</sup> *Id.* no. 375.

<sup>120</sup> N.Y. CITY BAR COMM. OP. b-7 (1945), in *OPINIONS ON PROFESSIONAL ETHICS* No. 684 (Cromwell Foundation ed. 1956).

<sup>121</sup> N.Y. CITY BAR COMM. OP. 53 (1926-1927), in *OPINIONS ON PROFESSIONAL ETHICS* No. 48 (Cromwell Foundation ed. 1956).

<sup>122</sup> N.Y. COUNTY LAWYERS ASS'N OP. 348 (1939).

<sup>123</sup> There are, however, decisions which hold that use of the term "Brothers" or "& Son" is proper. H. DRINKER, *LEGAL ETHICS*, app. A, nos. 370, 371 (1953).

<sup>124</sup> MARTINDALE-HUBBELL, *LAW DIRECTORY* (100th ed. 1968).

<sup>125</sup> ABA, *CANONS OF PROFESSIONAL ETHICS* No. 33 (1937).

<sup>126</sup> Cal. Stats. 1929, ch. 865, § 1, at 1912.

<sup>127</sup> CAL. CORP. CODE § 15502.

general partner or unless, prior to the time that the limited partner became such, the business was carried on in a name including his surname. Sections 15524 and 15525 set forth the procedure for amending or canceling the certificate and prescribe when such an amendment or cancellation must be made.<sup>128</sup>

New York,<sup>129</sup> North Carolina,<sup>130</sup> and Washington<sup>131</sup> have recognized the overlap and have excepted limited partnerships from their fictitious business name statutes. West Virginia does not require either general or limited partnerships to file a fictitious name statement,<sup>132</sup> apparently because those organizations must file under more comprehensive partnership acts. Michigan recently enacted a unique provision which requires all partnerships which file a fictitious name statement to include a reference to the place and date of filing with any governmental authority of any documents required to be filed in order to complete the organization of the business and entitle it to transact business in the state.<sup>133</sup>

When fictitious name files are maintained only at the county level—the present California practice—there is no substantial reason for requiring a limited partnership to file both a limited partnership statement and a fictitious business name statement. However, under a central filing system,<sup>134</sup> the purpose of which is to make as much information as possible available at a single location, the filing of both certificates serves a useful purpose. In addition, the fictitious name certificate maintained under a central filing system should indicate the place or places where the limited partnership certificate has been filed so that an interested party may find that information.

### Corporations

The California statute does not expressly include corporations. However, the court of appeal held in *Berg Metals Corp. v. Wil-*

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<sup>128</sup> Section 15524 provides that the certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such. Other pertinent subdivisions provide that a certificate must be amended if there is a change in the name of the partnership, or if new limited or general partners are admitted to the firm, or if a general partner ceases to be interested in the business.

The pertinent provisions of section 15525 provide that a writing to amend a certificate must be signed and acknowledged by all members of the firm and that a person desiring the cancellation or amendment of a certificate may petition the superior court to direct a cancellation or amendment of the certificate if any person who must execute the writing refuses to do so.

<sup>129</sup> N.Y. GEN. BUS. LAW § 130(7) (McKinney Supp. 1967).

<sup>130</sup> N.C. GEN. STAT. §§ 66-68, 66-70 (Supp. 1967).

<sup>131</sup> WASH. REV. CODE § 19.80.020 (1961).

<sup>132</sup> W. VA. CODE ANN. § 47-8-4 (1966).

<sup>133</sup> MICH. STAT. ANN. § 19.826 (1964), as amended No. 138, [1967] Mich. Pub. Act.

<sup>134</sup> See text accompanying notes 160-86 *infra*.

son<sup>135</sup> that the term "person" in the California statute includes corporations. As a result, a corporation must file a certificate when it is doing business under a name other than its corporate name. For example, if "California Mill Supply Corporation" is the corporate name and the business is transacted in that name, there is no need to file a certificate. However, if the same corporation transacts business as "Berg Metals Company," it is transacting business in a fictitious name and must file a certificate.

The New York fictitious name statute of 1833,<sup>136</sup> as amended in 1854,<sup>137</sup> provided an exception for both domestic and foreign corporations. At the present time, statutes in 15 states specifically exempt corporations.<sup>138</sup> In addition, 16 other states limit coverage to "persons" or "individuals" or individuals and partnerships but do not specifically exempt corporations.<sup>139</sup> However, 12 states<sup>140</sup> and the United Kingdom,<sup>141</sup> which originally had either an express or implied exception for corporations, now expressly include corporations within their statutes. The Australian acts also expressly include corporations.<sup>142</sup> In addition, at least two states include corporations within the statute by judicial decision,<sup>143</sup> and the Florida Attorney General

<sup>135</sup> 170 Cal. App. 2d 559, 339 P.2d 869 (1959).

<sup>136</sup> Ch. 281, [1833] N.Y. Laws 96.

<sup>137</sup> Ch. 400, § 2, [1854] N.Y. Laws 1084.

<sup>138</sup> ARK. STAT. ANN. § 70-404 (1947); DEL. CODE ANN. tit. 6, § 3107 (1953); FLA. STAT. § 865.09(2) (1965); IDAHO CODE ANN. § 53-504 (1957); ILL. REV. STAT. ch. 96, § 7 (1965); KY. REV. STAT. § 365.010(2) (1962); LA. REV. STAT. § 52:283 (1950); MINN. STAT. § 333.05 (1965); NEV. REV. STAT. § 602.080 (1957); N.J. STAT. ANN. § 56:1-5 (1964); N.Y. GEN. BUS. LAW § 130(7) (McKinney Supp. 1967); R.I. GEN. LAWS ANN. § 6-1-3 (1956); TEX. PEN. CODE art. 1069 (1948); TEX. REV. CIV. STAT. art. 5927 (1948); WASH. REV. CODE § 19.80.020 (1961); W. VA. CODE ANN. § 47-8-4 (1966).

<sup>139</sup> ALA. CODE tit. 14, § 230 (1958); CAL. CIV. CODE § 2466; DEL. CODE ANN. tit. 6, § 3101 (1953); FLA. STAT. § 865.09 (1965); IOWA CODE § 547.1 (1966); ME. REV. STAT. ANN. tit. 31, § 1 (1964); MD. ANN. CODE art. 2, § 18 (1957); MASS. ANN. LAWS ch. 110, § 5 (Supp. 1967); MO. REV. STAT. § 417.210 (1959); MONT. REV. CODES ANN. §§ 63-601, 63-606 (1962); NEB. REV. STAT. § 87-201 (1966); NEV. REV. STAT. § 602.010 (1957); N.J. STAT. ANN. § 56:1:1 (1964); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); S.C. CODE ANN. § 48-1 (1962); S.D. CODE § 49.0801 (1939).

<sup>140</sup> COLO. REV. STAT. ANN. § 141-2-1 (1963); CONN. GEN. STAT. REV. § 35-1 (1960), as amended No. 84, [1967] Conn. Pub. Acts 112; GA. CODE ANN. § 106-301 (1956); IND. ANN. STAT. § 50-201 (Supp. 1967); MICH. STAT. ANN. § 19.826 (Supp. 1968); N.H. REV. STAT. ANN. § 349:1 (1966); N.C. GEN. STAT. § 66-68 (1963); ORE. REV. STAT. § 648.005 (1965); S.C. CODE ANN. § 48-1 (1962); UTAH CODE ANN. § 42-2-5 (Supp. 1967); VT. STAT. ANN. tit. 11, §§ 1621, 1623 (Supp. 1967); VA. CODE ANN. § 59-169 (1950).

<sup>141</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116 (3).

<sup>142</sup> Uniform Business Names Act § 5(2b) (Victoria 1962).

<sup>143</sup> Berg Metals Corp. v. Wilson, 170 Cal. App. 2d 559, 399 P.2d 869 (1959); C.H. Batchelder & Co. v. Batchelder, 220 Mass. 42, 107 N.E. 455 (1914). But see 1936 IOWA OPS. ATT'Y GEN. 254.



has expressed the view that the corporate exception in the Florida statute applies only to use of the actual corporate name.<sup>144</sup> This marked trend toward inclusion of corporations is noteworthy in view of the significant number of corporations presently doing business in the United States under assumed names. There is no substantial reason for excluding a corporation from coverage unless the particular state prohibits a corporation from engaging in business under a name other than its corporate name.<sup>145</sup>

To meet the problem created by including corporations within the terms of a fictitious business name statute, seven states,<sup>146</sup> the United Kingdom,<sup>147</sup> and the Australian states<sup>148</sup> now provide by statute that a corporation need not file a certificate if it is doing business in its actual corporate name. This provision precludes a construction of the statute that would require a filing with the agency in charge of corporations in the particular state as well as with the office designated to receive fictitious name statements. This is a sensible rule because the corporate name should not be considered "fictitious"; it is the formally adopted name of a "legal person."<sup>149</sup> However, when a corporation does business under a name different from that under which it is incorporated, it should be required to file in the same manner and in the same place as any other person using a fictitious business name. Such a rule allows an interested person to trace down a particular name by searching the files in a single location. It would also fill a gap in the California corporate registration provisions since a California corporation is not otherwise required to file a certificate when it does business in a name other than its corporate name. The California statute should be revised to codify the decision in *Berg Metals* to include expressly corporations doing business under a fictitious name.

#### *Foreign Corporations Qualified to Transact Business in California*

California Corporations Code sections 6403-08 prohibit a foreign corporation from transacting intrastate business in California without having first obtained a certificate of qualification from the secretary of state. To obtain a certificate of qualification, the corporation must file a statement containing information specified in the stat-

<sup>144</sup> 1951 FLA. ATT'Y GEN. BIENNIAL REP. 756.

<sup>145</sup> See cases cited note 3 *supra* and accompanying text.

<sup>146</sup> COLO. REV. STAT. ANN. § 141-2-1 (1963); GA. CODE ANN. § 106-304 (1956); MASS. ANN. LAWS ch. 110, § 6 (1967); N.H. REV. STAT. ANN. § 349:1 (1966); N.C. GEN. STAT. § 66-68 (1965); S.C. CODE ANN. § 48-1 (1962); UTAH CODE ANN. § 42-2-9 (Supp. 1967).

<sup>147</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 1, as amended Companies Act of 1947, 10 & 11 Geo. 6, c. 47, § 58.

<sup>148</sup> Uniform Business Names Act § 5(2b) (Victoria 1962).

<sup>149</sup> N. LATTIN, CORPORATIONS 60 (1959).

ute.<sup>150</sup> The use of misleading or deceptive corporate names is prohibited; the secretary of state is authorized, however, to permit a foreign corporation to substitute a fictitious name, if the corporate name is the same as or deceptively similar to the name of a domestic or another foreign corporation authorized to transact business in California, or if its use would be likely to mislead the public.<sup>151</sup>

These California provisions relating to foreign corporations are generally satisfactory. At the present time, foreign corporations file only with the secretary of state.<sup>152</sup> The fictitious name statements, which are now filed only at the county level, contain no reference to the fact that the firm is not a domestic corporation. The statement should indicate the fact that the business is a foreign corporation so that the other information on file with the secretary of state will be readily accessible to interested persons. If central filing of fictitious business name statements is adopted,<sup>153</sup> the statement should still contain an indication that the business is a foreign corporation so the persons using the local file will be aware of that fact and will have a ready cross-reference to other files.

### **Persons Not Regularly Transacting Business in California**

The California statute has been held not to cover a person who does not maintain a place of business in California.<sup>154</sup> The need for California residents to be able to discover the identity of persons who do not have an established place of business in California seems at least as great as the need to be able to discover the identity of persons doing business from a fixed location within the state. Most foreign partnerships doing business in California are required to designate an agent for service of process if they do not maintain a place of business in this state,<sup>155</sup> and the extension of the fictitious business name statute to cover such partnerships would not impose a substantial additional burden on them, especially if filing under the fictitious business name statute were in the same office as the filing of the designation of an agent for service of process. Foreign corporations are also required to file to qualify to do business in

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<sup>150</sup> CAL. CORP. CODE § 6403.

<sup>151</sup> CAL. CORP. CODE § 6404.

<sup>152</sup> CAL. CORP. CODE § 6401, Cal. Stats. 1947, ch. 1038, § 6401, at 2405, required a foreign corporation also to file a copy of its articles with the county clerk of the county in which its principal place of business in this state was located and with the county clerk of any other county in this state in which it owns real property. This section was repealed in 1959.

<sup>153</sup> See text accompanying notes 160-86 *infra*.

<sup>154</sup> Moon v. Martin, 185 Cal. 361, 197 P. 77 (1921).

<sup>155</sup> CAL. CORP. CODE § 24003.

this state<sup>156</sup> and the requirement that they file under a fictitious name statute would impose no substantial additional burden.

Some jurisdictions such as Michigan<sup>157</sup> and the Australian states<sup>158</sup> specifically provide that certain transactions will not be considered "doing business" within the meaning of the statute. A better method would be to require only businesses "regularly" transacting business in this state to file. Reliance may be placed upon the normal judicial construction of the term "doing business" in cases involving fictitious names.<sup>159</sup> Inclusion of the term "regularly" will make it clear that the statute does not apply to a person who engages in only isolated transactions in California.

### Recommendation

The problems of what business entities are covered by a particular statute and what firm names must be registered have caused a great deal of litigation. A carefully drafted, comprehensive statute could eliminate most of these problems. Two appropriate sections of a definitional nature would be as follows:

(a) As used in this chapter, "fictitious business name" means:

(1) In the case of an individual, a name that does not include the surname of the individual or a name that suggests the

<sup>156</sup> CAL. CORP. CODE § 6403.

<sup>157</sup> MICH. STAT. ANN. § 19.821 (Supp. 1968), provides, "that the selling of goods by sample or through traveling agents or traveling salesmen or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this act as conducting or transacting business so as to require the filing of said certificate."

North Carolina and West Virginia have similar provisions. N.C. GEN. STAT. § 66-68(d) (1963); W. VA. CODE ANN. § 47-8-2 (1966).

<sup>158</sup> Uniform Business Names Act § 4(2) (Victoria 1962) provides:

"For the purposes of this Act a person shall not be regarded as carrying on business within this State for the reason only that within the State he—

(a) is or becomes a party to any action or suit or any administrative or arbitration proceeding, or effects settlement of an action, suit or proceeding of any claim or dispute;

(b) maintains any bank account;

(c) effects any sale through an independent contractor;

(d) creates evidence of any debt or creates a charge on real or personal property;

(e) secures or collects any of his debts or enforces his rights in regard to any securities relating to such debts;

(f) conducts an isolated transaction that is completed within a period of thirty-one days, but not being one of a number of similar transactions repeated from time to time; or

(g) invests any of his funds or holds any property."

<sup>159</sup> See *Moon v. Martin*, 185 Cal. 361, 197 P. 77 (1921); *Doll v. Rodgers*, 98 Colo. 36, 52 P.2d 1147 (1935); *Smith v. Johnson*, 47 Idaho 468, 276 P. 320 (1929); *Pacific States Automotive Fin. Corp. v. Addison*, 45 Idaho 270, 261 P. 683 (1927); *Loveland v. Shultz*, 108 Pa. Super. 358, 165 A. 67 (1933); *General Motors Acceptance Corp. v. Lund*, 60 Utah 247, 208 P. 502 (1922).

existence of additional owners.

(2) In the case of a partnership or other association of persons, a name that does not include the surname of each general partner or a name that suggests the existence of additional owners.

(3) In the case of a corporation, any name other than the corporate name stated in its articles of incorporation.

(b) A name that suggests the existence of additional owners within the meaning of subdivision (a) is one which includes such words as "Company," "& Company," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted.

(c) As used in paragraph (2) of subdivision (a), "general partner" means:

(1) In the case of a partnership, a general partner.

(2) In the case of an unincorporated association other than a partnership, a person interested in such business whose liability with respect to the business is substantially the same as that of a general partner.

As used in this chapter, "person" includes individuals, partnerships or other associations, and corporations.

To exclude nonprofit associations and corporations, the section that requires filing should provide that "every person who is regularly transacting business in this state for a profit under a fictitious name" must file in the manner prescribed by the statute.

### Place of Filing

California Civil Code section 2466 requires only that the fictitious business name certificate be filed with the clerk of the county in which the firm has its principal place of business. A number of other states have adopted a similar rule and require that the certificate be filed in the county or town of the firm's principal place of business.<sup>160</sup> In addition, eight states require filing in the county or town "where the business is to be conducted."<sup>161</sup> Although it is not entirely clear what interpretation is to be given this filing requirement, these eight statutes probably mean that the filing is to be made in the county or town of the principal place of business. The requirement in most other states, however, is that the fictitious name

<sup>160</sup> FLA. STAT. § 865.09(d) (1965); GA. CODE ANN. § 106-301 (1956); MONT. REV. CODES ANN. § 63-601 (1962); N.D. CENT. CODE § 45-11-01 (1960); OHIO REV. CODE ANN. § 1777.02 (Page 1964); OKLA. STAT. tit. 54, § 81 (1961); S.C. CODE ANN. § 48-1 (1962).

<sup>161</sup> ARIZ. REV. STAT. ANN. § 29-102 (Supp. 1967) (county); COLO. REV. STAT. ANN. § 141-2-1 (1963) (county); CONN. GEN. STAT. REV. § 35-1 (1958), as amended No. 84, [1967] Conn. Pub. Acts 112 (town); IOWA CODE § 547.1 (1966) (county); ME. REV. STAT. ANN. tit. 31, §§ 1-2 (1964) (town); MD. ANN. CODE art. 2, § 18 (1957) (county); R.I. GEN. LAWS ANN. § 6-1-1 (1956) (town); VA. CODE ANN. § 50-74 (1967) (county).

certificate be filed in each county in which business is to be conducted.<sup>162</sup>

Still other states require central filing, either alone or in addition to local filing. Missouri,<sup>163</sup> Nebraska,<sup>164</sup> New Hampshire,<sup>165</sup> and Utah<sup>166</sup> require filing only with the secretary of state. The United Kingdom statute provides for central filing in the particular country in which business is done,<sup>167</sup> and the Australian statutes require registration with the registrar of companies for the state in which business is to be transacted.<sup>168</sup> New Jersey,<sup>169</sup> Pennsylvania,<sup>170</sup> and Vermont<sup>171</sup> require filing at both the state and local levels. Indiana,<sup>172</sup> Colorado,<sup>173</sup> and Virginia<sup>174</sup> follow a similar rule with respect to corporations but not as to individuals and partnerships. Michigan requires partnerships and corporations, but not individuals, to file a certificate in the counties in which business is transacted as well as with the treasurer of the state.<sup>175</sup> Oregon has a unique provision which requires filing with the corporations commissioner who then sends a copy of the certificate to the county clerk of each county in which the registrant has indicated an intention to do business.<sup>176</sup>

Many of the states in this latter group at least partially coordinate the fictitious business name filings with their trade name protection system.<sup>177</sup> Where this is done, the entire system can consolidate the business name filings of sole proprietorships, unincorporated associations, and corporations, other trade name filings, corporate organization papers, and secured transaction information. Such a scheme lends itself to a central filing system that makes all information

<sup>162</sup> ALA. CODE tit. 14, § 230 (1958); ARK. STAT. ANN. § 70-401 (1947); DEL. CODE ANN. tit. 6, § 3101 (1953); IDAHO CODE ANN. § 53-501 (1957); ILL. REV. STAT. ch. 96, § 4 (1965); IND. ANN. STAT. § 50-201 (Supp. 1967); KY. REV. STAT. § 365.010 (1962); LA. REV. STAT. § 51:281 (1950); MINN. STAT. § 333.01 (1965); NEV. REV. STAT. § 602.010 (1963); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); N.C. GEN. STAT. § 66-68 (1965); S.D. CODE § 49.0801 (1939); TEX. PEN. CODE art. 1067 (1948); W. VA. CODE ANN. § 47-8-2 (1966). See also MASS. GEN. LAWS ANN. ch. 110, § 5 (Supp. 1967) (town).

<sup>163</sup> MO. REV. STAT. § 417.210 (1959).

<sup>164</sup> NEB. REV. STAT. § 87-201 (1966).

<sup>165</sup> N.H. REV. STAT. ANN. § 349:5 (1966).

<sup>166</sup> UTAH CODE ANN. § 42-2-5 (Supp. 1967).

<sup>167</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).

<sup>168</sup> Uniform Business Names Act §§ 4-7 (Victoria 1962).

<sup>169</sup> N.J. STAT. ANN. §§ 56:1-1 to 56:1-2 (1964).

<sup>170</sup> PA. STAT. ANN. tit. 54, § 28.1 (Supp. 1967).

<sup>171</sup> VT. STAT. ANN. tit. 11, § 1621 (Supp. 1967).

<sup>172</sup> IND. ANN. STAT. § 50-201 (Supp. 1967).

<sup>173</sup> COLO. REV. STAT. ANN. § 141-2-1 (1963).

<sup>174</sup> VA. CODE ANN. § 50-74, § 59-170 (1967).

<sup>175</sup> MICH. STAT. ANN. § 19.821 (Supp. 1968).

<sup>176</sup> ORE. REV. STAT. §§ 648.010, 648.045 (1965).

<sup>177</sup> See statutes cited notes 19-22 *supra* and accompanying text.

about a particular business available at a single location. However, the cost of instituting and maintaining such a comprehensive system in California might outweigh its value, especially since trade names are not now screened for similarity or other elements of possible unfair competition.

Nevertheless, centralized filing of fictitious business name certificates without trade name protection provisions would be a marked improvement in California practice. When the first fictitious name statutes were enacted, unincorporated associations and sole proprietors rarely did business in more than a localized area. Filing in the county or counties of operation was the least expensive and most efficient system. However, modern business has spread beyond these limits and has been accompanied by a substantial increase in credit transactions. Today, many businesses operate in several counties of the same state or in several states. It is therefore necessary that all information be obtainable in a single location. In California, where filing is now required only in the county of the principal place of business, an interested person often must search the records of several counties before the principal place of business is found. To find all similarly named businesses in this state, he must search the files in each of the 58 counties. Furthermore, the present filing system does not permit the gathering, at one location, of data about different businesses from different parts of the state.

Corporation organization documents must be filed with the secretary of state in California,<sup>178</sup> and California requires central filing for financing statements under section 9401 of the Commercial Code. Corporations Code sections 24003-06, enacted in 1967,<sup>179</sup> require the secretary of state to process and index information concerning the principal offices in this state of unincorporated associations and their agents for service of process. A state that is able to accommodate such filings at the state level should have no problem adding a file for fictitious business name statements, especially where data processing equipment is available, as it is in California.<sup>180</sup> The California secretary of state indicates that his office would be able to handle the additional workload with its data processing equipment.<sup>181</sup> Since the filings of information relating to domestic and foreign corporations,<sup>182</sup> foreign partnerships,<sup>183</sup> unincorporated as-

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<sup>178</sup> CAL. CORP. CODE § 308.

<sup>179</sup> Cal. Stats. 1967, ch. 1324, § 6.

<sup>180</sup> Of 43 states responding to a 1963 survey on the use of data processing equipment by state and local governments, 40 indicated some use of EDP systems. Price & Mulvihill, *The Present and Future Use of Computers in State Government*, 25 PUB. ADMIN. REV. 142, 144 (1965).

<sup>181</sup> Letter from Office of Secretary of State, State of California, to Cal. Law Revision Comm'n, July 28, 1966.

<sup>182</sup> See CAL. CORP. CODE § 308.

<sup>183</sup> CAL. CORP. CODE § 15700.

sociations,<sup>184</sup> and financing statements<sup>185</sup> are now made with the secretary of state, the fictitious name statements also should be filed with him.

Central filing, combined with the use of data processing equipment, would make it considerably easier for persons outside California and persons in counties other than the county of a firm's principal place of business to obtain the information contained in the fictitious business name statements. The use of data processing equipment also would make it possible to run fictitious business name searches more quickly and accurately than is possible under existing law. For example, searches could easily be made to determine whether a statement is on file for: (1) a business at a specific address that uses a specific fictitious business name, (2) every business having its principal place of business in a given county and using a specific fictitious business name, (3) all businesses within the state using a specific fictitious business name, and (4) all businesses within the state owned in whole or in part by a named individual. In addition to these advantages, the data processing equipment would automatically "print out" the results of a search, thus minimizing the possibility of human error.

However, in addition to central filing, retention of a local file would be highly desirable. There is substantial use of fictitious name information at the county level in California<sup>186</sup> and a local file would allow a businessman to check easily the files in his county when that is all that is required. Thus, the Oregon system—a central filing with a state officer who is directed to send copies of the certificate to each of the interested counties—should serve as a guide for the new California statute. A less expensive system which meets most of the requirements is recommended. It would require the California secretary of state to send a copy only to the county of the principal place of business. In addition, the latter plan would coordinate more easily with the present system in California which requires filing only in the county of the principal place of business.

### **Information Required in Certificates**

The information required in a fictitious business name statement depends upon the purpose of the statute in the particular jurisdiction. In California, the fictitious business name filings are not integrated with other business name filings. As a result, the statute requires only that the certificate state "the name in full and the place of residence of such person [transacting business under the fic-

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<sup>184</sup> CAL. CORP. CODE § 24003.

<sup>185</sup> CAL. CORP. CODE § 9401.

<sup>186</sup> See note 34 *supra* and accompanying text.

titious name] and . . . the names in full of all the members of such partnership [transacting business under the fictitious name] and their places of residence."<sup>187</sup> Thirty states have comparable provisions.<sup>188</sup> Nineteen of these states, like California, require no additional information.<sup>189</sup>

Ten states,<sup>190</sup> the United Kingdom,<sup>191</sup> and the Australian states<sup>192</sup> require fictitious name statements to set forth the name of the business, its location, the name and addresses of the owners and a description of the kind of business to be conducted. These provisions are necessary in these states because they have adopted fictitious business name statutes that implement trade name protection systems or protect the public against misleading names.

Four states require the location of the firm's principal place of business to be listed in the certificate,<sup>193</sup> and this requirement generally coincides with a requirement that the statement be filed in the county in which the firm's principal place of business is located. Five states require that the location of the business be included in the certificate.<sup>194</sup> In these states, the statement must be filed in the

<sup>187</sup> CAL. CIV. CODE § 2466.

<sup>188</sup> ALA. CODE tit. 14, § 230 (1958); ARIZ. REV. STAT. ANN. § 29-102 (Supp. 1967); ARK. STAT. ANN. § 70-401 (1947); CONN. GEN. STAT. REV. § 35-1 (1960), as amended No. 84, [1967] Conn. Pub. Acts 112; DEL. CODE ANN. tit. 6, § 3101 (1953); FLA. STAT. § 865.09 (1965); IDAHO CODE ANN. § 53-501 (1957); ILL. REV. STAT. ch. 96, § 4 (1965); IND. ANN. STAT. § 50-201 (Supp. 1967); IOWA CODE § 547.1 (1966); KY. REV. STAT. § 365.010 (1962); LA. REV. STAT. § 51:281 (1950); MASS. ANN. LAWS ch. 110, § 5 (Supp. 1967); MINN. STAT. § 333.01 (1965); MO. REV. STAT. § 417.210 (1959); MONT. REV. CODES ANN. § 63-601 (1962); NEV. REV. STAT. § 602.020 (1957); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); N.C. GEN. STAT. § 66-68 (Supp. 1967); N.D. CENT. CODE § 45-11-01 (1960); OHIO REV. CODE ANN. § 1777.02 (Page 1964); OKLA. STAT. tit. 54, § 81 (1961); R.I. GEN. LAWS ANN. § 6-1-1 (1956); S.C. CODE ANN. § 48-1 (1962); S.D. CODE § 49.0801 (1939); TEX. PEN. CODE art. 1067 (1948); TEX. REV. CIV. STAT. art. 5927 (1948); UTAH CODE ANN. § 42-2-5 (Supp. 1967); VA. CODE ANN. §§ 50-74, 59-169 (1967); WASH. REV. CODE § 19.80.010 (1958); W. VA. CODE ANN. § 47-8-2 (1966).

<sup>189</sup> Arizona, Arkansas, Connecticut, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Texas, Washington, and West Virginia.

<sup>190</sup> COLO. REV. STAT. ANN. § 141-2-1 (1963); GA. CODE ANN. § 106-301 (1956); ME. REV. STAT. ANN. tit. 31, §§ 1-2 (1964); MD. ANN. CODE art. 2, § 18 (1957); NEB. REV. STAT. § 87-202 (1943); N.H. REV. STAT. ANN. § 349:5 (1966); N.J. STAT. ANN. § 56:1-1 (1964); ORE. REV. STAT. § 648.010 (1965); PA. STAT. tit. 54, § 28.1 (Supp. 1967); VT. STAT. ANN. tit. 11, § 1621 (Supp. 1967).

<sup>191</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).

<sup>192</sup> Uniform Business Names Act § 9 (Victoria 1962).

<sup>193</sup> N.H. REV. STAT. ANN. § 349:5 (1966); PA. STAT. tit. 54, § 28.1 (Supp. 1967); S.D. CODE § 49.0801 (1939); UTAH CODE ANN. § 42-2-5 (Supp. 1967).

<sup>194</sup> IOWA CODE § 547.1 (1966); MD. ANN. CODE art. 2, § 18 (1957); MASS. GEN. LAWS ANN. ch. 110, § 5 (Supp. 1967); VT. STAT. ANN. tit. 11, § 1621 (Supp. 1967); VA. CODE ANN. § 50-74 (1967).



county in which the business is located. Thus, this provision serves the same purpose as one requiring the firm to list its principal place of business. Oregon requires that every county in which the name will be used be listed in the certificate.<sup>195</sup> This information enables the commissioner of corporations to send each interested county clerk a copy of the certificate as required by the Oregon statute.<sup>196</sup> If the California statute is amended, as it should be, to provide for filing with the secretary of state, it should include a provision requiring the person filing to list his principal place of business so that a certificate may be sent to the proper county clerk.

The New York statute includes a requirement that the ages of any infant partners be set forth.<sup>197</sup> At the time that the statute was enacted, the New York law prescribed a special limited liability for infant partners which has been described as follows:

The law does not deny an infant the right to enter a partnership. As between the infant and his co-partners, the contract of partnership is subject to the infant's privilege of avoidance, though binding upon the adult partners; upon such avoidance, the minor may recover from his co-partners his contribution to capital, less the amounts he received from the business. The infant may avoid *personal* liability on partnership obligations but as respects his contribution to capital, the infant's right of restitution is subordinate to the right of creditors to apply the firm assets to the payment of their claims.<sup>198</sup>

A later statute changed this rule with respect to infants over the age of 18 years where the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made.<sup>199</sup> The requirement remains in the statute to protect persons dealing with a firm that has an infant partner under the age of 18 as well as those over 18 when a contract is such that it might be considered "improvident."

In California, a minor is any person under 21 years of age, except that a married person over 18 years of age is considered an adult for the purposes of property or contract transactions.<sup>200</sup> The limits on the contractual capacity of minors are set forth in detail in California Civil Code sections 33 to 37. Section 33 provides in part that, "[A] minor cannot give a delegation of power."<sup>201</sup> This section codi-

<sup>195</sup> ORE. REV. STAT. § 648.010 (1965).

<sup>196</sup> ORE. REV. STAT. § 648.045 (1965).

<sup>197</sup> N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967). Comparable provisions are found in ALA. CODE tit. 14, § 230 (1958); Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 3; Uniform Business Names Act § 7(2) (Victoria 1962).

<sup>198</sup> 1938 N.Y. LAW REVISION COMM'N REPORTS 106-07 (footnotes omitted; emphasis in original).

<sup>199</sup> N.Y. GEN. OBLIGATIONS LAW § 3-101(1) (McKinney 1964).

<sup>200</sup> CAL. CIV. CODE § 25.

<sup>201</sup> A minor may also disaffirm any contract made under the age of 18 without restoring the consideration received. Where a contract is made when

fies the common law rule, that, except as expressly permitted by statute, any delegation of power by a minor is void.<sup>202</sup> As a result, it is not even necessary for a minor to disaffirm such a contract after he attains his majority.<sup>203</sup> The minor's misrepresentation of age or his failure to reveal his incapacity to the other contracting party does not estop him from asserting his lack of capacity.<sup>204</sup> Thus, it would seem that in California, since no minor can delegate authority and since any such attempted delegation is void, a minor cannot be a partner. Hence, there would appear to be no need for a provision similar to the New York requirement.

Michigan recently enacted a statute which gives an interested person a ready cross-reference to other public documents filed by a firm using a fictitious name:

The [fictitious name] certificate . . . , in the case of any person named therein other than an individual, shall state the nature of the entity; the statutory law, if any, pursuant to which it was organized; the place and the date of filing with any governmental authority, identifying it, of any documents, describing them, required to be filed in order to accomplish or complete the organization of the entity and to entitle it to operate or transact business under the laws of this state and, if organized elsewhere, of the state or county where organized but such certificate need not list the names and addresses of stockholders of corporations . . . .<sup>205</sup>

A similar provision should be added to the California statute because it provides a means of coordinating the various business filings in the state. However, the Michigan provision is much more comprehensive than that needed in California. All that is needed is a statement of the type of "person" running the business; the certificate should state whether the business is (1) an individual proprietorship, (2) a domestic partnership or other domestic unincorporated association, (3) a foreign partnership or other foreign unincorporated association, (4) a domestic corporation, or (5) a foreign corporation. With this information, a person could easily obtain the other documents since almost all business filings in California are made with the secretary of state or the county clerk of the firm's principal place of business and the principal place of business will also be listed on the certificate.

### **Indexing Requirements**

Section 2470 of the California Civil Code provides:

Every county clerk must keep a register of the names of firms and

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the minor is over 18 years old, he may disaffirm upon restoring the consideration received or paying its equivalent. CAL. CIV. CODE § 35.

<sup>202</sup> 1 CALIFORNIA FAMILY LAWYER § 17.8 (Cal. Cont. Educ. Bar ed. 1962).

<sup>203</sup> See *Lee v. Hibernia Sav. & Loan Soc'y*, 177 Cal. 656, 171 P. 677 (1918); *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 137 P. 911 (1913).

<sup>204</sup> *Lee v. Hibernia Sav. & Loan Soc'y*, 177 Cal. 656, 171 P. 677 (1918); *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 137 P. 911 (1913).

<sup>205</sup> MICH. STAT. ANN. § 19.821 (Supp. 1968).

persons mentioned in the certificates filed with him pursuant to this article, entering in alphabetical order the name of every such person who does business under a fictitious name, and the fictitious name, and the name of every such partnership, and of each partner therein.

Twelve other states also require that an alphabetical index or register be maintained for both the name of the business and the names of the owners.<sup>206</sup>

Eleven states have only a provision for indexing the name or names of the persons filing.<sup>207</sup> Although this may be considered a cumbersome procedure—in some instances of large partnerships 50 or more names may have to be indexed—it is a necessary index for tracing the business assets of a particular person. This index alone, however, is not sufficient. Most persons using the fictitious name files know the name of the business rather than that of the owner. For this reason, two states require only that the assumed name be indexed.<sup>208</sup> This is, of course, usually the most essential index. Collection agencies, persons checking credit references, and persons with claims against a firm using a fictitious name normally will use this index.

In some states, the usefulness of the fictitious name filings is frustrated because of nonexistent or faulty indexing requirements. Sixteen states have either no provision for indexing<sup>209</sup> or merely have a provision that the statements are to be “recorded,”<sup>210</sup> “filed,”<sup>211</sup> “indexed,”<sup>212</sup> or “registered.”<sup>213</sup> These statutes provide no guidelines to the type of index to be maintained or its accessibility to interested persons. Although these states may have provided for

<sup>206</sup> CONN. GEN. STAT. REV. § 35-1 (1960), *as amended* No. 84, [1967] Conn. Pub. Acts 112; DEL. CODE ANN. tit. 6, § 3103 (1953); IND. ANN. STAT. § 50-201 (Supp. 1967); MD. ANN. CODE art. 2, § 9 (1957); MONT. REV. CODES ANN. § 63-604 (1962); NEV. REV. STAT. § 602.050 (1957); N.D. CENT. CODE § 45-11-06 (1960); OHIO REV. CODE ANN. § 1777.05 (Page 1964); OKLA. STAT. tit. 54, § 85 (1961); R.I. GEN. LAWS ANN. § 6-1-2 (Supp. 1966); S.D. CODE § 49.0803 (1939); VA. CODE ANN. §§ 50-75, 59-174 (1967).

<sup>207</sup> ARK. STAT. ANN. § 70-403 (1957); IDAHO CODE ANN. § 50-505 (Supp. 1967); ILL. REV. STAT. ch. 96, § 6 (1965); KY. REV. STAT. § 365.010 (1960); LA. REV. STAT. § 51:282 (1950); MICH. STAT. ANN. § 19.825 (1968 Supp.); MINN. STAT. § 333.04 (1965); N.J. STAT. ANN. §§ 56:1-56:3 (Supp. 1966); TEX. REV. CIV. STAT. art. 5926 (1948); UTAH CODE ANN. § 42-2-7 (Supp. 1967); W. VA. CODE ANN. § 47-8-3 (1966).

<sup>208</sup> GA. CODE ANN. § 106-302 (1956); N.C. GEN. STAT. § 66-69 (Supp. 1967).

<sup>209</sup> Arizona, Missouri, Vermont, Washington.

<sup>210</sup> ALA. CODE tit. 14, § 230 (1958); COLO. REV. STAT. ANN. § 141-2-1 (1963); ME. REV. STAT. ANN. tit. 31, § 4 (1964); PA. STAT. tit. 54, § 28.1 (Supp. 1966).

<sup>211</sup> FLA. STAT. § 865.09 (1965); IOWA CODE § 547.1 (1966); N.H. REV. STAT. ANN. § 349:7 (1966).

<sup>212</sup> MASS. GEN. LAWS ANN. ch. 110, § 5 (Supp. 1967); NEB. REV. STAT. § 87-205 (1966); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); S.C. CODE ANN. § 48-3 (1962).

<sup>213</sup> ORE. REV. STAT. § 648.010 (1965).

an adequate system by administrative mandate,<sup>214</sup> the statute should provide for the types of indices to be maintained to assure that the information will be available in useful form. The California type of index is recommended because it is the most comprehensive and useful. It allows an interested person to determine all of the available information about a business if he knows the name of either the business or the owner. To reduce expenses, it might be advisable to provide for a comprehensive index at the state level and only an index of fictitious business names at the county level since most persons using the county file will know the name of the business rather than the name of the owner.<sup>215</sup>

### Updating the Files

The fictitious business name statute in California, Civil Code section 2469, requires that a new certificate be filed "on every change in the members of a partnership transacting business in this State under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business . . . ." The person or partnership filing and publishing a certificate may, upon ceasing to use that name, file a "certificate of abandonment."<sup>216</sup> Upon such abandonment, the county clerk must enter that fact in the register.<sup>217</sup> In addition, Corporations Code section 15035.5 provides that, whenever a partnership is dissolved, an affidavit of publication of the notice of dissolution must be filed with the county clerk.

Nine states have no express provision indicating when a new certificate must be filed.<sup>218</sup> Twenty states, like California, require a new filing whenever there is any change in the ownership of the business<sup>219</sup> although nine of these states<sup>220</sup> also specify other occur-

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<sup>214</sup> The Texas statute provides only for an alphabetical index of the names of the persons filing. TEX. REV. CIV. STAT. art. 5926 (1948). The Texas Attorney General has advised that an index be maintained for both the names of the persons filing and the business name. 1939 TEX. OPS. ATT'Y. GEN. No. 1630, at 436.

<sup>215</sup> In 1967, the County Clerks Association of California sponsored S.B. 1429 to repeal CAL. CIV. CODE § 2470 and thereby eliminate the alphabetical indexing requirements. The bill died in the Senate Judiciary Committee.

<sup>216</sup> CAL. CIV. CODE § 2469.1.

<sup>217</sup> CAL. CIV. CODE § 2470.

<sup>218</sup> Alabama, Connecticut, Florida, Kentucky, Louisiana, Maryland, North Carolina, Rhode Island, West Virginia.

<sup>219</sup> ARIZ. REV. STAT. ANN. § 29-102 (Supp. 1967); COLO. REV. STAT. ANN. § 141-2-1 (1963); DEL. CODE ANN. tit. 6, § 3102 (1953); GA. CODE ANN. § 106-301 (1956); IDAHO CODE ANN. § 53-503 (1957); IOWA CODE § 547.2 (1966); MINN. STAT. § 333.03 (1965); MO. REV. STAT. § 417.210 (1959); MONT. REV. CODES ANN. § 63-603 (1962); NEB. REV. STAT. § 87-202 (1966); NEV. REV. STAT. § 602.040 (1957); N.D. CENT. CODE § 45-11-05 (1960); OHIO REV. CODE ANN. § 1777.03 (Page 1964); OKLA. STAT. tit. 54, § 84 (1961); ORE. REV. STAT. § 648.025 (1965); PA. STAT. ANN. tit. 54, § 28.7 (Supp. 1967); S.D. CODE § 49.0801 (1939); UTAH

rences, such as a change in the registered name,<sup>221</sup> that require a new certificate. Illinois<sup>222</sup> and Massachusetts<sup>223</sup> require a new filing whenever an owner's residence address is changed. Four states require a new filing whenever there is a dissolution or termination of the business.<sup>224</sup> Four states expressly require that a withdrawing owner must file a statement to avoid liability for debts contracted after his withdrawal.<sup>225</sup> New York requires a new filing on any change in the facts shown in the statement;<sup>226</sup> this statute is broad enough to include even immaterial facts. The Illinois<sup>227</sup> and Australian<sup>228</sup> acts list a number of events that necessitate a new filing.

The wide variation in these statutes seems unnecessary. Each statute should require a new filing whenever there is a change in a material fact. In California, such material facts include the name of the business, the principal address of the business, if listed, and the name or names of the owner or owners of the business. A change in the residence address of an owner should not be considered such a material fact. To require a new filing in this case would impose an undue burden on businessmen. The address of a registrant, if changed, can be traced from the recent address found in the certificate.

Many states either require or permit a withdrawing partner to file a certificate of withdrawal so that his interests will not be prejudiced by failure of the remaining partners to file.<sup>229</sup> This is not

CODE ANN. § 42-2-6 (Supp. 1967); VA. CODE ANN. § 50-74 (1967); WASH. REV. CODE § 19.80.030 (1958).

<sup>220</sup> Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota.

<sup>221</sup> See NEV. REV. STAT. § 602.040 (1957); N.D. CENT. CODE § 45-11-05 (1960); OHIO REV. CODE ANN. § 1777.03 (Page 1964); OKLA. STAT. tit. 54, § 84 (1961); ORE. REV. STAT. § 648.025 (1965).

<sup>222</sup> ILL. REV. STAT. ch. 96, § 4 (1965).

<sup>223</sup> MASS. GEN. LAWS ANN. ch. 110, § 5 (Supp. 1967).

<sup>224</sup> IND. ANN. STAT. § 50-201 (Supp. 1967); MICH. STAT. ANN. § 19.824 (Supp. 1968); N.J. REV. STAT. ANN. § 56:1-6 (Supp. 1966); VT. STAT. ANN. tit. 11, § 1628 (Supp. 1967).

<sup>225</sup> ARK. STAT. ANN. § 70-402 (1947); ME. REV. STAT. ANN. tit. 31, § 1 (1964); S.C. CODE ANN. § 48-2 (1962); TEX. PEN. CODE art. 1068 (1948); TEX. REV. CIV. STAT. art. 5925 (1948).

<sup>226</sup> N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967).

<sup>227</sup> ILL. REV. STAT. ch. 96, §§ 4, 6a (1965) (change of name or residence address of owner; change of address of any place of business in the county where assumed name registered; addition of any owner to a registered business organization; change of business address to new county; establishment of additional location for doing business; withdrawal by an owner).

<sup>228</sup> Uniform Business Names Act § 12 (Victoria 1962) (change occurs which renders description of nature of business insufficient to disclose true nature of business; place or places where business done changed; change in name of resident agent; change in Christian or surname or place of residence of any person; change in the corporate name; dissolution of business; addition of owners).

<sup>229</sup> ARK. STAT. ANN. § 70-402 (1947); ILL. REV. STAT. ch. 96, § 6a (1965);

presently allowed by the California statute, although the partnership is required to file when there has been a change in its membership. Such a provision does not appear to be necessary in California. Corporations Code section 15035.5 requires a notice of dissolution of partnership to be published and an affidavit to be filed with the county clerk. A "dissolution" is defined as the "change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."<sup>230</sup> The publication of this notice and the filing of the affidavit should rebut the presumption, under Civil Code section 2471, that the facts contained in a fictitious name statement are true, and thereby effectively protect the withdrawing partner.

### Purging the Files

#### Expiration

The California statute, Civil Code section 2469.2, provides:

Every certificate of fictitious name filed under the authority of this chapter shall expire and be of no further force and effect at the end of five years following the first day of January next after the filing of a certificate of fictitious name with the county clerk in accordance with Section 2466, unless at any time within 12 months immediately preceding said date of expiration a renewal certificate containing all information required in the original certificate and subscribed and acknowledged as required by that section is filed with the county clerk with whom said original is on file.

Only six other states and the Australian Uniform Act provide for expiration of the certificate after a given length of time. The Australian act specifies that the certificate remains in force for 3 years and requires the registrar to send notice to the owner when it is time for renewal.<sup>231</sup> Michigan<sup>232</sup> and Oregon<sup>233</sup> provide that the certificate is effective for 5 years and is renewable, and that notice shall be mailed to the registrant. Utah prescribes an 8-year period with provision for renewal and notice.<sup>234</sup> Nebraska,<sup>235</sup> New Hampshire,<sup>236</sup> and Texas<sup>237</sup> use 10-year periods, with provision for renewal, but neither Nebraska nor Texas requires that any notice be given to the owner at the time of expiration.

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ME. REV. STAT. ANN. tit. 31, § 1 (1964); MASS. GEN. LAWS ANN. ch. 110, § 5 (Supp. 1967); N.H. REV. STAT. ANN. § 349:2 (1966); N.Y. GEN. BUS. LAWS § 130 (McKinney Supp. 1967); PA. STAT. ANN. tit. 54, § 28.7 (Supp. 1967); S.C. CODE ANN. § 48.2 (1962); S.D. CODE § 49.0801 (1939); TEX. PEN. CODE art. 1068 (1948); TEX. REV. CIV. STAT. art. 5925 (1948).

<sup>230</sup> CAL. CORP. CODE § 15029.

<sup>231</sup> Uniform Business Names Act § 11 (Victoria 1962).

<sup>232</sup> MICH. STAT. ANN. § 19.821(1) (1964).

<sup>233</sup> ORE. REV. STAT. §§ 648.010, 648.035 (1965).

<sup>234</sup> UTAH CODE ANN. § 42-2-8 (Supp. 1967).

<sup>235</sup> NEB. REV. STAT. § 87-204 (1966).

<sup>236</sup> N.H. REV. STAT. ANN. § 349:8 (1966).

<sup>237</sup> TEX. REV. CIV. STAT. art. 5924 (1948).

These provisions attempt to prevent overloading the business name files with the names of firms that have ceased to carry on business in the particular jurisdiction under a registered name. The United Kingdom statute attempted to solve this problem by requiring the owner of a business to inform the registrar that he had ceased to do business, or be subject to a fine.<sup>238</sup> However, this provision was found to be ineffective because many persons ceased to do business without reporting that fact.<sup>239</sup> For this reason, the Australian Uniform Act provides for expiration of the registration in addition to requiring that an owner report when he had ceased doing business.<sup>240</sup>

California should retain its expiration provision because it is the only practical way of providing an up-to-date, unencumbered file. However, the statute should also require that notice of the impending expiration be sent to the owner of the business to minimize the possibility of the registrant's being unaware of the expiration and the need for renewal. A similar procedure is provided by Corporations Code section 24006 with respect to statements filed by unincorporated associations to designate a principal place of business for venue purposes.

#### **Destruction of Outdated Certificates**

Civil Code section 2469.3 permits the county clerk to destroy a fictitious name certificate if it has expired or if a certificate of abandonment has been filed. However, the section also requires that mi-

<sup>238</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).

<sup>239</sup> P. HIGGINS, *THE LAW OF PARTNERSHIP IN AUSTRALIA AND NEW ZEALAND* 308-09 (1963). In a letter of December 18, 1967, to the California Law Revision Commission, Mr. R.B. James, Clerk of San Diego County, indicated that his office had conducted a survey showing that many businesses in California do not file certificates when they cease to do business. Thirty-eight numbers were picked in the age group of filings 10 years old and 38 in the age group of filings 5 years old. In the groups selected, every 25th number was listed. An envelope was addressed to the name and address exactly as it was contained in the San Diego County files. Printed postcards were included asking whether or not the business still existed. The results are as follows:

*FILLINGS—10 years old*

Inquiries sent - 38

Returned undelivered	17
Returned advising same business	8
Returned advising change	5
No reply	8

*FILINGS—5 years old*

Inquiries sent - 38

Returned undelivered	15
Returned advising same business	7
Returned advising change	2
No reply	14

<sup>240</sup> P. HIGGINS, *supra* note 239, at 308-09.

crofilm copies of the certificate be made and filed. This section is comparable to provisions in the Pennsylvania<sup>241</sup> and Utah<sup>242</sup> statutes. A better practice obtains in Michigan<sup>243</sup> and New Hampshire<sup>244</sup> where the certificates may be destroyed without retaining a copy after a given number of years. The time period selected must be sufficient to assure that substantially all actions against the firm have been barred by an applicable period of limitation and, at the same time, must allow for a worthwhile updating of the files. In California, the statute of limitations runs on oral contracts in 2 years,<sup>245</sup> on written contracts in 4 years,<sup>246</sup> and on torts in either 1 year<sup>247</sup> or 3 years<sup>248</sup> depending upon the nature of the wrong. Since almost all actions against business firms sound in contract or tort, it appears that a 4-year period for the retention of certificates after abandonment of the name or expiration would be sufficient. There may be a few instances where an action is initiated after the destruction of the certificate, but the number of such claims is insignificant in comparison with the importance of updating the files and the expense of microfilming material that has little, if any, permanent value.

### **The Publication Requirement**

California Civil Code section 2466 provides that a fictitious business name certificate

must be published . . . pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate . . . shall be filed with the county clerk within 30 days after the completion of such publication.

Government Code section 6064 requires publication once a week for 4 successive weeks. The certificate filed on a change of members of a partnership,<sup>249</sup> and the certificate of abandonment of a fictitious name<sup>250</sup> must be published in the same manner. However, a certificate of renewal need not be published if the information required in the original certificate has not changed.<sup>251</sup> In addition, section 15035.5 of the Corporations Code requires that notice of the dissolution of a

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<sup>241</sup> PA. STAT. ANN. tit. 54, § 28.10 (Supp. 1967) (records kept one year after microfilming).

<sup>242</sup> UTAH CODE ANN. § 42-2-8 (Supp. 1967) (permanent inactive file).

<sup>243</sup> MICH. STAT. ANN. § 19.821(1) (1964) (6 years after expiration).

<sup>244</sup> N.H. REV. STAT. ANN. § 349.8 (1966) (all registrations 10 years old and not renewed).

<sup>245</sup> CAL. CODE CIV. PROC. § 339.

<sup>246</sup> CAL. CODE CIV. PROC. § 337.

<sup>247</sup> CAL. CODE CIV. PROC. § 340.

<sup>248</sup> CAL. CODE CIV. PROC. § 338.

<sup>249</sup> CAL. CIV. CODE § 2469.

<sup>250</sup> CAL. CIV. CODE § 2469.1.

<sup>251</sup> CAL. CIV. CODE § 2469.2.



partnership be published at least once and that an affidavit of publication be filed with the county clerk.

The first statute to require publication of fictitious business name certificates was the New York enactment of 1833.<sup>252</sup> When that statute was revised and relocated, the publication requirement was deleted.<sup>253</sup> Meanwhile, California included a very similar provision in its Civil Code of 1872.<sup>254</sup> Subsequently, Montana,<sup>255</sup> Nevada,<sup>256</sup> North Dakota,<sup>257</sup> Ohio,<sup>258</sup> Oklahoma,<sup>259</sup> and South Dakota<sup>260</sup> enacted fictitious business name statutes that contained publication requirements based upon the California provision. Three of these states, plus New York, have since deleted the publication requirement: Ohio, which adopted its statute in 1894, deleted publication in 1896;<sup>261</sup> Nevada deleted publication in 1923;<sup>262</sup> and South Dakota eliminated the publication requirement in 1933.<sup>263</sup> In 1959, North Dakota, which had required publication in a newspaper of general circulation for 4 successive weeks—the existing California practice—reduced its requirement to one publication.<sup>264</sup> A few more recent statutes have included publication requirements.<sup>265</sup>

Of the 10 states that now require publication, only California,<sup>266</sup> Florida,<sup>267</sup> Montana,<sup>268</sup> and Oklahoma<sup>269</sup> require publication for 4 successive weeks. Two of these states, Montana and Oklahoma, adopted the California statute almost verbatim over 70 years ago. Illinois<sup>270</sup> requires three publications. Georgia,<sup>271</sup> Minnesota,<sup>272</sup> and Penn-

<sup>252</sup> Ch. 281, [1833] N.Y. Laws 404.

<sup>253</sup> Compare 3 N.Y. Rev. Stat. § 42 (Banks & Brothers 5th ed. 1859) with N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967) (continuing in force N.Y. Penal Law § 440, ch. 347, [1849] N.Y. Laws 502, which also did not require publication).

<sup>254</sup> CALIFORNIA CIVIL CODE ANNOTATED § 2469, at 109 (Haymond & Burch ed. 1872).

<sup>255</sup> MONT. REV. CODES ANN. § 63-601 (1962) (enacted in 1895).

<sup>256</sup> Ch. XL, § 1, [1887] Stat. of Nev. 46.

<sup>257</sup> N.D. CENT. CODE § 45-11-01 (1960); see § 4410, [1895] N.D. Rev. Code at 841.

<sup>258</sup> No. 794, [1894] Ohio Acts 257.

<sup>259</sup> OKLA. STAT. tit. 54, § 81 (1961) (enacted in 1887).

<sup>260</sup> See § 5252, [1899] Ann. S.D. Stat. 1374-75.

<sup>261</sup> No. 172, [1896] Ohio Acts 25.

<sup>262</sup> Ch. 156, [1923] Stat. of Nev. 271.

<sup>263</sup> Ch. 155, § 1 [1933] S.D. Stats. 160.

<sup>264</sup> Ch. 326, § 45-1101, [1959] Laws of N.D. 613-14.

<sup>265</sup> FLA. STAT. § 865.09(3) (1965); GA. CODE ANN. § 106-301 (1956); ILL. REV. STAT. ch. 96, § 4 (1965); MINN. STAT. § 333.01 (1965); NEB. REV. STAT. § 87-205 (1966); PA. STAT. ANN. tit. 54, § 28.3 (Supp. 1967).

<sup>266</sup> CAL. CIV. CODE § 2466; CAL. GOV'T CODE § 6064.

<sup>267</sup> FLA. STAT. § 865.09 (1965).

<sup>268</sup> MONT. REV. CODES ANN. § 63-601 (1962).

<sup>269</sup> OKLA. STAT. tit. 54, § 81 (1961).

<sup>270</sup> ILL. REV. STAT. ch. 96, § 4 (1965).

<sup>271</sup> GA. CODE ANN. § 106-301 (1956).

<sup>272</sup> MINN. STAT. § 333.01 (1965).

sylvania<sup>273</sup> require two publications, and Nebraska<sup>274</sup> and North Dakota<sup>275</sup> require only one.

New York, South Carolina, and the Australian states use posting as a substitute for publication. The New York<sup>276</sup> and Australian<sup>277</sup> statutes require that a copy of the most recent statement filed by the business be conspicuously posted on the premises. South Carolina<sup>278</sup> requires that a sign be posted at the place of business indicating the names of the owners. The United Kingdom statute is more extensive. To assure that interested persons have knowledge of the fact that a business is trading under an assumed name, the statute requires that no business letter or advertisement be issued or sent unless the name or names of the owner or owners appear thereon in legible characters.<sup>279</sup>

Newspaper publication of fictitious business name statements was useful and perhaps necessary in the horse-and-buggy days when there were very few newspapers in any one city or county, and unincorporated businesses normally did not operate in more than one locality. Since then, business has expanded to the point where many "small" enterprises operate in several counties or even in several states. Each area now has many newspapers,<sup>280</sup> including legal newspapers which the public normally does not consult. As a result, it has become almost impossible to assemble all of the filings for a large urban area merely by clipping the published newspaper notices.

Assembly of the published fictitious name data in an area such as Los Angeles County is almost impossible without a large staff. In 1966, the letterhead of the Los Angeles Newspaper Service Bureau, a "legal advertising clearing house," listed in an incomplete roster the names of 107 newspapers in Los Angeles County. The cost of having employees read the legal notices from all these newspapers plus those from adjoining counties, and maintaining an up-to-date, useful file of the information, is almost prohibitive. The Los Angeles county clerk indicates that approximately 21,000 fictitious name certificates were filed in that county alone last year.<sup>281</sup> There are approxi-

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<sup>273</sup> PA. STAT. ANN. tit. 54, § 28.3 (Supp. 1967).

<sup>274</sup> NEB. REV. STAT. § 87-205(1) (1966).

<sup>275</sup> N.D. CENT. CODE § 45-11-01 (1960).

<sup>276</sup> N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967).

<sup>277</sup> Uniform Business Names Act § 20 (Victoria 1962).

<sup>278</sup> S.C. CODE ANN. § 48.1 (1962).

<sup>279</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 18, *as amended*, Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).

<sup>280</sup> In 1966 California had approximately 670 weekly, and 156 daily, newspapers. CALIFORNIA INFORMATION ALMANAC 348 (San Jose News-Mecury ed. 1967).

<sup>281</sup> Letter from William G. Sharp, Los Angeles County Clerk, to Cal. Law Revision Comm'n, March 17, 1966.

mately 345,000 business names (including corporations) now on file in that office.<sup>282</sup> A businessman could hardly be expected to maintain a comprehensive file of the information. Where there are adequate public files, properly indexed, the overwhelming majority of users of fictitious business name information are forced to use those files. It seems clear, therefore, that publication of fictitious business name certificates no longer serves a useful purpose. This conclusion has been reached by almost all of the California businessmen who have made their views known to the California Law Revision Commission.<sup>283</sup> A similar view is taken by various public officials in Cal-

In a 1966 survey of the California county clerks by the Cal. Law Revision Comm'n, the number of fictitious name certificates filed during a calendar or fiscal year in each county was reported as follows:

County	Number	County	Number
Alameda	861	Orange	2,900
Alpine	2	Placer	85
Amador	no reply	Plumas	20
Butte	113	Riverside	973
Calaveras	12	Sacramento	528
Colusa	9	San Benito	32
Contra Costa	400	San Bernardino	870
Del Norte	25	San Diego	2,726
El Dorado	132	San Francisco	1,110
Fresno	323	San Joaquin	256
Glenn	8	San Luis Obispo	110
Humboldt	no reply	San Mateo	425
Imperial	91	Santa Barbara	437
Inyo	24	Santa Clara	1,000
Kern	411	Santa Cruz	108
Kings	16	Shasta	237
Lake	55	Sierra	0
Lassen	19	Siskiyou	67
Los Angeles	20,958	Solano	151
Madera	30	Sonoma	261
Marin	279	Stanislaus	160
Mariposa	no reply	Sutter	42
Mendocino	49	Tehama	32
Merced	145	Trinity	11
Modoc	24	Tulare	146
Mono	20	Tuolumne	26
Monterey	300	Ventura	633
Napa	50	Yolo	74
Nevada	29	Yuba	33
		<b>Total</b>	<b>37,838</b>

<sup>282</sup> Letter from William G. Sharp, note 281 *supra*.

<sup>283</sup> Letter from Credit Bureau of Santa Clara Valley to Cal. Law Revision Comm'n, March 1966; Letter from The Jewelers Board of Trade to Cal. Law Revision Comm'n, March 9, 1966; Letter from Dun & Bradstreet, Inc. to Cal. Law Revision Comm'n, March 15, 1966; Letter from Assets Research to Cal. Law Revision Comm'n, March 18, 1966; Letter from Bank of America to Cal. Law Revision Comm'n, March 18, 1966; Letter from Sidney R. Rose to Cal. Law Revision Comm'n, June 13, 1966; Letter from The Credit Bureau of San Francisco, Inc. to Cal. Law Revision Comm'n, June 24, 1966; Letter from Credit Bureau of Palo Alto to Cal. Law Revision Comm'n, June 24, 1966; Letter from John W. Brooks to Cal. Law Revision Comm'n, August 1, 1966. *Contra*, Letter from *The Recorder* to Cal. Law Revision Comm'n, March 15, 1966; Letters from *McCords Daily Notification Sheet* to Cal. Law Revision Comm'n, March 15, 1966 and June 23, 1966; Letter from Credit Bureau of

ifornia whose agencies frequently use the fictitious name information for purposes of investigation.<sup>284</sup>

The experience in California has been that the newspaper industry strenuously opposes any attempt to eliminate publication requirements and normally is successful in its efforts.<sup>285</sup> For this reason and because it is difficult to effect changes in long-established practices, it may not be possible to eliminate the publication requirement altogether. However, marked improvements in the mode of publication should be made, as follows:

(1) The duty of publishing the fictitious business name information should be imposed upon the secretary of state, rather than on the person doing business under a fictitious name. This change will reduce the cost of publication because the secretary of state can consolidate all the information for a particular county, thereby eliminating the present cost of processing and publishing many individual certificates. The fee imposed for filing a fictitious business name statement should be increased to an amount adequate to cover the cost of publication in this manner.

(2) For each fiscal year, one paper of general circulation in each county should be selected for the publication of all fictitious business name information required to be published in that county. This will permit interested persons to obtain all the fictitious name information for the entire county by consulting that paper. Selection of one newspaper to publish the information for a fiscal year should result in economy of publication. This procedure is now prescribed by Government Code section 37907 which requires that publication of all city legal notices during a fiscal year be in one newspaper if there are several newspapers of general circulation in the city.

(3) The fictitious business name information should be published in a more useful form, and useless material should be deleted. The information to be published should include the fictitious business name, the address of the principal place of business in this state, the name of the individual or corporation or the names of the partners doing business under the fictitious name, the index number assigned by the secretary of state to the statement, and the date the statement was filed. Although the statute need not so specify, the secretary of

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Santa Clara Valley to Cal. Law Revision Comm'n, July 1, 1966; Letter from Collection & Contact Agency to Cal. Law Revision Comm'n, July 8, 1966; Letter from California Newspaper Publishers Association, Inc. to Cal. Law Revision Comm'n, July 15, 1966; Letters from Los Angeles Newspaper Service Bureau to Cal. Law Revision Comm'n, July 28, 1966, and August 25, 1966.

<sup>284</sup> Letter from California Division of Real Estate to Cal. Law Revision Comm'n, March 9, 1966; Letters from California Division of Corporations to Cal. Law Revision Comm'n, March 15, 1966, and April 1, 1966.

<sup>285</sup> Address by Telford Work to Annual Convention of Nevada Press Association, May 21, 1966.

state should arrange for publication of the fictitious name information according to the city in which the principal place of business is located with the information for each city published in alphabetical order by the fictitious business name. The use of data processing equipment will make it possible to prepare the information for publication in this form.<sup>286</sup> Although a business operating under a fictitious name frequently will not confine its operations to the city where it is located and may, in fact, operate throughout the county or even the state, classification of the information according to the city in which the principal place of business is located will present the information in a form that will be most useful to interested persons.

The residence addresses of the individual or partners should not be included in the published information. The slight value this information might have does not justify the cost of publication. The addresses can easily be obtained, using the index number contained in the published information, by reference to the fictitious business name statement filed in the office of the county clerk and the office of the secretary of state.

(4) In view of the improvements thus effected in the form of publication, the number of publications should be reduced from four publications to two. Since all publications in a particular county will be in the same newspaper, the likelihood that an interested person will fail to note the publication of information relating to a particular business is minimized. Although some newspapers now indicate material that is published for the first time, many do not. Thus, the reduction in the number of publications will substantially reduce the volume of material that must be examined by persons who use or assemble the published information.

### Sanctions

An oft-expressed view of businessmen and others interested in the California statute is that widespread noncompliance with it makes it largely ineffective. It is, of course, essential that any statute in this field include sanctions adequate to compel compliance with the law. Otherwise, the policy of the statute will be circumvented by those to whom its requirements are addressed.

The sole penalty for failure to comply with the California legislation is provided by Civil Code section 2468:

No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain

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<sup>286</sup> In California, information concerning financing statements filed under the Commercial Code is now provided in this form by the secretary of state pursuant to CAL. COMM. CODE § 9407(2).

any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required.

California never followed the early rule formulated in other states that a contract made during noncompliance was illegal and void.<sup>287</sup> Rather, section 2468 was originally construed to mean that the filing of a complaint was an incident to "maintaining an action," and therefore the certificate had to be filed prior to the filing of the complaint in any action involving a contract or transaction made under a fictitious name.<sup>288</sup> Numerous later cases have relaxed this strict interpretation;<sup>289</sup> modern California cases indicate that noncompliance merely abates the action until compliance is had.<sup>290</sup> The certificate may be filed and publication made at any time before the trial,<sup>291</sup> and even if judgment is rendered for the defendant on the grounds of noncompliance by the plaintiff, the judgment is not res judicata.<sup>292</sup> Further, the rule is applied only to contract cases and does not bar a suit in tort,<sup>293</sup> or to recover property,<sup>294</sup> unless the cause of action is a direct result of the failure to file. Moreover, an individual proprietor who generally uses a fictitious business designation is not within the scope of the legislation where he either consummates all of his business transactions under his own name<sup>295</sup> or did so with respect to the particular transaction.<sup>296</sup>

California experience has resulted in at least two informal sanctions being applied. It is reported that banks in Los Angeles will not open a commercial account for a business until compliance with the

<sup>287</sup> See generally 1 J. BARRETT & E. SEAGO, PARTNERS AND PARTNERSHIPS 161 & n.26 (1956); Annot., 45 A.L.R. 198, 208-12 (1926); Annot., 42 A.L.R.2d 516 (1955).

<sup>288</sup> Byers v. Bourret, 64 Cal. 73, 28 P. 61 (1883).

<sup>289</sup> E.g., Nicholson v. Auburn Gold Mining & Milling Co., 6 Cal. App. 547, 92 P. 651 (1907).

<sup>290</sup> Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946); accord, Croft v. Bain, 49 Mont. 484, 143 P. 960 (1914); Walsh v. J.R. Thomas' Sons, 91 Ohio St. 210, 110 N.E. 454 (1915); Peterson v. Morris, 119 Wash. 335, 205 P. 408 (1922).

<sup>291</sup> Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946).

<sup>292</sup> Folden v. Lobrovich, 153 Cal. App. 2d 32, 314 P.2d 56 (1957).

<sup>293</sup> Ralph v. Lockwood, 61 Cal. 155 (1882) (conversion); accord, Melcher v. Beeler, 48 Colo. 233, 110 P. 181 (1910) (libel); Southern Security Co. v. American Discount Co., 55 Ga. App. 736, 191 S.E. 258 (1937) (conversion); Naihau v. Louisiana Weekly Pub. Co., 176 La. 240, 145 So. 527 (1933) (libel); Bagby v. Blackwell, 240 Mo. App. 574, 211 S.W.2d 69 (1948) (enjoin unfair competition); Cincinnati Traction Co. v. Hulvershorn, 12 Ohio C.C.R. (n.s.) 390, 21 Ohio C. Dec. 444 (Cir. Ct. 1909) (damages for negligence); Fechner v. A.H. Belo & Co., 283 S.W. 926 (Tex. Civ. App. 1926) (libel).

<sup>294</sup> Wallbrecht v. Blush, 43 Colo. 329, 95 P. 927 (1908); Lowenstine v. Citro, 74 Ind. App. 516, 129 N.E. 280 (1920).

<sup>295</sup> Messick v. Houx Bros., 105 Cal. App. 637, 288 P. 434 (1930).

<sup>296</sup> Dennis v. Overholtzer, 178 Cal. App. 2d 766, 3 Cal. Rptr. 193 (1960).

statute has been shown.<sup>297</sup> In San Francisco, a firm conducting business in a fictitious name is not allowed to file an action in the small claims court unless the firm has complied with the statute.<sup>298</sup> This procedure has been adopted despite the fact that the defense of failure to register normally may be waived by the opposing party.<sup>299</sup>

Several states force compliance with their fictitious business name legislation by providing that no license shall be issued to certain enterprises until the fictitious business name has been filed in the proper office.<sup>300</sup> California has several special provisions which require proof of filing a fictitious business name certificate before a permit or license will issue. Real estate brokers,<sup>301</sup> mineral, oil and gas brokers,<sup>302</sup> yacht or ship brokers,<sup>303</sup> private detectives,<sup>304</sup> and check sellers and cashers<sup>305</sup> must show such compliance.

The statutes in seven states, like California, provide only that no action may be maintained on a contract without compliance with the filing requirement.<sup>306</sup> An additional eight states combine a "no action" provision with a provision making violation of the statute a misdemeanor.<sup>307</sup> In most such states, violations of the statute are punishable by fine or imprisonment. The United Kingdom statute is similar but contains a unique provision.<sup>308</sup> It imposes a criminal sanction and offers an alternative to the "no action" provision. It provides that no action may be maintained on a contract made during noncompliance, but this is subject to the discretion of the trial court to allow or disallow suit. Thus, the court may allow an "innocent" noncompliant to maintain an action, but may preclude a party from enforcing a contract if enforcement would not be in the public interest.

<sup>297</sup> Address by Telford Work to Annual Convention of Nevada Press Association, May 21, 1966.

<sup>298</sup> Letter from Martin Mongan, San Francisco County Clerk, to Cal. Law Revision Comm'n, March 15, 1967.

<sup>299</sup> *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App. 2d 796, 167 P.2d 518 (1946).

<sup>300</sup> See LA. REV. STAT. § 51:281 (1950); VA. CODE ANN. § 50-76 (1967).

<sup>301</sup> CAL. BUS. & PROF. CODE § 10159.5.

<sup>302</sup> CAL. BUS. & PROF. CODE § 10522.5.

<sup>303</sup> CAL. BUS. & PROF. CODE § 8936.1.

<sup>304</sup> CAL. BUS. & PROF. CODE § 7540.

<sup>305</sup> CAL. FIN. CODE § 12300.2.

<sup>306</sup> ARIZ. REV. STAT. ANN. § 29-102B (Supp. 1967); MONT. REV. CODES ANN. § 63-602 (1962); N.D. CENT. CODE § 45-11-04 (1960); OHIO REV. CODE ANN. § 1777.04 (Page 1964); OKLA. STAT. tit. 54, § 83 (1961); S.D. CODE § 49.0802 (1939); WASH. REV. CODE § 19.80.040 (1958).

<sup>307</sup> COLO. REV. STAT. ANN. § 141-2-2 (1963); FLA. STAT. § 865.09 (1965); IDAHO CODE ANN. § 53-506 (1957); MICH. STAT. ANN. § 19.827 (Supp. 1968); ORE. REV. STAT. §§ 648.090, 648.990 (1965); PA. STAT. ANN. tit. 54, §§ 28.4, 28.13 (Supp. 1967); UTAH CODE ANN. § 42-2-10 (Supp. 1967); VA. CODE ANN. §§ 50-77, 50-78 (1967).

<sup>308</sup> Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 7, as amended, Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).

Nineteen states impose only a criminal sanction.<sup>309</sup> These statutes vary a great deal. For example, the Maine statute prescribes a fine of \$5.00 for each day of violation<sup>310</sup> whereas the Alabama statute prescribes a penalty of not more than \$500 and 6 months at hard labor.<sup>311</sup> In addition to a criminal penalty, North Carolina<sup>312</sup> and Delaware<sup>313</sup> provide that anyone who sues an unincorporated association that is in violation of the statute may recover \$50 to \$500, respectively.<sup>314</sup> The Australian statutes<sup>315</sup> have a unique feature designed to enforce compliance by a corporation whose officers may feel that compliance is too much trouble. The statute makes any director, manager, secretary, or other officer of the corporation, who was knowingly a party to the offense, also guilty of the violation.

A civil penalty is the most desirable form of sanction. Since compliance is the result sought, a civil penalty large enough to compel compliance is necessary. The conviction of a misdemeanor is a harsh penalty in some instances, especially if the party fails to file because of inadvertance, ignorance, or mistake of law. Where a party is engaged in some illegal or fraudulent activity, other criminal charges are available against him. Thus, a civil penalty of substantial proportions, recoverable by a state or county officer, seems most appropriate. In addition, the statute should either provide that the civil penalty is the sole penalty or that all contracts executed when one is not in compliance with the statute are valid and fully enforceable.<sup>316</sup> This precludes a construction of the statute that would impose the civil penalty in addition to the presently existing "no action" penalty.

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<sup>309</sup> ALA. CODE tit. 14, § 230 (1958); ARK. STAT. ANN. § 70-405 (1947); CONN. GEN. STAT. REV. § 35-1 (1960), *as amended* No. 84, [1967] Conn. Pub. Acts 112; ILL. REV. STAT. ch. 96, § 8 (1965); IND. ANN. STAT. § 50-203 (Supp. 1967); IOWA CODE § 547.4 (1966); LA. REV. STAT. § 51:284 (1950); ME. REV. STAT. ANN. tit. 31, § 5 (1964); MASS. GEN. LAWS ANN. ch. 110, § 5 (Supp. 1967); MO. REV. STAT. § 417.230 (1959); NEB. REV. STAT. § 87-206 (1966); NEV. REV. STAT. § 602.090 (1957); N.H. REV. STAT. ANN. § 349:9 (1966); N.J. REV. STAT. § 56:1-4 (1937); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); R.I. GEN. LAWS ANN. § 6-1-4 (1956); S.C. CODE ANN. § 48-4 (1962); TEX. PEN. CODE art. 1070 (1948); W. VA. CODE ANN. § 47-8-5 (1966).

<sup>310</sup> ME. REV. STAT. ANN. tit. 31, § 5 (1964).

<sup>311</sup> ALA. CODE tit. 14, § 230 (1958).

<sup>312</sup> N.C. GEN. STAT. § 66-71 (1963).

<sup>313</sup> DEL. CODE ANN. tit. 6, §§ 3104, 3106 (1953).

<sup>314</sup> A similar statute in Manitoba requires the person suing to divide the \$100.00 penalty with the government. MAN. REV. STAT. c. 196, § 57 (Can. 1954).

<sup>315</sup> Uniform Business Names Act § 29 (Victoria 1962).

<sup>316</sup> Several jurisdictions with criminal sanctions expressly declare that contracts are valid and enforceable. See GA. CODE ANN. § 106-303 (1956); N.C. GEN. STAT. § 66-71(b) (1963).



## Evidentiary Effect

Civil Code section 2471 provides that a certified copy of the certificate or an affidavit of publication is presumptive evidence of the facts stated therein. Most fictitious business name statutes in other jurisdictions provide that the certificate will be prima facie or presumptive evidence in any court in the state where one of the facts stated therein is in issue. Fourteen states have no provision on the matter.<sup>317</sup> Seventeen states provide that the statement shall be presumptive evidence of all of the facts stated therein,<sup>318</sup> and five states<sup>319</sup> and the Australian Uniform Act<sup>320</sup> provide that it shall be prima facie proof of such facts. One state provides only that the certificate is admissible evidence,<sup>321</sup> and Maine makes it a conclusive presumption of the contents.<sup>322</sup> The latter is too harsh a rule. The Washington rule—that the failure to file is presumptive evidence of fraud in procuring credit—is also too harsh.<sup>323</sup> However, a rebuttable presumption of the truth of the facts stated in the certificate does impose a sanction of sorts. Although a party can overcome the presumption, he may be more likely to complete the form correctly if he knows that anything he states therein can be used against him in a court of law.

## Conclusion

Forty-two states have fictitious business name filing requirements. The purpose and plan of most of these statutes is similar. Yet, the statutes vary from jurisdiction to jurisdiction as to the types of businesses that are required to file, the information to be included in the statement, the place of filing, the accessibility and maintenance of the information, and the sanctions imposed. The California statute

<sup>317</sup> Alabama, Arizona, Delaware, Georgia, Indiana, Iowa, Maryland, Massachusetts, Missouri, Nebraska, South Carolina, Vermont, Virginia, and Washington.

<sup>318</sup> ARK. STAT. ANN. § 70-403 (1947); CONN. GEN. STAT. REV. § 35-1 (1960), *as amended* No. 84, [1967] Conn. Pub. Acts 112; ILL. REV. STAT. ch. 96, § 6 (1965); KY. REV. STAT. § 365.010 (1960); LA. REV. STAT. § 51:282 (1950); MICH. STAT. ANN. § 19.825 (Supp. 1968); MINN. STAT. § 333.04 (1965); MONT. REV. CODES ANN. § 63-605 (1962); N.J. STAT. ANN. § 56:1-3 (Supp. 1966); N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967); N.D. CENT. CODE § 45-11-07 (1960); OHIO REV. CODE ANN. § 1777.06 (Page 1964); OKLA. STAT. tit. 54, § 86 (1961); R.I. GEN. LAWS ANN. § 6-1-2 (1956); S.D. CODE § 49.0803 (1939); TEX. REV. CIV. STAT. art. 5926 (1948); UTAH CODE ANN. § 42-2-7 (Supp. 1967); W. VA. CODE ANN. § 47-8-3 (1966).

<sup>319</sup> IDAHO CODE ANN. § 53-505 (Supp. 1967); NEV. REV. STAT. § 602.060 (1957); N.H. REV. STAT. ANN. § 349:3 (1966); N.C. GEN. STAT. § 66-69.1 (Supp. 1967); ORE. REV. STAT. § 648.105 (1963).

<sup>320</sup> Uniform Business Names Act § 30 (Victoria 1962).

<sup>321</sup> PA. STAT. ANN. tit. 54, § 28.5 (Supp. 1967).

<sup>322</sup> ME. REV. STAT. ANN. tit. 31, §§ 1, 3 (1964).

<sup>323</sup> WASH. REV. CODE § 19.80.040 (1958).

serves a useful purpose but is largely ineffective because of outmoded provisions, especially in the areas of publication, local filing, and sanctions. The statutory comparisons made in this article indicate that the California statute can be modernized and modified to serve its purpose better. It is particularly important that all businesses doing business in the state under an assumed name be required to register, that registration be in a state agency, that publication be eliminated or modified, and that sanctions be imposed which will elicit substantial compliance with the law.