

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

2003-2004 RECOMMENDATIONS

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September 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Authority of Court Commissioner

September 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Authority of Court Commissioner*, 33 Cal. L. Revision Comm'n Reports 673 (2003). This is part of publication #218 [2003-2004 Recommendations].

STATE OF CALIFORNIA

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September 18, 2003

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

This recommendation would repeal obsolete provisions of Code of Civil Procedure Section 259, such as those relating to notarial functions, fees, and official seal of a court commissioner. The recommendation would also harmonize the language of Section 259 relating to appointment of a court commissioner as temporary judge with the controlling constitutional provision.

This recommendation was prepared pursuant to Government Code Section 8298.

Respectfully submitted,

Frank Kaplan
Chairperson

AUTHORITY OF COURT COMMISSIONER

Code of Civil Procedure Section 259 prescribes powers of a court commissioner. Various provisions of Section 259 are either obsolete or inconsistent with governing law. The Commission recommends corrective legislation to modernize the statute.

OBSOLETE PROVISIONS

Code of Civil Procedure Section 259 has an ancient lineage, dating from 1872. It still includes provisions that suggest that the position of court commissioner is a county rather than a court position and is funded out of county rather than court funds.¹ The statute also purports to require a court commissioner to maintain an official seal distinct from that of the court.² In addition, the statute suggests that a court commissioner performs notarial acts,³ but a court commissioner no longer performs those functions. Rather, a court commissioner acts as a subordinate judicial officer.⁴

The provisions of Section 259 highlighted below are obsolete (or duplicative of other statutes)⁵ and should be repealed:

1. See Code Civ. Proc. § 259(i) (deposit of fees in general fund of county).

2. The statute also refers to the seal as “engraved” and requires that the seal identify the county where the commissioner resides rather than the county where the commissioner performs duties. Code Civ. Proc. § 259(j).

3. See Code Civ. Proc. § 259(d), (i), (k).

4. See Cal. Const. art. VI, § 22 (subordinate judicial functions).

5. Other statutes provide independent authority for a court commissioner to administer oaths and affirmations and take affidavits and depositions. See Code Civ. Proc. § 2093(a) (“every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths and affirmations”); Civ. Code § 1181 (listing various officers authorized to take proof or acknowledgment of instrument, including court clerks, court commissioners, judges, district attorneys, county counsels, etc.).

Code Civ. Proc. § 259. Court commissioners

259. Subject to the supervision of the court, every court commissioner shall have power to do all of the following:

(a) Hear and determine *ex parte* motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed.

(b) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order.

(c) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings.

(d) Administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever, and take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this or any other state or country.

(e) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of an appearing party. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

(f) Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary spousal support, costs and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage, or legal separation.

(g) Hear actions to establish paternity and to establish or enforce child and spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

(h) Hear, report on, and determine all uncontested actions and proceedings subject to the requirements of subdivision (e).

(i) Charge and collect the same fees for the performance of official acts as are allowed by law to notaries public in this state for like services. This subdivision does not apply to any services of the commissioner, the compensation for which is expressly fixed by law. The fees so collected shall be paid to the treasurer of the county, for deposit in the general fund of the county.

(j) Provide an official seal, upon which must be engraved the words “Court Commissioner” and the name of the county, or city and county, in which the commissioner resides.

(k) Authenticate with the official seal the commissioner’s official acts.

COURT COMMISSIONER AS TEMPORARY JUDGE

Subdivision (e) of Code of Civil Procedure Section 259 appears to authorize a court commissioner to act as a temporary judge on consent of a single party, in violation of the constitutional requirement of a stipulation of “the parties litigant.”⁶

California Constitution, Article VI, Section 21

Article VI, Section 21, of the California Constitution provides for appointment of a temporary judge “on stipulation of the parties litigant.” Cases applying the constitutional

6. See Cal. Const. art. VI, § 21 (“On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.”).

provision have approved appointment of a temporary judge without stipulation of any party. This has occurred where both parties are present in court, a temporary judge acts, and no one objects. In that circumstance there is an “implied” or “tantamount” stipulation.⁷

If only one party is before the court, the absent party may in some circumstances be presumed to have impliedly stipulated to a temporary judge.⁸ This doctrine has its limits, however, and there are situations in which a temporary judge is not authorized to act without the stipulation of the absent party.⁹

Code of Civil Procedure Section 259(e)

Section 259(e) states that a court commissioner may act as a temporary judge “by written consent of an appearing party.” This provision appears to be consistent with the constitutional requirement that a temporary judge may be appointed “on stipulation of the parties litigant” — provided there is only one appearing party. If there is more than one appearing party, however, the language of Section 259(e) allowing a

7. See, e.g., *In re Brittany K.*, 96 Cal. App. 4th 805, 813, 117 Cal. Rptr. 2d 813 (2002), *Walker v. San Francisco Housing Authority*, 100 Cal. App. 4th 685, 691, 122 Cal. Rptr. 2d 758 (2002), *cert. denied*, 537 U.S. 1009.(2002). A discussion of the implied stipulation doctrine appears in *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995).

8. See, e.g., *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 31 Cal. Rptr. 30 (1963) (defaulting party not “litigant” within meaning of Constitution and therefore stipulation unnecessary); *Bill Benson Motors v. Macmorris Sales Corp.*, 238 Cal. App. 2d Supp. 937, 48 Cal. Rptr. 123 (1965) (party who had appeared in case but failed to appear for trial not “litigant” within meaning of Constitution and therefore stipulation unnecessary).

9. See, e.g., *Reisman v. Shahverdian*, 153 Cal. App. 3d 1074, 201 Cal. Rptr. 194 (1984) (defaulting, nonappearing defendant who appears in post judgment proceeding may revoke implied stipulation to temporary judge for purpose of post judgment proceeding); *Yetenekian v. Superior Court*, 140 Cal. App. 3d 361, 189 Cal. Rptr. 458 (1983) (party who had appeared but refused to participate in trial for fear that participation would be construed as stipulation to temporary judge held to be “party litigant” notwithstanding absence from courtroom).

temporary judge on consent of “an” appearing party would appear to be inconsistent with the Constitution.

Until 1989, Section 259(e) was silent concerning the need for a stipulation to enable a court commissioner to act as a temporary judge. The matter was governed by the Constitution. In 1989, the provision was amended to provide explicitly that a court commissioner might:¹⁰

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, *or by written consent of the party appearing at the hearing where the action is either uncontested or the other party or parties are in default.* While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

The 1989 language appears to have precisely captured the state of the law at the time. However, that language was believed to be defective because it was too narrowly drawn. Under it, a temporary judge could only be authorized where there was a hearing in open court at which a party gave written consent. This failed to cover the situation in which there is written consent but no hearing in open court because the matter is submitted by the parties in writing. By implication, a temporary judge could not act in that case.

The provision was further amended in 1990 to eliminate the court hearing requirement.¹¹ However, that amendment appears to state an overly broad standard:

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of the party appearing at the hearing where the action is either uncontested or the other party or parties are in default *an appearing party.* While acting as temporary

10. 1989 Cal. Stat. ch. 1105, § 5.

11. 1990 Cal. Stat. ch. 411, § 5.

judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

In one sense, the overly broad statutory language is immaterial because it is the Constitution that controls. If two parties appear before the court and one does not give written consent to a temporary judge, the Constitution will preclude use of a temporary judge regardless of the language of Section 259(e) purporting to authorize a temporary judge on consent of “an” appearing party.

However, the statute on its face appears to restrict the traditional “implied consent” or “tantamount stipulation” doctrine of earlier cases. Moreover, the statute relies on a nebulous “appearing party” standard; it is not clear whether that language picks up prior case law giving a more expansive meaning to the term “party litigant.” Finally, the statute improperly suggests that the prescribed conditions under which a commissioner may act as a temporary judge are alternative rather than cumulative.

Revision of Code of Civil Procedure Section 259(e)

The Law Revision Commission recommends that the constitutional standard be substituted for the existing language of Section 259(e). The constitutional standard controls in any event, but a litigator should be able to find relevant controlling procedural detail in a logical place in the codes.

Section 259(e) would be amended to read:

Code Civ. Proc. § 259 (amended). Court commissioners

259. Subject to the supervision of the court, every court commissioner shall have power to do all of the following:

...

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, ~~or by written consent of an appearing party~~ *on stipulation of the parties*

litigant. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

....

Comment. Subdivision (e) of Section 259 is amended to replace the provision for appointment of a commissioner as temporary judge on written consent of an appearing party with the constitutional standard for appointment of a temporary judge. See Cal. Const. art. VI, § 21. Under the Constitution, written consent is not required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the Constitution, whether the stipulation of a party is required for designation of a temporary judge is determined by the party’s status as a “litigant,” not by whether the party is “an appearing party.” See, e.g., *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P.2d 53, 118 Cal. Rptr. 21 (1974); *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).

PROPOSED LEGISLATION

Code Civ. Proc. § 259 (amended). Court commissioners

259. Subject to the supervision of the court, every court commissioner shall have power to do all of the following:

(a) Hear and determine *ex parte* motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed.

(b) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order.

(c) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings.

~~(d) Administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever, and take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this or any other state or country.~~

(e) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, ~~or by written consent of an appearing party~~ *on stipulation of the parties litigant*. While acting as temporary judge the commissioner

shall receive no compensation therefor other than compensation as commissioner.

(f) *(e)* Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary spousal support, costs and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage, or legal separation.

(g) *(f)* Hear actions to establish paternity and to establish or enforce child and spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

(h) *(g)* Hear, report on, and determine all uncontested actions and proceedings subject to the requirements of subdivision (e) *(d)*.

~~(i) Charge and collect the same fees for the performance of official acts as are allowed by law to notaries public in this state for like services. This subdivision does not apply to any services of the commissioner, the compensation for which is expressly fixed by law. The fees so collected shall be paid to the treasurer of the county, for deposit in the general fund of the county.~~

~~(j) Provide an official seal, upon which must be engraved the words "Court Commissioner" and the name of the county, or city and county, in which the commissioner resides.~~

~~(k) Authenticate with the official seal the commissioner's official acts.~~

Comment. Former subdivisions (d), (i), (j), and (k) of Section 259 are repealed as obsolete. The repeal of these provisions does not preclude a court commissioner from administering an oath or affirmation, or from taking proof or acknowledgment of an instrument. See Code Civ. Proc. § 2093(a) ("every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths and affirmations"); Civ. Code § 1181 (officers authorized to take proof or acknowledgment of instrument include court commissioner).

Former subdivision (e) is amended to replace the provision for appointment of a commissioner as temporary judge on written consent of an appearing party with the constitutional standard for appointment of a temporary judge. See Cal. Const. art. VI, § 21. Under the Constitution, written consent is not required in case of “implied consent” or “tantamount stipulation.” See, e.g., *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the Constitution, whether the stipulation of a party is required for designation of a temporary judge is determined by the party’s status as a “litigant,” not by whether the party is “an appearing party.” See, e.g., *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P.2d 53, 118 Cal. Rptr. 21 (1974); *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Alternative Dispute Resolution in
Common Interest Developments

September 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003). This is part of publication #218 [2003-2004 *Recommendations*].

STATE OF CALIFORNIA

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EDMUND L. REGALIA

September 19, 2003

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

As part of its general study of common interest development law, the Commission proposes the following improvements to California's dispute resolution process for common interest developments:

- (1) The existing pre-litigation ADR requirement should be preserved and improvements made to various weaknesses in the process.
- (2) Every association should be required to offer its residents a simple, informal, and cost-free way to have their concerns heard and addressed.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

Frank Kaplan
Chairperson

ALTERNATIVE DISPUTE RESOLUTION IN COMMON INTEREST DEVELOPMENTS

BACKGROUND

The main body of law governing common interest developments is the Davis-Stirling Common Interest Development Act.¹ Other key statutes include the Subdivision Map Act, the Subdivided Lands Act, the Local Planning Law, and the Nonprofit Mutual Benefit Corporation Law, as well as various environmental and land use statutes. In addition, statutes based on separate, rather than common, ownership models still control many aspects of the governing law.² The complexities and inconsistencies of this statutory arrangement have been criticized by homeowners and practitioners, among others.³

A common interest development (“CID”) is governed by a board of laypeople, elected from among the unit owners. Faced with the complexity of common interest development law, many of these volunteers make mistakes and violate procedures for conducting hearings, adopting budgets, establishing reserves, enforcing parking, and collecting assessments. Housing consumers do not readily understand and cannot easily exercise their rights and obligations.

The Law Revision Commission is engaged in a general study of the law relating to CIDs. The objective of the study is to set a clear, consistent, and unified policy with regard to their formation and management and the transaction of real property interests located within them. The study will seek to

1. Civ. Code § 1350 *et seq.*

2. See, e.g., Civ. Code §§ 1102 *et seq.*, 2079 *et seq.* (real estate disclosure).

3. See, e.g., SR 10 (Lee and Sher) (Apr. 10, 1997); H. Roland, Residential Common Interest Developments: An Overview (Cal. Res. Bur., Apr. 1998), available at <www.library.ca.gov>.

clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, and determine to what extent common interest housing developments should be subject to regulation.

The Commission will make a series of recommendations proposing revision of the laws governing CIDs. Previous recommendations have dealt with the organization of the Davis-Stirling Common Interest Development Act⁴ and with procedural fairness in association rulemaking and decisionmaking.⁵ The current recommendation addresses alternative dispute resolution.

ALTERNATIVE DISPUTE RESOLUTION

Disputes Within Common Interest Developments

A common interest housing development is characterized by (1) separate ownership of dwelling space coupled with an undivided interest in the common area, (2) covenants, conditions, and restrictions (“CC&Rs”) that limit use of both the common area and separate ownership interests, and (3) administration of common property by a homeowners association. This structure inevitably leads to conflicts within the development, either between the association management and an individual homeowner, or between homeowners.

Experience suggests that disputes typically fall into one of several categories:

- (1) Financial disputes (maintenance, common charges, special assessments, fines and penalties, restrictions on resale or transfer, access to books and records).

4. See *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision Comm’n Reports 1 (2002).

5. See *Procedural Fairness in Association Rulemaking and Decisionmaking*, 33 Cal. L. Revision Comm’n Reports 81 (2002).

- (2) Architectural controls (repairs, alterations, painting, decor, landscaping).
- (3) Pet issues (barking dogs, wandering cats, animal waste).
- (4) Use of private space (leasing/subleasing, commercial or professional use).
- (5) Personal interactions (facilities use, parking, noise, rudeness).

Good information is not available concerning the incidence of disputes of this type in California. They are not uncommon, however. Data is available from other jurisdictions in which there is government oversight of CID operations. That data suggests that a dispute reaches the point where it becomes serious enough to lodge a complaint approximately once per 200 dwelling units per year. In California, with its estimated 3.5 million CID dwelling units, that would yield about 175,000 “serious” disputes in CIDs each year.⁶

Many of the worst disputes appear to have started as relatively minor disagreements that have escalated as the parties have taken entrenched positions. If the disputes could be resolved quickly and inexpensively, all concerned would be better off.

Litigation involving these types of disputes generally involves filing a lawsuit and securing provisional relief (temporary restraining order and preliminary injunction), followed by a trial with damages and attorney’s fees. The cost of litigation necessary to resolve these disputes is often disproportionate to the character of the dispute. Moreover, in a dispute between an individual homeowner and the association, there is an inherent inequality of position, since

6. For another effort to estimate the frequency of CID disputes, see J. Johnston & K. Johnston-Dodds, *Common Interest Developments: Housing at Risk?* 35 (Cal. Res. Bur., Aug. 2002), available at <www.library.ca.gov>.

the association is able to fund litigation costs from association-wide assessments, including assessment of the homeowner with whom the association is engaged in litigation. Aside from cost considerations, litigation is not a satisfactory way of resolving interactions that arise out of daily living arrangements among persons who must continue to interact with each other in the future.

The Law Revision Commission has concluded that California law governing CIDs could be substantially improved by, among other changes, providing more affordable and available means to ensure compliance with the law and resolve disputes among CID members and boards.⁷

Summary of Existing Law

The Davis-Stirling Common Interest Development Act includes a number of provisions relating to alternative dispute resolution (“ADR”). The principal ADR provision — Civil Code Section 1354 — was added in 1994 in an effort to divert the growing number of minor disputes involving CIDs out of congested courts.⁸ It was intended to encourage ADR for disputes involving relatively minor issues, such as the height of fences, color of paint, number of vehicles, outbuildings, and similar disputes that characterize contemporary life in residential neighborhoods.

The relevant provisions of existing law include:

7. See also Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 St. John’s L. Rev. 75 (1999); S. French, *Scope of Study of Laws Affecting Common Interest Developments* 8 (Nov. 2000), available at <www.clrc.ca.gov/bkstudies.html>.

8. The Davis-Stirling Act also provides for a form of ADR in developer-association disputes (construction design and defect). Civ. Code § 1375 *et seq.* That is beyond the scope of the present inquiry, which relates to operational disputes.

“Mandatory” ADR.⁹ Before either the association or an owner may file an action to enforce an association’s governing documents (CC&Rs, bylaws, operating rules, etc.), the parties must “endeavor” to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration, which may be binding or nonbinding at the option of the parties. The parties bear the costs of any ADR they may engage in.

This requirement is limited in its application. It applies only if the action is solely for declaratory or injunctive relief (or for that type of relief in conjunction with a claim for damages not exceeding \$5,000). It does not apply to a claim for association assessments. The court may excuse a party’s failure to seek ADR in a number of circumstances.¹⁰

*ADR for assessment dispute.*¹¹ A homeowner may invoke the ADR procedure for an assessment dispute by paying under protest the amount of the assessment plus late charges, interest, and delinquency costs.¹²

ADR required by governing documents. The Davis-Stirling Act does not directly address the issue of alternative dispute resolution (e.g., mandatory arbitration) that may be required in an association’s governing documents. At least one provision of the Davis-Stirling Act suggests that such a requirement might be enforceable.¹³

9. Civ. Code § 1354(b).

10. Civ. Code § 1354(c).

11. Civ. Code § 1366.3.

12. Recent legislation has added an internal process for disputing an assessment. See Civ. Code § 1367.1(c).

13. Civ. Code § 1366.3(a) (association must inform owner who pays assessment under protest of “any other procedures to resolve the dispute that may be available through the association”). At least one recent case holds a mandatory arbitration clause in CC&Rs unenforceable because unconscionable. *Villa Milano Homeowners Ass’n v. Il Davorge*, 84 Cal. App. 4th 819, 102 Cal.

*Voluntary ADR.*¹⁴ If either the association or an owner has filed an action to enforce the association's governing documents, the action may be stayed and the matter referred to ADR on written stipulation of the parties. Trial court delay reduction rules do not apply during the time the action is stayed. The parties bear the costs of the ADR.

*Attorney's fees.*¹⁵ An incentive for the parties to agree to ADR is found in Civil Code Section 1354(f), which assesses attorney's fees against the losing party in the event of a lawsuit. The statute also gives the court discretion, in determining the amount awarded, to "consider a party's refusal to participate in alternative dispute resolution prior to the filing of an action."

*Confidentiality of ADR communications.*¹⁶ An added incentive for ADR is the confidentiality granted to ADR communications by Civil Code Section 1354(g)-(h).

*Informing homeowners.*¹⁷ The Davis-Stirling Act requires that members of an association be provided an annual summary of the ADR requirements.

*Attorney General intervention.*¹⁸ Various provisions of the Nonprofit Mutual Benefit Corporation Law govern the operations of CIDs under the Davis-Stirling Act. The Attorney General has authority under the Corporations Code to intervene on behalf of members of the association who are denied certain rights by the association, including:

Rptr. 2d 1 (2000) (clause limiting association's right to sue developer for design and construction defects).

14. Civ. Code § 1354(d).

15. Civ. Code § 1354(f).

16. Civ. Code § 1354(g)-(h).

17. Civ. Code § 1354(i).

18. Gov't Code § 8216.

- (1) Failure to hold regular meetings of members.
- (2) Failure to allow a member access to books and records of the association.
- (3) Failure to provide annual financial reports to members.
- (4) Failure on request to provide a list of names and addresses of members.

Complaints may be submitted to the Attorney General's Public Inquiry Unit. After a review, the Attorney General will send, if appropriate, a "Notice of Complaint" letter with a copy of the complaint to the association, and direct the association to respond to both the Attorney General and the member within 30 days. The Attorney General is authorized by statute to go further, but does not ordinarily get involved beyond this.¹⁹ Lack of resources appears to be a significant factor in this determination.

Critique of Existing Law

Participants in alternative dispute resolution in CIDs report mixed results. To a large extent, success or failure will depend on the good faith of the participants and their motivation to achieve a mutually agreeable resolution of the dispute. Because all involved have a continuing relationship with each other in a residential setting, there are strong forces that favor successful dispute resolution. The dispute resolution process may also be enhanced by a readily accessible local dispute resolution program, such as a neighborhood mediation program.

However, personalities can become a determinative factor in an intimate setting such as a CID. An intransigent actor on

19. The Attorney General's Public Inquiry Unit has noted that many times a "Notice of Complaint" from that office will be sufficient to prompt an otherwise recalcitrant board of directors to resolve a complaint.

either side of a dispute can effectively preclude a rational resolution.

There are also structural factors that work against effective alternative dispute resolution. These include the relative inequality of bargaining position between the association and an individual homeowner, and the cost of invoking a neutral resolution process.

The ability of the existing California alternative dispute resolution mechanisms to cope with the conflicts inherent in a CID is limited. The current statutes have a number of defects.²⁰ The Law Revision Commission recommends the following improvements to California's dispute resolution process:

- (1) Improve the existing "mandatory" ADR requirement as a prerequisite to litigation.²¹
- (2) Require every association to offer its residents a simple, informal, and cost-free way to have their concerns heard and addressed.²²

In addition to the improvements proposed in this recommendation, the Commission is currently studying the possible establishment of a governmental regulatory program for dispute resolution. That subject will be addressed in a separate recommendation.

20. There are several published critiques of the statute. See Sproul, *Alternative Dispute Resolution for Common Interest Developments: Recent Amendments to Civil Code Section 1354 Fall Short*, 12 Cal. Real Prop. J. 28 (1994); Batchelder, *Mandatory ADR in Common Interest Developments: Oxymoronic or Just Moronic?*, 23 Thom. Jeff. L. Rev. 227 (2001).

21. See discussion of "Improvement of Current Statute" *infra*.

22. See discussion of "Association Procedures" *infra*.

PROPOSED IMPROVEMENTS TO THE LAW

Improvement of Current Statute

The Davis-Stirling Act seeks to encourage parties to a dispute within the association to resolve their differences out of court. Civil Code Section 1354 includes a well-articulated requirement that, before filing a lawsuit, the parties must engage in alternative dispute resolution.

The statutory procedure, while salutary, has a number of limitations that render it less effective than it might otherwise be. For example:

- (1) The statute only requires ADR efforts before filing suit to enforce the association's governing documents. But it may be equally important to resolve disputes involving statutory requirements of the Davis-Stirling Act or of the Nonprofit Mutual Benefit Corporation Law that are applicable to the association and its members.
- (2) The statute excuses ADR efforts if a lawsuit is filed within 120 days of the running of the statute of limitations. This facilitates manipulation by a party who may simply wait until 120 days before the statute expires, and then file suit.
- (3) The statute only requires ADR efforts before bringing an action for declaratory or injunctive relief. Writ relief is an equally important vehicle for enforcing rights in the CID context, and it is not covered.
- (4) The duty to make a good faith effort to resolve the dispute out of court is enforceable by an award of attorney's fees and costs to the prevailing party. But the statute as drawn appears to limit the award to an action to enforce covenants and restrictions, omitting an action to enforce other governing documents of the association.²³

23. *Cf.* Kaplan v. Fairway Oaks Homeowners Ass'n, 98 Cal. App. 4th 715, 120 Cal. Rptr. 2d 158 (2002) ("The Legislature obviously intended to broaden

- (5) There are numerous other lesser defects in the statute, such as an inefficient and ineffective manner of service of a request for dispute resolution, and ADR confidentiality provisions that are narrower in coverage than the general mediation confidentiality provisions of the Evidence Code.

The proposed law addresses these concerns by expanding the application of the existing statute to cure these defects. The proposed law also reorganizes and recasts the existing statute for ease of use and understanding.²⁴

A significant limitation of existing law is that, while it encourages ADR efforts, it does not mandate ADR. The availability of attorney's fees and costs is an inducement for the parties to resolve their dispute out of court, but experience suggests that this type of sanction is ineffective in many CID disputes. However, it is not clear that mandatory ADR would produce better results than existing law. A party who declines to participate in ADR despite the threat of monetary sanctions may not be open to the possibility of a negotiated settlement. Requiring ADR in such a case could simply be a waste of

the availability of attorney fee awards by authorizing attorney fees in an action to enforce the governing documents rather than just the declaration.”)

24. In conjunction with the overhaul of Civil Code Section 1354(b), the proposed law would also remedy a technical defect in the wording of Civil Code Section 1354(a), relating to enforcement of governing documents promulgated pursuant to CC&Rs. Section 1354(a) addresses enforcement of CC&Rs but not of other governing documents, creating an implication that there is no enforcement mechanism for other governing documents. See, e.g., Sproul & Rosenberry, *Advising California Condominium and Homeowners Associations*, § 7.1 (Cal. Cont. Ed. Bar 1991). The case law is reasonably clear that governing documents are enforceable if consistent with CC&Rs and unenforceable if not. See, e.g., *MaJor v. Miraverde Homeowners Ass'n*, 7 Cal. App. 4th 626, 9 Cal. Rptr. 2d 237 (1992) (inconsistent and unenforceable); *Liebler v. Point Loma Tennis Club*, 40 Cal. App. 4th 1609, 47 Cal. Rptr. 2d 783 (1995) (consistent and enforceable). For a general discussion of relevant principles, see, e.g., *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 377, 878 P. 2d 1275, 33 Cal. Rptr. 2d 63 (1994). The proposed law would add statutory language to Section 1354, making clear that an association may enforce its governing documents against an owner of a separate interest and vice versa.

time and resources. Pilot projects in Los Angeles County involving mandatory mediation in civil cases are currently being analyzed by the Judicial Council, but reports on experience under them are not yet available.²⁵ The Commission plans to review the results of these programs before considering whether to propose that mediation be required in the CID context.

Association Procedures

The formal alternative dispute resolution process that is prerequisite to litigation under Civil Code Section 1354 contemplates use of a neutral such as a mediator or arbitrator in the resolution of the dispute. While use of a neutral to help resolve a dispute may be effective to avert litigation, it is nonetheless a costly remedy in the context of the nonmonetary types of disputes that frequently surface in daily interactions in a CID. A person should be able to resolve a dispute involving ordinary living arrangements without having to go to the extent of a formal dispute resolution process.

For this reason, the proposed law includes a requirement that every homeowners association must make available a fair, reasonable, and expeditious internal dispute resolution mechanism, at no cost to its members.²⁶ This would supplement the formal dispute resolution procedure involving use of a neutral provided in Civil Code Section 1354.

Under the proposed law, if an association fails to provide such an internal dispute resolution mechanism, a default

25. See Code Civ. Proc. §§ 1730 *et seq.* (court-related alternative dispute resolution processes), 1775 *et seq.* (civil action mediation).

26. This is analogous to the New Jersey requirement that a planned real estate development “shall provide a fair and efficient procedure for the resolution of disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation.” N.J.S.A. 45:22A-44(c).

dispute resolution mechanism would apply. The default mechanism is a meet and confer process, in which the board is required to appoint one of its members to meet with the homeowner and hear the complaint. Any resulting agreement would be binding if it is consistent with the law, the association's governing documents, and the authority granted by the board to its representative.

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PROPOSED LEGISLATION

CIVIL CODE

Civ. Code § 1354 (amended). Enforcement of governing documents

SEC. ____ . Section 1354 of the Civil Code is amended to read:

1354. (a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

(b) *A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association.*

~~Unless the applicable time limitation for commencing the action would run within 120 days, prior to the filing of a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not in excess of five thousand dollars (\$5,000), related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The form of alternative dispute resolution chosen may be binding or nonbinding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. The Request for Resolution shall include (1) a brief description of the dispute~~

between the parties, (2) a request for alternative dispute resolution, and (3) a notice that the party receiving the Request for Resolution is required to respond thereto within 30 days of receipt or it will be deemed rejected. Service of the Request for Resolution shall be in the same manner as prescribed for service in a small claims action as provided in Section 116.340 of the Code of Civil Procedure. Parties receiving a Request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. If alternative dispute resolution is accepted by the party upon whom the Request for Resolution is served, the alternative dispute resolution shall be completed within 90 days of receipt of the acceptance by the party initiating the Request for Resolution, unless extended by written stipulation signed by both parties. The costs of the alternative dispute resolution shall be borne by the parties.

(c) At the time of filing a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages not in excess of five thousand dollars (\$5,000), related to the enforcement of the governing documents, the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to the dispute refused alternative dispute resolution prior to the filing of the complaint, that preliminary or temporary

~~injunctive relief is necessary, or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties.~~

~~(d) Once a civil action specified in subdivision (a) to enforce the governing documents has been filed by either an association or an owner or member of a common interest development, upon written stipulation of the parties the matter may be referred to alternative dispute resolution and stayed. The costs of the alternative dispute resolution shall be borne by the parties. During this referral, the action shall not be subject to the rules implementing subdivision (c) of Section 68603 of the Government Code.~~

~~(e) The requirements of subdivisions (b) and (c) shall not apply to the filing of a cross-complaint.~~

~~(f) (c) In any *an* action specified in subdivision (a) to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs. Upon motion by any party for attorney's fees and costs to be awarded to the prevailing party in these actions, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action.~~

~~(g) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), evidence of anything said or of admissions made in the course of the alternative dispute resolution process shall not be admissible in evidence, and testimony or disclosure of such a statement or admission may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.~~

~~(h) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), documents prepared for the purpose or in the course of, or pursuant to, the alternative dispute resolution shall not be admissible in evidence, and disclosure of these documents may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.~~

~~(i) Members of the association shall annually be provided a summary of the provisions of this section, which specifically references this section. The summary shall include the following language:~~

~~“Failure by any member of the association to comply with the pre-filing requirements of Section 1354 of the Civil Code may result in the loss of your rights to sue the association or another member of the association regarding enforcement of the governing documents.”~~

~~The summary shall be provided either at the time the pro forma budget required by Section 1365 is distributed or in the manner specified in Section 5016 of the Corporations Code.~~

~~(j) Any Request for Resolution sent to the owner of a separate interest pursuant to subdivision (b) shall include a copy of this section.~~

Comment. Subdivision (b) of Section 1354 is added to state the authority of an association or homeowner to enforce governing documents other than the declaration. See Section 1351(j) (“governing documents” defined). It is consistent with existing law. See former Code Civ. Proc. § 383(a)(1) (association enforcement of governing documents), renumbered as Section 1368.3. See also *Kaplan v. Fairway Oaks Homeowners Ass’n*, 98 Cal. App. 4th 715, 120 Cal. Rptr. 2d 158 (2002) (owner enforcement of association bylaws). A homeowner may bring an action against an association for failure to enforce the governing documents. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 1246, 280 Cal. Rptr. 568 (1991) (“Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration.”). Governing documents are enforceable under this section only if

consistent with the declaration, reasonable, and if adopted with proper authority and procedures, including any required notice. See, e.g., *MaJor v. Miraverde Homeowners Ass'n*, 7 Cal. App. 4th 626, 9 Cal. Rptr. 2d 237 (1992) (inconsistent and unenforceable); *Liebler v. Point Loma Tennis Club*, 40 Cal. App. 4th 1609, 47 Cal. Rptr. 2d 783 (1995) (consistent and enforceable). For a general discussion of relevant principles, see *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 377, 878 P. 2d 1275, 33 Cal. Rptr. 2d 63 (1994). See also Section 1357.110 (enforceability of operating rule).

The first sentence of former subdivision (f) is continued without substantive change in subdivision (c). See also *Kaplan*, 98 Cal. App. 4th at 719 (“The Legislature obviously intended to broaden the availability of attorney fee awards by authorizing attorney fees in an action to enforce the governing documents rather than just the declaration.”). The second sentence of former subdivision (f), relating to the amount of a fee award, is continued in Section 1369.580. That provision has been broadened to apply to an award of fees in an action to enforce this title or the Nonprofit Mutual Benefit Corporation Law. See Section 1369.510(b) (“enforcement action” defined).

Former subdivisions (b)-(e) and (g)-(j) relating to alternative dispute resolution, are relocated and revised as Sections 1369.510-1369.570, and 1369.590 (alternative dispute resolution). See the Comments to those sections for details of the disposition and revision of former subdivisions (b)-(e) and (g)-(j).

Civ. Code §§ 1363.810-1363.840 (added). Dispute resolution procedure

SEC. ____ . Article 5 (commencing with Section 1363.810) is added to Chapter 4 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 5. Dispute Resolution Procedure

§ 1363.810. Scope of article

1363.810. (a) This article applies to a dispute between an association and a member involving their rights, duties, or liabilities under this title, under the Nonprofit Mutual Benefit Corporation Law, or under the governing documents of the common interest development or association.

(b) This article supplements, and does not replace, Article 2 (commencing with Section 1369.510) of Chapter 7, relating to alternative dispute resolution as a prerequisite to an enforcement action.

(c) This article does not apply to a dispute that is subject to subdivision (c) of Section 1367.1.

Comment. Article 5 (commencing with Section 1363.810) is intended to provide a simple and efficient intra-association dispute resolution procedure at no cost to the parties. This is distinct from the alternative dispute resolution process involving a neutral that is required by Article 2 (commencing with Section 1369.510) of Chapter 7 as a prerequisite to litigation to resolve the dispute.

The Nonprofit Mutual Benefit Corporation Law is found at Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code.

See Section 1351(j) (“governing documents” defined).

§ 1363.820. Fair, reasonable, and expeditious dispute resolution procedure required

1363.820. (a) An association shall provide a fair, reasonable, and expeditious procedure for resolving a dispute within the scope of this article.

(b) A dispute resolution procedure provided by an association is presumed to be fair, reasonable, and expeditious. The presumption created by this subdivision is a presumption affecting the burden of proof.

(c) If an association does not provide a fair, reasonable, and expeditious procedure for resolving a dispute within the scope of this article, the procedure provided in Section 1363.840 applies and satisfies the requirement of subdivision (a).

Comment. Subdivision (a) of Section 1363.820 establishes the requirement, and prescribes the standard, for an association’s internal dispute resolution procedure. For a description of disputes covered by the requirement, see Section 1363.810 (scope of article).

Although an association is required to provide a fair, reasonable, and expeditious dispute resolution procedure, its failure to do so is not subject to judicial mandate by writ or injunction and is not otherwise actionable. Pursuant to subdivision (c), inaction by an association is in effect

adoption of the default procedure provided in Section 1363.840 (default meet and confer procedure).

The standard of “fair, reasonable, and expeditious” prescribed in Section 1363.820 is not an objective standard, and will vary from association to association, depending on such factors as size, involvement of membership, etc. A larger association might, for example, make use of a “covenants committee” composed of disinterested association members to hear and resolve disputes with binding effect on the board, whereas in a smaller association such a procedure might well be impossible because every member of the association could have an interest in the dispute.

Subdivision (b) implements the policy of this article to avoid squabbles over procedural details and instead focus on the substance of the dispute to be resolved. An association that has an existing internal dispute resolution procedure need not re-adopt it for the purposes of this article; the existing procedure is presumed to satisfy the requirements of this article.

The minimum requirements for an association’s internal dispute resolution procedure are prescribed in Section 1363.830. The default meet and confer procedure applicable if an association fails to adopt a fair, reasonable, and expeditious procedure is prescribed in Section 1363.840.

§ 1363.830. Minimum requirements of association procedure

1363.830. A fair, reasonable, and expeditious dispute resolution procedure shall at a minimum satisfy all of the following requirements:

(a) The procedure may be invoked by either party to the dispute.

(b) If the procedure is invoked by a member, the association shall participate in, and is bound by any resolution of the dispute pursuant to, the procedure.

(c) If the procedure is invoked by the association, the member may elect not to participate in the procedure. If the member participates but the dispute is resolved other than by agreement of the member, the member shall have a right of appeal to the association’s board of directors.

(d) An agreement reached pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the parties and is judicially enforceable.

(e) A member of the association shall not be charged a fee to participate in the process.

Comment. Section 1363.830 prescribes the standards for an association's fair, reasonable, and expeditious internal dispute resolution procedure. If an association fails to provide a fair, reasonable, and expeditious procedure, the default dispute resolution procedure provided in Section 1363.840 is applicable.

§ 1363.840. Default meet and confer procedure

1363.840. (a) This section applies in an association that does not otherwise provide a fair, reasonable, and expeditious dispute resolution procedure. The procedure provided in this section is fair, reasonable, and expeditious, within the meaning of this article, subject to good faith implementation by an association.

(b) Either party to a dispute within the scope of this article may invoke the following procedure:

(1) The party may request the other party to meet and confer in an effort to resolve the dispute. The request shall be in writing.

(2) A member of an association may refuse a request to meet and confer. The association may not refuse a request to meet and confer.

(3) The association's board of directors shall designate a member of the board to meet and confer.

(4) The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in an effort to resolve the dispute.

(5) A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the association.

(c) An agreement reached under this section binds the parties and is judicially enforceable if both of the following conditions are satisfied:

(1) The agreement is not in conflict with law or the governing documents of the common interest development or association.

(2) The agreement is either consistent with the authority granted by the board of directors to its designee or the agreement is ratified by the board of directors.

Comment. Section 1363.840 provides a default dispute resolution procedure based on a “meet and confer” model. See, e.g., Gov’t Code § 3505 (“Meet and confer in good faith” means that the parties have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement”)

An agreement reached pursuant to the meet and confer procedure prescribed in subdivision (b) binds the parties, provided it is not inconsistent with law or the governing documents and does not exceed the authority granted to the board’s representative. Thus, for example, a dispute could not legally be resolved by an agreement to a change in operating rules; operating rules may only be changed by appropriate association action. But an agreement could involve a commitment to bring the proposed rule change before the board with a favorable recommendation for board action.

Civ. Code § 1366.3 (amended). Alternative dispute resolution for assessments

SEC. ____ . Section 1366.3 of the Civil Code is amended to read:

1366.3. (a) The exception for disputes related to association assessments in ~~subdivision (b) of Section 1354 shall~~ *Article 2 (commencing with Section 1369.510) of Chapter 7* does not apply if, in a dispute between the owner of a separate interest and the association regarding the assessments imposed by the association, the owner of the separate interest chooses to pay in full to the association all of the charges listed in paragraphs (1) to (4), inclusive, and states by written notice that the

amount is paid under protest, and the written notice is mailed by certified mail not more than 30 days from the recording of a notice of delinquent assessment in accordance with Section 1367 or 1367.1; and in those instances, the association shall inform the owner that the owner may resolve the dispute through alternative dispute resolution as set forth in ~~Section 1354~~ *Article 2 (commencing with Section 1369.510) of Chapter 7*, civil action, and any other procedures to resolve the dispute that may be available through the association.

(1) The amount of the assessment in dispute.

(2) Late charges.

(3) Interest.

(4) All reasonable fees and costs associated with the preparation and filing of a notice of delinquent assessment, including all mailing costs, and including reasonable attorney's fees not to exceed four hundred twenty-five dollars (\$425).

(b) The right of any owner of a separate interest to utilize alternative dispute resolution under this section may not be exercised more than two times in any single calendar year, and not more than three times within any five calendar years. Nothing within this section shall preclude any owner of a separate interest and the association, upon mutual agreement, from entering into alternative dispute resolution for a number of times in excess of the limits set forth in this section. The owner of a separate interest may request and be awarded through alternative dispute resolution reasonable interest to be paid by the association on the total amount paid under paragraphs (1) to (4), inclusive, of subdivision (a), if it is determined through alternative dispute resolution that the assessment levied by the association was not correctly levied.

Comment. Section 1366.3 is amended to correct cross-references.

The reference to "other procedures to resolve the dispute that may be available through the association" in subdivision (a) would include the procedure for disputing a debt provided in Section 1367.1(c).

An association may elect to enforce a delinquent assessment in small claims court. *Cf.* Sproul & Rosenberry, *Advising California Condominium and Homeowners Associations* § 4.19, at 170-71 (Cal. Cont. Ed. Bar 1991) (small claims procedure preferred). In that case, alternative dispute resolution provisions would be inapplicable, since the small claims procedure satisfies the same functions. See Section 1369.520 & Comment (ADR prerequisite to enforcement action).

Civ. Code §§ 1368.3-1368.4 (added). Miscellaneous provisions

SEC. ____ . Article 1 (commencing with Section 1368.3) is added to Chapter 7 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 1. Miscellaneous Provisions

§ 1368.3. Association standing

1368.3. An association established to manage a common interest development has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:

- (a) Enforcement of the governing documents.
- (b) Damage to the common area.
- (c) Damage to a separate interest that the association is obligated to maintain or repair.
- (d) Damage to a separate interest that arises out of, or is integrally related to, damage to the common area or a separate interest that the association is obligated to maintain or repair.

Comment. Section 1368.3 continues subdivision (a) of former Code of Civil Procedure Section 383 without substantive change.

§ 1368.4. Comparative fault as affirmative defense

1368.4. (a) In an action maintained by an association pursuant to subdivision (b), (c), or (d) of Section 1368.3, the amount of damages recovered by the association shall be

reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based upon principles of comparative fault. The comparative fault of the association or its managing agents may be raised by way of defense, but shall not be the basis for a cross-action or separate action against the association or its managing agents for contribution or implied indemnity, where the only damage was sustained by the association or its members. It is the intent of the Legislature in enacting this subdivision to require that comparative fault be pleaded as an affirmative defense, rather than a separate cause of action, where the only damage was sustained by the association or its members.

(b) In an action involving damages described in subdivision (b), (c), or (d) of Section 1368.3, the defendant or cross-defendant may allege and prove the comparative fault of the association or its managing agents as a setoff to the liability of the defendant or cross-defendant even if the association is not a party to the litigation or is no longer a party whether by reason of settlement, dismissal, or otherwise.

(c) Subdivisions (a) and (b) apply to actions commenced on or after January 1, 1993.

(d) Nothing in this section affects a person's liability under Section 1431, or the liability of the association or its managing agent for an act or omission which causes damages to another.

Comment. Section 1368.4 continues subdivisions (b)-(e) of former Code of Civil Procedure Section 383 without substantive change.

Civ. Code § 1368.4 (amended and renumbered). Notice of civil action

SEC. _____. Section 1368.4 of the Civil Code is amended and renumbered to read:

1368.4. 1368.5. (a) Not later than 30 days prior to the filing of any civil action by the association against the declarant or other developer of a common interest development for alleged

damage to the common areas, alleged damage to the separate interests that the association is obligated to maintain or repair, or alleged damage to the separate interests that arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair, the board of directors of the association shall provide written notice to each member of the association who appears on the records of the association when the notice is provided. This notice shall specify all of the following:

(1) That a meeting will take place to discuss problems that may lead to the filing of a civil action.

(2) The options, including civil actions, that are available to address the problems.

(3) The time and place of this meeting.

(b) Notwithstanding subdivision (a), if the association has reason to believe that the applicable statute of limitations will expire before the association files the civil action, the association may give the notice, as described above, within 30 days after the filing of the action.

Comment. Former Section 1368.4 is renumbered as 1368.5. Subdivision (a) is amended to correct a technical error.

Civ. Code § 1369.510-1369.590 (added). Alternative dispute resolution

SEC. ____ . Article 2 (commencing with Section 1369.510) is added to Chapter 7 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 2. Alternative Dispute Resolution

§ 1369.510. Definitions

1369.510. As used in this article:

(a) “Alternative dispute resolution” means mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decisionmaking process. The

form of alternative dispute resolution chosen pursuant to this article may be binding or nonbinding at the option of the parties.

(b) “Enforcement action” means a civil action or proceeding, other than a cross-complaint, for any of the following purposes:

(1) Enforcement of this title.

(2) Enforcement of the Nonprofit Mutual Benefit Corporation Law.

(3) Enforcement of the governing documents of a common interest development.

Comment. The first sentence of subdivision (a) of Section 1369.510 continues the substance of a portion of the first sentence of former Section 1354(b), and broadens it to include conciliation and other nonjudicial processes that involve a neutral in dispute resolution. The second sentence of subdivision (a) continues the substance of the second sentence of former Section 1354(b).

Subdivision (b) supersedes the portion of the first sentence of former Section 1354(b) that limited the alternative dispute resolution process to enforcement of governing documents. Under this section, an enforcement proceeding may involve enforcement of rights under this title or the Nonprofit Mutual Benefit Corporation Law. See also Section 1351(j) (“governing documents” defined). The Nonprofit Mutual Benefit Corporation Law is found at Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code.

Subdivision (b) continues the exemption of cross-complaints formerly found in Section 1354(e).

§ 1369.520. ADR prerequisite to enforcement action

1369.520. (a) An association or an owner or a member of a common interest development may not file an enforcement action unless the parties have endeavored to submit their dispute to alternative dispute resolution.

(b) This section applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of five thousand dollars (\$5,000). Except as provided in Section 1366.3, this section does not apply to an

action for association assessments. This section does not apply to a small claims action.

Comment. Subdivision (a) of Section 1369.520 continues the substance of a portion of the first sentence of former Section 1354(b). See also Section 1369.510 (“alternative dispute resolution” and “enforcement action” defined). Subdivision (a) does not continue the clause excepting a dispute where the applicable time limitation for commencing the action would run within 120 days. Instead, action under this subdivision tolls a statute of limitations that would run within 120 days. See Section 1369.550.

Subdivision (b) expands the provision of the first sentence of former Section 1354(b) specifying the types of enforcement actions to which the section applies. As revised, the provision covers an action for writ relief, as well as an action for declaratory or injunctive relief. It makes clear that a dispute resolution effort is not a prerequisite to a small claims action. Because the alternative dispute resolution requirement is limited to an action for declaratory, injunctive, or writ relief (or those types of relief joined with a damage claim not exceeding the jurisdictional limit of the small claims division of superior court), the requirement necessarily is inapplicable to a small claims proceeding. *Cf.* Code Civ. Proc. § 116.220 (limited jurisdiction of small claims court). A small claims action itself satisfies key functions of alternative dispute resolution — it provides a quick and inexpensive means of resolving a dispute within the jurisdiction of the small claims division of the superior court.

Subdivision (b) also is revised to include an explicit cross-reference to Section 1366.3 (alternative dispute resolution for assessments). Although the alternative dispute resolution requirement does not by its terms apply to assessment disputes, the requirement may be made applicable pursuant to the procedure provided in Section 1366.3.

§ 1369.530. Request for resolution

1369.530. (a) Any party to a dispute may initiate the process required by Section 1369.520 by serving on all other parties to the dispute a Request for Resolution. The Request for Resolution shall include all of the following:

- (1) A brief description of the dispute between the parties.
- (2) A request for alternative dispute resolution.

(3) A notice that the party receiving the Request for Resolution is required to respond within 30 days of receipt or the request will be deemed rejected.

(4) If the party on whom the request is served is the owner of a separate interest, a copy of this article.

(b) Service of the Request for Resolution shall be by personal delivery, first class mail, express mail, facsimile transmission, or other means reasonably calculated to provide the party on whom the request is served actual notice of the request.

(c) A party on whom a Request for Resolution is served has 30 days following service to accept or reject the request. If a party does not accept the request within that period, the request is deemed rejected by the party.

Comment. Paragraphs (1)-(3) of Section 1369.530(a) continue the substance of the third and fourth sentences of former Section 1354(b). Paragraph (4) continues the substance of former Section 1354(j). As used in subdivision (a), “all other parties to the dispute” refers to all persons intended to be named as parties to the enforcement action.

Subdivision (b) supersedes the fifth sentence of former Section 1354(b). It expands the permissible manner of service of the Request for Resolution, consistent with general provisions for notice of motion in civil proceedings.

Subdivision (c) continues the substance of the sixth sentence of former Section 1354(b).

§ 1369.540. ADR process

1369.540. (a) If the party on whom a Request for Resolution is served accepts the request, the parties shall complete the alternative dispute resolution within 90 days after the party initiating the request receives the acceptance, unless this period is extended by written stipulation signed by both parties.

(b) Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code applies to any form of alternative dispute resolution initiated by a Request for Resolution under this article, other than arbitration.

(c) The costs of the alternative dispute resolution shall be borne by the parties.

Comment. Subdivision (a) of Section 1369.540 continues the substance of the seventh sentence of former Section 1354(b).

Subdivision (b) supersedes former Section 1354(g)-(h). It replaces the former provisions with a reference to the general mediation confidentiality statute, but precludes application of that statute to arbitration proceedings pursuant to this article. See also Section 1269.510(a) (“alternative dispute resolution” defined).

Subdivision (c) continues the eighth sentence of former Section 1354(b).

The parties to an agreement reached pursuant to alternative dispute resolution may include in the agreement provisions for its enforcement in case of breach, such as a stipulation for entry of judgment or for injunctive relief.

§ 1369.550. Tolling of statute of limitations

1369.550. If the applicable time limitation for commencing an enforcement action would run within 120 days after service of a Request for Resolution, the time limitation is extended to the 120th day after service. If the parties have stipulated to an extension of the alternative dispute resolution period beyond the 120th day after service of a Request for Resolution pursuant to Section 1369.540, a time limitation that would expire during the alternative dispute resolution period is extended to the end of the stipulated period.

Comment. Section 1369.550 supersedes the first clause of former Section 1354(b), which excepted a dispute where the applicable time limitation for commencing the action would run within 120 days. Under Section 1369.550, a Request for Resolution is required even if the statute of limitations would expire within 120 days of the request. Instead, if the statute of limitations would run within 120 days after service of the request, the statute is tolled until the 120th day after service of the request.

§ 1369.560. Certification of efforts to resolve dispute

1369.560. (a) At the time of commencement of an enforcement action, the party commencing the action shall file with the initial pleading a certificate stating that alternative dispute resolution has been completed in compliance with this article.

(b) Failure to file a certificate pursuant to subdivision (a) is grounds for a demurrer or a motion to strike unless one of the following conditions is satisfied:

(1) The party commencing the action certifies in writing that one of the other parties to the dispute refused alternative dispute resolution before commencement of the action, or that preliminary or temporary injunctive relief is necessary.

(2) The court finds that dismissal of the action for failure to comply with this article would result in substantial prejudice to one of the parties.

Comment. Subdivision (a) of Section 1369.560 continues the substance of the first sentence of former Section 1354(c), but expands its application beyond an action for enforcement of the association's governing documents. See Sections 1369.510(b) ("enforcement action" defined), 1369.520 (ADR prerequisite to enforcement action).

Subdivision (b) continues the substance of the second sentence of former Section 1354(c), but no longer excuses compliance if the statute of limitations would run within 120 days after filing. *Cf.* Section 1369.550 & Comment (tolling of statute of limitations). See also Code Civ. Proc. §§ 430.10 (demurrer), 435 (motion to strike).

The requirement of this section does not apply to the filing of a cross-complaint. See Section 1369.510(b) ("enforcement action" defined).

§ 1369.570. Stay of litigation for dispute resolution

1369.570. (a) After an enforcement action is commenced, on written stipulation of the parties the matter may be referred to alternative dispute resolution and stayed.

(b) The costs of the alternative dispute resolution shall be borne by the parties.

(c) During a referral, the action is not subject to the rules implementing subdivision (c) of Section 68603 of the Government Code.

Comment. Section 1369.570 continues the substance of former Section 1354(d) but expands its application beyond an action for enforcement of the association's governing documents. See Section 1369.510(b) ("enforcement action" defined).

§ 1369.580. Attorney's fees

1369.580. In an enforcement action in which fees and costs may be awarded, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution before commencement of the action.

Comment. Section 1369.580 continues the substance of the second sentence of former Section 1354(f) but expands its application beyond an action for enforcement of the association's governing documents. See Section 1369.510(b) ("enforcement action" defined).

§ 1369.590. Member information

1369.590. (a) An association shall annually provide its members a summary of the provisions of this article, that specifically references this article. The summary shall include the following language:

Failure of a member of the association to comply with the prefiling requirements of Section 1369.520 of the Civil Code may result in the loss of your right to sue the association or another member of the association regarding enforcement of the governing documents or the applicable law.

(b) The summary shall be provided either at the time the pro forma budget required by Section 1365 is distributed or in the manner prescribed in Section 5016 of the Corporations Code.

Comment. Subdivision (a) of Section 1369.590 continues the substance of the first and second paragraphs of former Section 1354(i). Subdivision (a) makes clear that it is the duty of the association to provide the summary.

Subdivision (b) continues the third paragraph of former Section 1354(i).

CODE OF CIVIL PROCEDURE**Code Civ. Proc. § 383 (repealed). Civil action brought by association**

SEC. ____ . Section 383 of the Code of Civil Procedure is repealed.

383. (a) An association established to manage a common interest development shall have standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:

(1) Enforcement of the governing documents.

(2) Damage to the common areas.

(3) Damage to the separate interests which the association is obligated to maintain or repair.

(4) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.

(b) In any action maintained by an association pursuant to paragraph (2), (3), or (4) of subdivision (a), the amount of damages recovered by the association shall be reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based upon principles of comparative fault. In such an action, the comparative fault of the association or its managing agents may be raised by way of defense, but shall not be the basis for any cross-action or separate action against the association or its managing agents for contribution or implied indemnity, where the only damage was sustained by the association or its members. It is the intent of the Legislature in enacting this subdivision to require that comparative fault be plead as an affirmative defense, rather than a separate cause of action, where the only damage was sustained by the association or its members.

(c) In any action involving damages described in paragraph (2), (3), or (4) of subdivision (a), the defendant or cross-defendant may allege and prove the comparative fault of the

~~association or its managing agents as a setoff to his or her liability even if the association is not a party to the litigation or is no longer a party whether by reason of settlement, dismissal, or otherwise.~~

~~(d) Subdivisions (b) and (c) apply to actions commenced on or after January 1, 1993.~~

~~(e) Nothing in this section shall affect (1) any person's liability under Section 1431 of the Civil Code, or (2) the liability of the association or its managing agent for any act or omission which causes damages to another.~~

Comment. Subdivision (a) of former Section 383 is continued without substantive change in Civil Code Section 1368.3. Subdivisions (b)-(e) are continued without substantive change in Civil Code Section 1368.4.

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Unincorporated Associations

September 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Unincorporated Associations*, 33 Cal. L. Revision Comm'n Reports 729 (2003). This is part of publication #218 [2003-2004 Recommendations].

STATE OF CALIFORNIA

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September 19, 2003

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

The Law Revision Commission recommends a number of improvements to the law governing unincorporated associations, including the following:

- (1) Reorganize and revise Title 3 of the Corporations Code (“Unincorporated Associations”) to improve its structure and clarify its relation to other law.
- (2) Replace the patchwork of existing rules governing the liability of a member of a nonprofit association with a set of clear and comprehensive provisions based on the principle that a member is not liable for an obligation of the association solely as a consequence of being a member.
- (3) Simplify existing law governing ownership and transfer of property by an unincorporated association.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

Frank Kaplan
Chairperson

UNINCORPORATED ASSOCIATIONS

Many private associations are not organized as corporations. An unincorporated association may be a for-profit or nonprofit group, such as a partnership, social club, charitable group, mutual aid society, homeowners association, labor union, political group, or religious society. Although some unincorporated associations are legally sophisticated, others are small, informal groups, without legal counsel. It is important that the law governing unincorporated associations be clear and understandable to a layperson.

Historically, an unincorporated association was not considered to be a legal entity separate from its members. It was treated as an aggregation of individuals.¹ An unincorporated association could not own or transfer property and could not sue or be sued in its own name. Members of an unincorporated association could be held jointly and severally liable for the liabilities of the group.

In 1996, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Unincorporated Nonprofit Association Act (“Uniform Act”) to address some of the problems that result from the historical view of unincorporated associations. The Uniform Act is narrow in its scope, focusing on three basic subjects: “authority to acquire, hold, and transfer property, especially real property; authority to sue and be sued as an entity; and contract and tort liability of officers and members of the association.”²

1. “Associations ... are not bodies politic or corporations; nor are they recognized by the law as persons. They are mere aggregates of individuals called for convenience, like partnerships, by a common name.” *Grand Grove of United Ancient Order of Druids of California v. Garibaldi Grove*, 130 Cal. 116, 119, 62 P. 486 (1900).

2. Unif. Unincorporated Nonprofit Ass’n Act (1996) (prefatory note).

The Law Revision Commission has conducted a study to determine whether the Uniform Act should be adopted in California.³ The Commission recommends against adoption of the Uniform Act. Most of the issues that are addressed in the Uniform Act have already been addressed by statute in California.⁴ Adoption of the Uniform Act in California would unsettle existing law without providing significant substantive benefit. Interstate uniformity of law is not a significant advantage in this context because (1) the need to preserve aspects of California law that differ from the Uniform Act would make complete uniformity impossible to achieve,⁵ and (2) the Uniform Act has not been adopted in most states.⁶

3. See 2003 Cal. Stat. res. ch. 92.

4. Many of the prior reforms were enacted on the recommendation of the Law Revision Commission, after careful study. See *Suit by or Against an Unincorporated Association*, 8 Cal. L. Revision Comm'n Reports 901 (1966); *Service of Process on Unincorporated Associations*, 8 Cal. L. Revision Comm'n Reports 1403 (1967); *Service of Process on Unincorporated Associations*, 13 Cal. L. Revision Comm'n Reports 1657 (1976).

5. For example, California case law provides that, on dissolution, the remaining assets of an unincorporated association are disposed of according to the association's governing documents or, if the governing documents are silent as to the disposition of assets, are to be divided pro rata among the association's members. *Holt v. Santa Clara County Sheriff's Benefit Ass'n*, 250 Cal. App. 2d 925, 932, 59 Cal. Rptr. 180 (1967). Section 9 of the Uniform Act governs distribution of the assets of a nonprofit association. However, it does not address voluntary dissolution, for-profit associations, or distribution of assets to members. If Section 9 of the Uniform Act were adopted in California, it would need to be significantly modified in order to preserve the full scope of existing law, thereby undermining interstate uniformity. Note that the proposed law would provide rules for distribution of assets that are generally consistent with case law and the law governing nonprofit corporations. See proposed Corp. Code §§ 18130-18135.

6. The Uniform Act has been adopted in Alabama, Arkansas, Colorado, District of Columbia, Delaware, Hawaii, Idaho, Texas, West Virginia, Wisconsin, and Wyoming. See Uniform Unincorporated Nonprofit Association Act Fact Sheet, <www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uunaa.asp> (10/9/03).

The Commission recommends a number of improvements to existing California law governing unincorporated associations.

ORGANIZATION OF EXISTING LAW

The proposed law would recast existing law to improve its accessibility. Sections would be organized into a logical order, with appropriate headings, to better reflect the legal principles they address. Important terms would be defined and those definitions would be applied consistently.⁷

RELATION TO OTHER LAW

The proposed law includes provisions detailing its relation to other law. Corporations, government entities, partnerships, joint ventures, and limited liability companies are expressly excluded from application of the proposed law.⁸ Those entities are subject to comprehensive regulation by other statutes. The proposed law also includes a provision subordinating it to any inconsistent statute governing a specific type of association.⁹ Thus, the proposed law provides default rules that apply to the extent an association is not governed by other law.

PROPERTY POWERS

Under existing law, an unincorporated association can own and transfer property in its own name.¹⁰ The proposed law

7. Under existing law there are gaps and inconsistencies in the application of defined terms. For example, Corporations Code Section 24000 defines “unincorporated association” but that definition does not apply to other sections that use the same term (such as Corporations Code Section 20001).

8. See proposed Corp. Code § 18055 *infra*.

9. See proposed Corp. Code § 18060 *infra*.

10. See Corp. Code § 20001.

would simplify the existing provisions relating to property ownership and transfer by eliminating antiquated distinctions that developed as application of the law was incrementally extended to the various types of unincorporated association.¹¹

The proposed law would add a provision governing the disposition of an unincorporated association's assets on dissolution of the association. Under the proposed law, assets would be disposed of pursuant to the following priorities: first according to any applicable condition requiring that an asset be returned or transferred, then according to the terms of any applicable trust. Assets that are not subject to a condition or a trust would be distributed pursuant to the association's governing principles. If the association's governing principles are silent on distribution of assets on dissolution, the assets would be divided pro rata among the existing members.¹² This is consistent with case law¹³ and the law governing nonprofit corporations.¹⁴

Under the proposed law, within four years after distribution a creditor of a dissolved unincorporated association could recover assets distributed to a member.¹⁵ That is analogous to the right of a creditor of a dissolved nonprofit corporation to recover assets distributed on dissolution.¹⁶

11. See proposed Corp. Code §§ 18105, 18115, 18120 *infra*.

12. See proposed Corp. Code § 18130 *infra*.

13. See *Holt v. Santa Clara County Sheriff's Benefit Ass'n*, 250 Cal. App. 2d 925, 932, 59 Cal. Rptr. 180 (1967) ("It is the general rule that upon the dissolution of a voluntary association its property should be distributed pro-rata among its members unless otherwise provided by its constitution or by-laws.") (citations omitted). See also *Lynch v. Spilman*, 67 Cal. 2d 251, 260, 431 P.2d 636, 62 Cal. Rptr. 12 (1967) ("property transferred to a corporation or other institution organized for a charitable purpose without a declaration of the use to which the property is to be put, is received and held by it 'in trust to carry out the objects for which the organization was created.'") (citations omitted).

14. See, e.g., Corp. Code §§ 8715-8717.

15. See proposed Corp. Code § 18135 *infra*.

16. See Corp. Code § 8723.

LIABILITY FOR OBLIGATION OF NONPROFIT ASSOCIATION

Contract Liability

*Security-First National Bank of Los Angeles v. Cooper*¹⁷ held that a person is not liable for a contractual obligation of an unincorporated association merely because the person is a member of the association. However, a member is liable if the member “expressly or impliedly authorizes or ratifies the contract.” In that case, authorization of a lease was inferred from the fact that members had signed the association’s bylaws.

In response to that decision, the Legislature enacted three rules that limit the liability of a member of a nonprofit association. Under these rules: (1) a member is not individually liable for an association debt or obligation relating to real property,¹⁸ (2) no presumption or inference of consent or agreement to a nonprofit association incurring an obligation may be drawn from the fact that a person is a member of the association or has signed its bylaws,¹⁹ and (3) a member can only assume responsibility for an association obligation in a signed writing that identifies the specific contract for which responsibility is assumed.²⁰

These rules are both too broad and too narrow. They are too broad because they seem to preclude member liability on a real property contract even where liability should properly be imposed (e.g., where the member has expressly assumed responsibility for the contract). They are too narrow because the principal limit on liability only applies to a limited class

17. 62 Cal. App. 2d 653, 145 P.2d 722 (1944).

18. See Corp. Code § 21100.

19. See Corp. Code § 21102.

20. See Corp. Code § 21101.

of contracts (e.g., a member would not be shielded from personal liability for a contract to purchase a vehicle).

The proposed law would replace existing statutory limits on contract liability with a more comprehensive and generally applicable set of rules:

- (1) A member, director, officer, or agent of a nonprofit association would not be liable for a debt, obligation, or liability of the association solely by reason of being a member, director, officer, or agent.²¹
- (2) A member of a nonprofit association would not be liable unless the member expressly assumes liability, expressly authorizes or ratifies a specific contract, or with knowledge of a contract, receives benefits under that contract. Liability on the basis of a received benefit would be limited to the value of the benefit received.²²
- (3) A director, officer, or agent of a nonprofit association would not be liable unless the director, officer, or agent expressly assumes liability, executes a contract without disclosing that the director, officer, or agent is acting as an agent of the association, or executes a contract without authority to do so.²³ The latter two grounds for liability are specific applications of general agency law.²⁴

Tort Liability

In *Orser v. George*,²⁵ the court considered whether the members of an unincorporated hunting club were liable for

21. See proposed Corp. Code § 18605 *infra*.

22. See proposed Corp. Code § 18610 *infra*.

23. See proposed Corp. Code § 18615 *infra*.

24. See Civ. Code §§ 2342 (warranty of authority), 2343(2) (bad faith representation of authority); 2 B. Witkin, Summary of California Law Agency §§ 144-48, at 141-44 (9th ed. 1987).

25. 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967).

one member's accidental shooting of a non-member. The court noted:

It has been held that an unincorporated association is bound to use the same care as a natural person; but that mere membership does not make all members liable for unlawful acts of other members without their participation, knowledge or approval. Vicarious liability may exist, however, based upon ... personal participation in an unlawful activity or setting it in motion.²⁶

In *Steuer v. Phelps*,²⁷ the court considered whether the members of a small unincorporated church group, with no officers or management, were liable for one member's negligence while driving on group business. The court noted:

There is evidence that each individual member, rather than an officer, manager, or committee, participated directly in entrusting the car to Mrs. Henry to operate exclusively for purposes of the association. Under the doctrine of respondeat superior, it is elemental that one who entrusts another with the operation of his automobile is liable for the negligent operation of the vehicle, even though he neither authorized nor approved the driving in a negligent manner. ... Mere authorization to Mrs. Henry to operate the car fastens liability upon the individual members who gave that authorization.²⁸

Thus, it appears that a member of a nonprofit association may be vicariously liable for the tortious conduct of an agent or other member of the association, if the member personally participates in the tort (in which case the member is probably liable for the member's own conduct, rather than vicariously liable for the agent's conduct), or authorizes or "sets in motion" the agent's actions.

26. *Id.* at 670-71.

27. 41 Cal. App. 3d 468, 116 Cal. Rptr. 61 (1974).

28. *Id.* at 472.

Generally, the law does not hold a person liable for the wrongs of another. However, vicarious liability has been justified as a deliberate allocation of risk to the party best able to bear it:

Although earlier authorities sought to justify the respondeat superior doctrine on such theories as “control” by the master of the servant, the master’s “privilege” in being permitted to employ another, the third party’s innocence in comparison to the master’s selection of the servant, or the master’s “deep pocket” to pay for the loss, “the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer’s enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.”²⁹

This rationale is less persuasive when the principal is a nonprofit group, which does not “profit” by its activity and has little opportunity to spread risk to society at large by raising prices on goods or services. Extending vicarious liability to individual members of the group would be even harder to justify.

The proposed law would provide that a member, director, officer, or agent of a nonprofit association is not liable for the torts of an agent or member of the association unless (1) the

29. *Hinman v. Westinghouse Elec. Co.*, 2 Cal. 3d 956, 959-60, 471 P.2d 988, 88 Cal. Rptr. 188 (1970) (quoting Prosser, *Law of Torts* 471 (3d. ed. 1964)).

member, director, officer, or agent expressly assumes liability for any injury caused by the activity, or (2) the tortious conduct of the member, director, officer, or agent causes the injury.³⁰ In other words, a member, director, officer, or agent of a nonprofit association would not be vicariously liable for the torts of the association.

Alter Ego Liability

The proposed law provides that a member of a nonprofit association may be subject to liability for a debt, obligation, or liability of the association under common law principles governing alter ego liability of shareholders of a corporation, taking into account differences in form between a nonprofit association and a corporation.³¹ This would allow a court to disregard a nonprofit association's form if a member is misusing that form to defraud others or work an injustice.

30. See proposed Corp. Code § 18620 *infra*.

31. See proposed Corp. Code § 18630 *infra*.

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PROPOSED LAW
CORPORATIONS CODE
TITLE 3. UNINCORPORATED
ASSOCIATIONS

Corp. Code §§ 18000-18270 (added). General Provisions

SEC. _____. Part 1 (commencing with Section 18000) is added to Title 3 of the Corporations Code, to read:

PART 1. GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS

§ 18000. Application of definitions

18000. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this title.

Comment. Section 18000 is new.

§ 18005. Director

18005. “Director” means a natural person serving as a member of the board or other representative governing body of the unincorporated association.

Comment. Section 18005 is new. See also Sections 8 (“writing” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined).

§ 18010. Governing principles

18010. “Governing principles” means the principles stated in the constitution, articles of association, bylaws, regulations, or other writing that governs the purpose or operation of an unincorporated association or the rights or obligations of its

members. If there is no written provision governing an issue, the association's governing principles regarding that issue may be inferred from its established practices. For the purpose of this section, "established practices" means the practices used by an unincorporated association without material change or exception during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence.

Comment. Section 18010 is new. See also Sections 8 ("writing" defined), 18015 ("member" defined), 18035 ("unincorporated association" defined).

§ 18015. Member

18015. (a) If the governing principles of an unincorporated association define the membership of the association, "member" has the meaning provided by the governing principles.

(b) If the governing principles of an unincorporated association do not define the membership of the association, "member" means a person who, pursuant to the governing principles of the unincorporated association, has a right to participate in the selection of persons authorized to manage the affairs of the unincorporated association or in the development of policy of the unincorporated association, but does not include a person who participates solely as director, officer, or agent of the association.

Comment. Section 18015 is new. Subdivision (a) recognizes the authority of an unincorporated association to determine its own membership requirements. Nothing in this subdivision is intended to authorize unlawful discrimination by an unincorporated association in its membership policy.

Subdivision (b) is drawn from Section 1(1) of the Uniform Unincorporated Nonprofit Association Act (1996). However, subdivision (b) adds an exception for a person who participates in association decisionmaking solely as a director, officer, or agent of the association. This does not preclude a director, officer, or agent from being a member, if that person qualifies as a member for another reason. For example, if

an association's employee assists in developing association policy, that participation does not make the employee a member of the association. However, the fact that the employee serves as an agent of the association does not preclude the employee from being a member under subdivision (a).

See also Sections 18005 ("director" defined), 18010 ("governing principles" defined), 18025 ("officer" defined), 18030 ("person" defined), 18035 ("unincorporated association" defined).

§ 18020. Nonprofit association

18020. (a) "Nonprofit association" means an unincorporated association with a primary common purpose other than to operate a business for profit.

(b) A nonprofit association may carry on a business for profit and apply any profit that results from the business activity to any activity in which it may lawfully engage.

Comment. Subdivision (a) of Section 18020 defines "nonprofit association" for the purpose of this title. See Section 18035 ("unincorporated association" defined). *Cf.* Sections 16101(7) ("partnership" defined), 16202 (formation of partnership). Unincorporated associations organized primarily to carry on a business for profit include a business trust, real estate investment trust, and joint stock association.

Subdivision (b) recognizes that a nonprofit entity may carry on some for-profit business activity. See, e.g., Sections 5140(*l*) (powers of nonprofit public benefit corporation), 7140(*l*) (powers of nonprofit mutual benefit corporation).

§ 18025. Officer

18025. "Officer" means a natural person serving as an unincorporated association's chair, president, secretary, chief financial officer, or other position of authority that is established pursuant to the association's governing principles.

Comment. Section 18025 is new. See also Sections 18010 ("governing principles" defined), 18035 ("unincorporated association" defined).

§ 18030. Person

18030. “Person” includes a natural person, corporation, partnership or other unincorporated organization, government or governmental subdivision or agency, or any other entity.

Comment. Section 18030 continues and generalizes former Section 24000(b). See also Section 18 (“person” defined for purposes of code).

§ 18035. Unincorporated association

18035. (a) “Unincorporated association” means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not.

(b) Joint tenancy, tenancy in common, community property, or other form of property tenure does not by itself establish an unincorporated association, even if coowners share ownership of the property for a common purpose.

(c) Marriage or creation of a registered domestic partnership does not by itself establish an unincorporated association.

Comment. Subdivision (a) of Section 18035 is drawn from former Section 24000. Subdivision (b) is drawn from Section 16202(c)(1). Subdivision (c) makes clear that marriage or creation of a registered domestic partnership does not by itself create an unincorporated association. This does not prevent spouses or domestic partners from forming an unincorporated association for any purpose beyond the purposes inherent in marriage or registered domestic partnership. See also Sections 18030 (“person” defined), 18055 (exempt persons), 18060 (relation to other law).

CHAPTER 2. APPLICATION OF TITLE

§ 18055. Exempt persons

18055. This title does not apply to any of the following persons:

- (a) A corporation.
- (b) A government or governmental subdivision or agency.
- (c) A partnership or joint venture.
- (d) A limited liability company.

Comment. Section 18055 lists entities that are not subject to this title because they are governed by other law. Subdivision (b) is drawn from former Section 24000. Section 18200(g) provides an exception to the general rule provided in this section.

§ 18060. Relation to other law

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

Comment. Section 18060 is new. It makes clear that the general provisions of this title are subordinate to entity-specific statutes. For example, Section 18105 authorizes an unincorporated association to own property. Insurance Code Section 9089 provides a more restrictive property ownership rule specific to a fraternal fire insurer. An unincorporated fraternal fire insurer would be subject to both sections. To the extent they are inconsistent, Insurance Code Section 9089 would prevail. See also Section 18035 (“unincorporated association” defined).

§ 18065. Relation to law of agency

18065. Except to the extent this title provides a specific rule, the general law of agency, including Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 of, and Title 9 (commencing with Section 2295) of, Part 4 of Division 3 of the Civil Code, applies to an unincorporated association.

Comment. Section 18065 is new. See also Sections 18035 (“unincorporated association” defined), 18615 (contract liability of agent of nonprofit association), 18620 (tort liability).

§ 18070. Continuation and restatement of prior law

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

include a reference to the previously existing provision unless a contrary intent appears.

Comment. The first part of Section 18070 is drawn from Section 2. The last clause makes clear that a statutory reference to a new provision of this title includes a reference to the former law from which it is drawn. *Cf.* Gov't Code § 9604 (reference to previously existing provision deemed reference to restatement or continuation).

CHAPTER 3. PROPERTY

§ 18100. Membership interest is personal property

18100. The interest of a member in an unincorporated association is personal property.

Comment. Section 18100 continues former Section 20000 without substantive change. A member has no property interest in association assets that are dedicated to a public or charitable purpose. See also Sections 18015 (“member” defined), 18035 (“unincorporated association” defined).

§ 18105. Property powers

18105. An unincorporated association may, in its name, acquire, hold, manage, encumber, or transfer an interest in real or personal property.

Comment. Section 18105 continues the substance of former Section 20001, except that the limitation on the permissible purpose for which property is acquired, held, managed, encumbered, or transferred is not continued. Under this section, an unincorporated association has all of the powers granted under former Section 20001, including the power to purchase, receive, own, hold, lease, mortgage, pledge, or encumber, by deed of trust or otherwise, manage, and sell property. See also Section 18035 (“unincorporated association” defined).

§ 18110. Association property

18110. Property acquired by or for an unincorporated association is property of the unincorporated association and not of the members individually, regardless of how title is held.

Comment. Section 18110 is new. See also Sections 18015 (“member” defined), 18035 (“unincorporated association” defined).

§ 18115. Execution of real property acquisition, transfer, or encumbrance

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

Comment. Section 18115 continues the first paragraph of former Section 20002 without substantive change, except that the special, more restrictive, rule for fraternal or benevolent societies and labor organizations has not been continued. These organizations are now subject to the same rule as any other form of unincorporated association. See also Sections 18025 (“officer” defined), 18030 (“person” defined), 18035 (“unincorporated association” defined).

§ 18120. Statement of authority

18120. (a) An unincorporated association may record in a county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to acquire, transfer, or encumber real property. For the purposes of this section, “statement of authority” includes a certified copy of a statement recorded in another county.

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

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

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

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

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

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

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

Comment. Section 18120 continues the substance of the second paragraph of former Section 20002. Subdivision (b) is new.

Former Section 20002 incorporated definitions set out in former Section 15010.5. The obsolete definitions have not been continued. See also Sections 18005 (“director” defined), 18015 (“member” defined), 18025 (“officer” defined), 18030 (“person” defined), 18035 (“unincorporated association” defined).

§ 18125. Limit on assertion of unauthorized action

18125. No limitation on the power of an unincorporated association to acquire, hold, manage, pledge, encumber, or transfer an interest in real or personal property, or the manner of exercise of those powers, shall be asserted as between the unincorporated association or a member of the unincorporated association and a third person, except in the following proceedings:

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

(b) A proceeding to dissolve the unincorporated association.

(c) A proceeding against a director, officer, or agent of the unincorporated association for violation of that person's authority.

Comment. Section 18125 is drawn from Section 208(a). It protects third parties from claims that an action of an unincorporated association is unauthorized or improperly executed. See also Sections 18005 ("director" defined), 18015 ("member" defined), 18025 ("officer" defined), 18035 ("unincorporated association" defined).

§ 18130. Disposition of assets of dissolved association

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

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

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

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

Comment. Section 18130 is new. It provides rules for distribution of assets of a dissolving unincorporated association that remain after the association has satisfied its known debts and liabilities.

Subdivision (a) is drawn from Section 8715.

Subdivision (b) governs distribution of assets that are held in trust and are not subject to a valid condition requiring return, transfer, or conveyance. See *Lynch v. Spilman*, 67 Cal. 2d 251, 260, 431 P.2d 636, 62 Cal. Rptr. 12 (1967) (“property transferred to a corporation or other institution organized for a charitable purpose without a declaration of the use to which the property is to be put, is received and held by it ‘in trust to carry out the objects for which the organization was created.’”) (citations omitted).

Subdivision (c) governs assets that are not subject to a valid condition requiring return, transfer, or conveyance, and are not subject to a trust. It is consistent with the holding in *Holt v. Santa Clara County Sheriff's Benefit Ass'n*, 250 Cal. App. 2d 925, 932, 59 Cal. Rptr. 180 (1967) (“It is the general rule that upon the dissolution of a voluntary association its property should be distributed pro-rata among its members unless otherwise provided by its constitution or by-laws.”) (citations omitted).

Section 18060 provides that a statute specific to a particular type of unincorporated association prevails over a provision of this title, to the extent of any inconsistency. For example, a statutory rule governing disposition of the property of a dissolved cemetery association would prevail over provisions of this section, to the extent of any inconsistency. See, e.g., Health & Safety Code §§ 7925 (limitation on proceeds of sale of cemetery land), 8825-8829 (dedication of pioneer memorial park).

See also Sections 18010 (“governing principles” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined).

§ 18135. Recovery of distributed assets

18135. (a) Notwithstanding Section 18260, a cause of action against an unincorporated association may be enforced against a person who received assets distributed under Section 18130. Liability under this section shall be limited to the value of the assets distributed to the person or the person's pro rata share of the claim against the unincorporated association, whichever is less.

(b) An action under this section shall be commenced before the earlier of the following dates:

(1) Expiration of the statute of limitations applicable to the cause of action.

(2) Four years after dissolution of the unincorporated association. This paragraph does not apply in a quiet title action.

Comment. Section 18135 is new. See also Sections 18015 (“member” defined), 18030 (“person” defined), 18035 (“unincorporated association” defined).

CHAPTER 4. DESIGNATION OF AGENT FOR SERVICE OF PROCESS

§ 18200. Statement of unincorporated association

18200. (a) An unincorporated association may file with the Secretary of State, on a form prescribed by the Secretary of State, a statement containing either of the following:

(1) A statement designating the location and complete address of the unincorporated association’s principal office in this state. Only one place may be designated.

(2) A statement (i) designating the location and complete address of the unincorporated association’s principal office in this state in accordance with paragraph (1) or, if the unincorporated association does not have an office in this state, designating the complete address of the unincorporated association to which the Secretary of State shall send any notices required to be sent to the association under Sections 18210 and 18215, and (ii) designating as agent of the association for service of process any natural person residing in this state or any corporation that has complied with Section 1505 and whose capacity to act as an agent has not terminated.

(b) If a natural person is designated as agent for service of process, the statement shall include the person’s complete business or residence address. If a corporate agent is designated, no address for it shall be included.

(c) Filing is deemed complete on acceptance by the Secretary of State of the statement, a copy of the statement, and the filing fee. The Secretary of State shall return the copy of the statement to the unincorporated association, with notations that indicate the file number and filing date of the original.

(d) At any time, an unincorporated association that has filed a statement under this section may file a new statement superseding the last previously filed statement. If the new statement does not designate an agent for service of process, the filing of the new statement shall be deemed to revoke the designation of an agent previously designated. A statement filed under this section expires five years from December 31 following the date it was filed in the office of the Secretary of State, unless previously superseded by the filing of a new statement.

(e) Delivery by hand of a copy of any process against the unincorporated association (1) to any natural person designated by it as agent, or (2) if the association has designated a corporate agent, to any person named in the last certificate of the corporate agent filed pursuant to Section 1505 at the office of the corporate agent shall constitute valid service on the association.

(f) For filing a statement as provided in this section, the Secretary of State shall charge and collect the fee provided in paragraph (1) of subdivision (b) of Section 12191 of the Government Code for filing a designation of agent.

(g) Notwithstanding Section 18055, a statement filed by a partnership under former Section 24003 is subject to this chapter until the statement is revoked or expires.

Comment. Section 18200 continues former Section 24003 without substantive change. Subdivision (g) is added as a transitional provision to make clear that this chapter applies to a statement filed by a partnership under former Section 24003, despite language in Section 18055 providing that this title does not apply to a partnership. See Sections

16309-16310 (partnership's designation of agent for service of process). See also Section 18035 ("unincorporated association" defined).

§ 18205. Numbering, filing, and indexing of statements

18205. (a) The Secretary of State shall mark each statement filed under Section 18200 with a consecutive file number and the date of filing. In lieu of retaining the original statement, the Secretary of State may retain a copy in accordance with Section 14756 of the Government Code.

(b) The Secretary of State shall index each statement filed under Section 18200 according to the name of the unincorporated association as set out in the statement and shall enter in the index the file number and the address of the association as set out in the statement and, if an agent for service of process is designated in the statement, the name of the agent and, if a natural person is designated as the agent, the address of that person.

(c) Upon request of any person, the Secretary of State shall issue a certificate showing whether, according to the Secretary of State's records, there is on file on the date of the certificate, any presently effective statement filed under Section 18200 for an unincorporated association using a specific name designated by the person making the request. If a statement is on file, the certificate shall include the information required by subdivision (b) to be included in the index. The fee for the certificate is the fee provided in Section 12183 of the Government Code.

(d) When a statement has expired under subdivision (d) of Section 18200, the Secretary of State shall enter that fact in the index together with the date of the expiration.

(e) Four years after a statement has expired, the Secretary of State may destroy or otherwise dispose of the statement and delete information concerning that statement from the index.

Comment. Section 18205 continues former Section 24004 without substantive change. See also Section 18030 (“person” defined), 18035 (“unincorporated association” defined).

§ 18210. Revocation or resignation of agency

18210. (a) An agent designated by an unincorporated association for the service of process may file with the Secretary of State a signed and acknowledged written statement of resignation as agent of the unincorporated association. The resignation is effective when filed. The Secretary of State shall mail written notice of the filing to the unincorporated association at its address set out in the statement filed by the association.

(b) An unincorporated association may at any time file with the Secretary of State a revocation of a designation of an agent for service of process. The revocation is effective when filed.

(c) Notwithstanding subdivisions (a) and (b), service made on an agent designated by an unincorporated association for service of process in the manner provided in subdivision (e) of Section 18200 is effective if made within 30 days after the statement of resignation or the revocation is filed with the Secretary of State.

Comment. Section 18210 continues former Section 24005 without substantive change. See also Section 18035 (“unincorporated association” defined).

§ 18215. Notice of expiration

18215. Between the first day of October and the first day of December immediately preceding the expiration date of a statement filed under Section 18200, the Secretary of State shall send by first class mail a notice, indicating the date on which the statement will expire and the file number assigned to the statement, to the unincorporated association at its address as set out in the statement. Neither the failure of the Secretary of State to mail the notice as provided in this

section nor the failure of the notice to reach the unincorporated association shall continue the statement in effect after the date of its expiration. Neither the state nor any officer or employee of the state is liable for damages for failure to mail the notice as required by this section.

Comment. Section 18215 continues former Section 24006 without substantive change. See also Section 18035 (“unincorporated association” defined).

§ 18220. Service of process on unincorporated associations in certain cases

18220. If designation of an agent for the purpose of service of process has not been made as provided in Section 18200, or if the agent designated cannot with reasonable diligence be found at the address specified in the index referred to in Section 18205 for delivery by hand of the process, and it is shown by affidavit to the satisfaction of a court or judge that process against an unincorporated association cannot be served with reasonable diligence upon the designated agent by hand or the unincorporated association in the manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or subdivision (a) of Section 415.20 of the Code of Civil Procedure, the court or judge may make an order that service be made upon the unincorporated association by delivery of a copy of the process to one or more of the association’s members designated in the order and by mailing a copy of the process to the association at its last known address. Service in this manner constitutes personal service upon the unincorporated association.

Comment. Section 18220 continues former Section 24007 without substantive change. See also Sections 18015 (“member” defined), 18035 (“unincorporated association” defined).

CHAPTER 5. LIABILITY AND ENFORCEMENT OF JUDGMENTS

§ 18250. Liability of unincorporated association

18250. Except as otherwise provided by law, an unincorporated association is liable for its act or omission and for the act or omission of its director, officer, agent, or employee, acting within the scope of the office, agency, or employment, to the same extent as if the association were a natural person.

Comment. Section 18250 continues the substance of former Section 24001, with two exceptions:

(1) Language providing that former Section 24001 did not affect the liability of an association to a member of the association has not been continued. It is now clear that an unincorporated association may be liable to a member of the association. See *Marshall v. ILWU*, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962) (member can sue labor union for negligent acts that member neither participated in nor authorized); *White v. Cox*, 17 Cal. App. 3d 824, 828, 95 Cal. Rptr. 259 (1971) (“unincorporated associations are now entitled to general recognition as separate legal entities and ... as a consequence a member of an unincorporated association may maintain a tort action against his association.”).

(2) The phrase “except as otherwise provided by statute” has been broadened. Both statutory and common law limitations on the liability of an unincorporated association should govern. For example, in *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 253, 980 P.2d 940, 87 Cal. Rptr. 237 (1999), the court held that courts should defer to a decision of a duly-constituted community association board, where the board, “upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development’s common areas....” Section 18250 does not override the rule stated in that case.

See also Sections 18005 (“director” defined), 18025 (“officer” defined), 18035 (“unincorporated association” defined).

§ 18260. Enforcement of money judgment against unincorporated association

18260. A money judgment against an unincorporated association, whether organized for profit or not, may be enforced only against the property of the association.

Comment. Section 18260 continues former Section 24002 without substantive change. Nothing in the section precludes the plaintiff from also resorting to the individual property of a member of the association to satisfy a judgment against the member in a case where the member was also a party defendant. See also Sections 18035 (“unincorporated association” defined), 18270 (enforcement of judgment against member, officer, or agent of nonprofit association).

§ 18270. Enforcement of judgment against member, officer, or agent

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

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

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

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

(4) A court grants permission to the judgment creditor to levy execution against the assets of a member, director, officer, or agent based on a finding that the assets of the unincorporated association subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the unincorporated association is excessively

burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.

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

Comment. Section 18270 is drawn from Section 16307(d). In general, a judgment against an unincorporated association can only be satisfied from the property of the association. See Section 18250. However, if there is also a judgment against a member, officer, or agent of the unincorporated association that is based on the same claim as the judgment against the unincorporated association, the judgment against the member, officer, or agent may be satisfied from that person's assets pursuant to this section. See also Sections 18015 ("member" defined), 18025 ("officer" defined), 18035 ("unincorporated association" defined).

PART 2. NONPROFIT ASSOCIATIONS

Corp. Code §§ 18605-18640 (added). Liability

SEC. _____. Chapter 1 (commencing with Section 18605) is added to Part 2 of Title 3 of the Corporations Code, to read:

CHAPTER 1. LIABILITY

§ 18605. No liability based solely on membership or agency

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

Comment. Section 18605 codifies the general rule that a member of an unincorporated nonprofit association is not liable for the association's debts, obligations, or liabilities solely by reason of membership. See *Security-First National Bank of Los Angeles v. Cooper*, 62 Cal. App. 2d 653, 667, 145 P.2d 722 (1944) ("Membership, as such, imposes no personal liability for the debts of the association") (quoting 7 C.J.S. 78);

Orser v. George, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) (“mere membership does not make all members liable for unlawful acts of other members without their participation, knowledge or approval.”).

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

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

§ 18610. Contract liability of member of nonprofit association

18610. A member of a nonprofit association is not liable for a contractual obligation of the association unless one of the following conditions is satisfied:

(a) The member expressly assumes personal responsibility for the obligation.

(b) The member expressly authorizes or ratifies the specific contract. This subdivision does not apply if the member authorizes or ratifies a contract solely in the member’s capacity as a director, officer, or agent of the association.

(c) With notice of the contract, the member receives a benefit under the contract. Liability under this subdivision is limited to the value of the benefit received.

Comment. Section 18610 is new. It specifies the scope of personal liability of a member of a nonprofit association for a contractual obligation of the association.

Subdivision (a) provides that a member is liable where the member has personally guaranteed a debt or otherwise assumed responsibility for a contract. A promise to answer for the debt of another is subject to the statute of frauds. Civ. Code § 1624(a)(2).

Subdivision (b) is consistent with the common law rule that a member of a nonprofit association is liable for a contractual obligation that the member has expressly authorized or ratified. See *Security-First National Bank of Los Angeles v. Cooper*, 62 Cal. App. 2d 653, 145 P.2d 722 (1944). Subdivision (b) does not continue the common law rule that a member is liable for a contract that the member has impliedly authorized

or ratified. Authorization and ratification may not be inferred from mere participation in the governance of the association — express approval of the contract is required. For example, approval of bylaws, election of officers, or participation in a vote in which the member votes against authorization or ratification of a contract would not constitute express authorization or ratification of a contract.

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

§ 18615. Contract liability of director, officer, or agent of nonprofit association

18615. A director, officer, or agent of a nonprofit association is not liable for a contractual obligation of the association unless one of the following conditions is satisfied:

(a) The director, officer, or agent expressly assumes responsibility for the obligation.

(b) The director, officer, or agent executes the contract without disclosing that the director, officer, or agent is acting on behalf of the association.

(c) The director, officer, or agent executes the contract without authority to execute the contract.

Comment. Section 18615 is new. It specifies the scope of liability of a director, officer, or agent of a nonprofit association for a contractual obligation of the association.

Subdivision (a) provides that a director, officer, or agent is liable where the director, officer, or agent has guaranteed a debt or otherwise assumed responsibility for a contract. A promise to answer for the debt of another is subject to the statute of frauds. Civ. Code § 1624(a)(2).

Subdivision (b) is consistent with existing law providing that an agent is not liable for a contract entered into on behalf of a disclosed principal. See 2 B. Witkin, *Summary of California Law Agency* §§ 144-48, at 141-44 (9th ed. 1987).

Subdivision (c) provides that a director, officer, or agent is liable for a contract executed on behalf of an association if the director, officer, or agent lacks authority to execute the contract. See Civ. Code §§ 2342 (warranty of authority), 2343(2) (bad faith representation of authority); B. Witkin, *supra* §§ 144-45, at 141-42.

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

§ 18620. Tort liability

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

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

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

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

§ 18630. Alter ego liability of member of nonprofit association

18630. Notwithstanding any other provision of this chapter, a member of a nonprofit association may be subject to liability for a debt, obligation, or liability of the association under common law principles governing alter ego liability of shareholders of a corporation, taking into account differences in form between a nonprofit association and a corporation.

Comment. Section 18630 is new. It provides that the common law alter ego doctrine applicable to corporations may also be applied to nonprofit associations. The alter ego doctrine is summarized in *Communist Party of the United States v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 993, 41 Cal. Rptr. 2d 618 (1995) (“In general, the two requirements for applying the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice.”).

In applying the alter ego doctrine to a nonprofit association, a court should take into account differences in form between a nonprofit corporation and a nonprofit association. For example, failure to observe

corporate formalities may be a factor in a decision to impose alter ego liability on shareholders of a corporation. Although it would be unreasonable to expect a nonprofit association to observe the governance formalities required of a corporation, it might be reasonable to expect that a nonprofit association will follow the governance formalities it has established for itself. Failure to do so may indicate that the personality of a nonprofit association and its members are not truly separate.

Failure to provide a corporation with reasonably adequate assets to cover its prospective liabilities may justify imposing alter ego liability on shareholders of a corporation. In *Automotriz del Golfo de California v. Resnick*, 47 Cal. 2d 792, 306 P.2d 1 (1957), the court relied in part on inadequate capitalization to justify imposing alter ego liability:

If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.

Id. at 797 quoting Ballantine on Corporations (1946). This principle could also be applied to a nonprofit association. However, it would be necessary to carefully consider the nature of the association to determine what level of unencumbered capital would be reasonably adequate for the association's prospective liabilities. For example, a small historical society, operating a museum that is open to the public, should probably insure against liability for any injuries suffered by the public while in the museum. Such insurance might reasonably be considered adequate capitalization. On the other hand, an association that publishes controversial and potentially defamatory commentaries about public figures might reasonably anticipate greater risk of liability. If the association fails to insure against that risk or maintain a cash reserve to satisfy any judgment against it, a court might conclude that the association is inadequately capitalized.

If, as an incident to its nonprofit purpose, a nonprofit association conducts for-profit business activity, the appropriate levels of capitalization and insurance for that activity would be analogous to the

capitalization and insurance that a for-profit entity should carry when conducting similar business activity.

See also Sections 18015 (“member” defined), 18020 (“nonprofit association” defined).

§ 18640. Fraudulent transfers

18640. Nothing in this chapter limits application of the Uniform Fraudulent Transfer Act (Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4 of the Civil Code).

Comment. Section 18640 is new. It makes clear that limits on liability provided in this chapter do not affect the application of the Uniform Fraudulent Transfer Act (Civ. Code §§ 3439-3439.12). Thus, if an insolvent association transfers assets to a member (e.g., through a general distribution or redemption of membership), those assets may be recoverable by a creditor, regardless of whether the member is liable for the debt.

CONFORMING REVISIONS AND REPEALS

Bus. & Prof. Code § 17912 (amended). Real estate investment trusts

SEC. _____. Section 17912 of the Business and Professions Code is amended to read:

17912. This chapter does not apply to a real estate investment trust as defined in Section 23000 of the Corporations Code and *that* has a statement on file, pursuant to Section 24003 ~~18200~~ of the Corporations Code, designating an agent for service of process or has qualified to do business under Chapter 21 (commencing with Section 2100) of *Division 1* of the Corporations Code.

Comment. Section 17912 is amended to correct cross-references to former Corporations Code Section 24003 and to correct technical errors.

Code Civ. Proc. § 395.2 (amended). Place of trial in action against unincorporated association

SEC. _____. Section 395.2 of the Code of Civil Procedure is amended to read:

395.2. If an unincorporated association has filed a statement with the Secretary of State pursuant to ~~Section 24003 of the Corporations Code~~ listing *statute, designating* its principal office in this state, the proper county for the trial of an action against ~~sueh~~ *the* unincorporated association is the same as it would be if the unincorporated association were a corporation and, for the purpose of determining ~~sueh~~ *the proper* county, the principal place of business of the unincorporated association shall be deemed to be the principal office in this state listed in the statement.

Comment. Section 395.2 is amended to reflect that an unincorporated association may file a statement designating its principal office under sections other than former Corporations Code Section 24003 (continued without substantive change in Corporations Code Section 18200). See, e.g., Corp. Code §§ 15621(a)(4) (limited partnership), 16309 (general partnership), 16953(a)(3) (limited liability partnership), 17051(a)(4) (limited liability company), 17060(a)(2) (limited liability company).

Code Civ. Proc. § 416.40 (amended). Service on unincorporated association

SEC. _____. Section 416.40 of the Code of Civil Procedure is amended to read:

416.40. A summons may be served on an unincorporated association (including a partnership) by delivering a copy of the summons and of the complaint:

(a) If the association is a general or limited partnership to the person designated as agent for service of process as ~~provided in Section 24003 of the Corporations Code~~ *in a statement filed with the Secretary of State* or to a general partner or the general manager of the partnership;

(b) If the association is not a general or limited partnership, to the person designated as agent for service of process as ~~provided in Section 24003 of the Corporations Code~~ *in a statement filed with the Secretary of State* or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process;

(c) When authorized by ~~Section 15700 or 24007~~ *18220* of the Corporations Code, as provided by ~~the applicable~~ *that* section.

Comment. Section 416.40 is amended to reflect that an unincorporated association may designate an agent for service of process under sections other than former Corporations Code Section 24003 (continued without substantive change in Corporations Code Section 18200). See, e.g., Corp. Code §§ 15621(a)(4) (limited partnership), 16309 (general partnership), 16953(a)(3) (limited liability partnership), 17051(a)(4) (limited liability company), 17060(a)(2) (limited liability company).

Corp. Code § 174.5 (amended). “Other business entity” defined

SEC. _____. Section 174.5 of the Corporations Code is amended to read:

174.5. “Other business entity” means a domestic or foreign limited liability company, limited partnership, general

partnership, business trust, real estate investment trust, unincorporated association (other than a nonprofit association), or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance as set forth in Article 16 (commencing with Section 1550) of Chapter 3 of Part 2 of Division 1 of the Insurance Code. As used herein, “general partnership” means a “partnership” as defined in subdivision (7) of Section 16101; “business trust” means a business organization formed as a trust; “real estate investment trust” means a “real estate investment trust” as defined in subsection (a) of Section 856 of the Internal Revenue Code of 1986, as amended; and “unincorporated association” has the meaning set forth in Section 24000 18035.

Comment. Section 174.5 is amended to correct a cross-reference to former Section 24000.

Corp. Code § 5063.5 (amended). “Other business entity” defined

SEC. _____. Section 5063.5 of the Corporations Code is amended to read:

5063.5. “Other business entity” means a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association (other than a nonprofit association), or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance as set forth in Article 16 (commencing with Section 1550) of Chapter 3 of Part 2 of Division 1 of the Insurance Code. As used herein, “general partnership” means a “partnership” as defined in subdivision (7) of Section 16101; “business trust” means a business organization formed as a trust; “real estate investment trust” means a “real estate investment trust” as defined in subsection (a) of Section 856 of the Internal Revenue Code of 1986, as amended; and “unincorporated

association” has the meaning set forth in Section 24000 18035.

Comment. Section 5063.5 is amended to correct a cross-reference to former Section 24000.

Corp. Code § 12242.5 (amended). “Other business entity” defined

SEC. _____. Section 12242.5 of the Corporations Code is amended to read:

12242.5. “Other business entity” means a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association (other than a nonprofit association), or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance as set forth in Article 16 (commencing with Section 1550) of Chapter 3 of Part 2 of Division 1 of the Insurance Code. As used herein, “general partnership” means a “partnership” as defined in subdivision (7) of Section 16101; “business trust” means a business organization formed as a trust; “real estate investment trust” means a “real estate investment trust” as defined in subsection (a) of Section 856 of the Internal Revenue Code of 1986, as amended; and “unincorporated association” has the meaning set forth in Section 24000 18035.

Comment. Section 12242.5 is amended to correct a cross-reference to former Section 24000.

Corp. Code § 15800 (amended). Designation of agent for service of process

SEC. _____. Section 15800 of the Corporations Code is amended to read:

15800. (a) Every partnership, other than a foreign limited partnership subject to Chapter 3 (commencing with Section 15611) or a commercial or banking partnership established and transacting business in a place without the United States,

that is domiciled without this state and has no regular place of business within this state, shall, within 40 days from the time it commences to do business in this state, file a statement in the office of the Secretary of State in accordance with Section 24003 16309 designating some natural person or corporation as the agent of the partnership upon whom process issued by authority of or under any law of this state directed against the partnership may be served. A copy of the designation, duly certified by the Secretary of State, is sufficient evidence of the appointment.

(b) The process may be served in the manner provided in subdivision (e)-(b) of Section 24003 16310 on the person so designated, or, in the event that no such person has been designated, or if the agent designated for the service of process is a natural person and cannot be found with due diligence at the address stated in the designation, or if the agent is a corporation and no person can be found with due diligence to whom the delivery authorized by subdivision (e)-(b) of Section 24003 16310 may be made for the purpose of delivery to the corporate agent, or if the agent designated is no longer authorized to act, then service may be made by personal delivery to the Secretary of State, Assistant Secretary of State, or a Deputy Secretary of State of the process, together with a written statement signed by the party to the action seeking the service, or by the party's attorney, setting forth the last known address of the partnership and a service fee as set forth in Section 12197 of the Government Code. The Secretary of State shall immediately give notice of the service to the partnership by forwarding the process to it by registered mail, return receipt requested, at the address given in the written statement.

(c) Service on the person designated, or personal delivery of the process and statement of address together with a service fee as set forth in Section 12197 of the Government Code to

the Secretary of State, Assistant Secretary of State, or a Deputy Secretary of State, pursuant to this section is a valid service on the partnership. The partnership so served shall appear within 30 days after service on the person designated or within 30 days after delivery of the process to the Secretary of State, Assistant Secretary of State, or a Deputy Secretary of State.

Comment. Section 15800 is amended to correct cross-references to former Section 24003. Subdivision designations have been added for ease of reference.

Corp. Code § 16309 (added). Designation of agent for service of process

SEC. _____. Section 16309 is added to the Corporations Code, to read:

16309. (a) The statement of partnership authority may designate an agent for service of process. The agent may be an individual residing in this state or a corporation that has complied with Section 1505 and whose capacity to act as an agent has not terminated. If an individual is designated, the statement shall include that person's complete business or residence address in this state.

(b) An agent designated for service of process may file with the Secretary of State a signed and acknowledged written statement of resignation as an agent. On filing of the statement of resignation, the authority of the agent to act in that capacity shall cease and the Secretary of State shall give written notice of the filing of the statement of resignation by mail to the partnership, addressed to its principal executive office.

(c) If an individual who has been designated agent for service of process dies or resigns or no longer resides in the state, or if the corporate agent for that purpose resigns, dissolves, withdraws from the state, forfeits its right to transact intrastate business, has its corporate rights, powers,

and privileges suspended, or ceases to exist, the partnership or foreign partnership shall promptly file an amended statement of partnership authority, designating a new agent.

Comment. Section 16309 is new. Similar provisions govern designation of an agent for service of process by other types of unincorporated business entities. See Sections 15627(d) (limited partnership), 16962(a) (limited liability partnership), 17061(d) (limited liability company).

Corp. Code § 16310 (added). Service of process on designated agent

SEC. _____. Section 16310 is added to the Corporations Code, to read:

16310. (a) If a partnership has designated an agent for service of process, process may be served on the partnership as provided in this section and in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

(b) Personal service of a copy of any process against the partnership by delivery to an individual designated by it as agent, or if the designated agent is a corporation, to a person named in the latest certificate of the corporate agent filed pursuant to Section 1505 at the office of the corporate agent, shall constitute valid service on the partnership.

(c) No change in the address of the agent for service of process or appointment of a new agent for service of process shall be effective until an amendment to the statement of partnership authority is filed.

(d)(1) If an agent for service of process has resigned and has not been replaced, or if the designated agent cannot with reasonable diligence be found at the address designated for personal delivery of the process, and it is shown by affidavit to the satisfaction of the court that process against a partnership cannot be served with reasonable diligence upon the designated agent by hand in the manner provided in Section 415.10, subdivision (a) of Section 415.20, or

subdivision (a) of Section 415.30 of the Code of Civil Procedure, the court may make an order that the service shall be made on a partnership by delivering by hand to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing the service. Service in this manner shall be deemed complete on the 10th day after delivery of the process to the Secretary of State.

(2) Upon receipt of the copy of process and the fee for service, the Secretary of State shall give notice of the service of the process to the partnership, at its principal executive office, by forwarding to that office, by registered mail with request for return receipt, the copy of the process.

(3) The Secretary of State shall keep a record of all process served on the Secretary of State under this section and shall record therein the time of service and the action taken by the Secretary of State. A certificate under the Secretary of State's official seal, certifying to the receipt of process, the giving of notice to the partnership, and the forwarding of the process pursuant to this section, shall be competent and prima facie evidence of the service of process.

Comment. Section 16310 is new. Similar provisions govern service of process on other types of unincorporated business entities. See Sections 15627(a)-(b) (limited partnership), 16962(b)-(f) (limited liability partnership), 17061(a)-(c) (limited liability company).

Corp. Code §§ 20000-20003 (repealed). In General

SEC. _____. Part 1 (commencing with Section 20000) of Title 3 of the Corporations Code is repealed.

Corp. Code § 21000 (repealed). Definition

SEC. _____. Chapter 1 (commencing with Section 21000) of Part 2 of Title 3 of the Corporations Code is repealed.

Corp. Code §§ 21100-21103 (repealed). Liability of members

SEC. _____. Chapter 2 (commencing with Section 21100) of Part 2 of Title 3 of the Corporations Code is repealed.

Corp. Code § 21200 (amended). Nonprofit medical association

SEC. _____. Section 21200 of the Corporations Code is amended to read:

21200. Any unincorporated association that is an organized medical society limiting its membership to licensed physicians and surgeons and that has as members at least 25 percent of the eligible physicians and surgeons residing in the area in which it functions (which must be at least one county) may, without incorporation, purchase, receive, own, hold, lease, mortgage, pledge, or encumber by deed of trust or otherwise, manage and sell all the real estate and other property as may be convenient for the purposes and objects of the association. However, if the association has less than 100 members, it shall have as members at least a majority of the eligible persons or licensees in the geographic area served by the particular association. The members of that unincorporated association are not individually or personally liable for debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, construction, repairing or furnishing of buildings or other structures to be used for the purposes of the association or for debts or liabilities contracted or incurred by the association in the carrying out or performance of any of its purposes; provided, that the purposes are within the purposes stated in Section 21000 of this part 18020.

Comment. Section 21200 is amended to correct a cross-reference to former Section 21000.

Heading of Part 5 (commencing with Section 24000) (amended)

SEC. _____. The heading of Part 5 (commencing with Section 24000) of Title 3 of the Corporations Code is amended to read:

~~PART 5. LIABILITY; LEVIES AGAINST
PROPERTY; DESIGNATION OF AGENT FOR
SERVICE AND OF PRINCIPAL OFFICE
LIABILITY OF DIRECTOR OR OFFICER OF
NONPROFIT MEDICAL ASSOCIATION~~

Corp. Code § 24000 (repealed). Definitions

SEC. _____. Section 24000 of the Corporations Code is repealed.

~~24000. (a) As used in this part, "unincorporated association" means any partnership or other unincorporated organization of two or more persons, whether organized for profit or not, but does not include a government or governmental subdivision or agency.~~

~~(b) As used in this section, "person" includes a natural person, corporation, partnership or any other unincorporated organization, limited liability company, and a government or governmental subdivision or agency.~~

Comment. Subdivision (a) of former Section 24000 is continued without substantive change in Sections 18035(a) and 18055(b).

Subdivision (b) is continued without substantive change in Section 18030.

Corp. Code § 24001 (repealed). Liability

SEC. _____. Section 24001 of the Corporations Code is repealed.

~~24001. (a) Except as otherwise provided by statute, an unincorporated association is liable to a person who is not a member of the association for an act or omission of the association, and for the act or omission of its officer, agent, or~~

~~employee acting within the scope of his office, agency, or employment, to the same extent as if the association were a natural person.~~

~~(b) Nothing in this section in any way affects the rules of law which determine the liability between an association and a member of the association.~~

Comment. Subdivision (a) of former Section 24001 is continued without substantive change in Section 18250.

Subdivision (b) is not continued. An unincorporated association may be liable to a member of the association. See *Marshall v. ILWU*, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962) (member can sue labor union for negligent acts which member neither participated in nor authorized); *White v. Cox*, 17 Cal. App. 3d 824, 828, 95 Cal. Rptr. 259 (1971) (“unincorporated associations are now entitled to general recognition as separate legal entities and ... as a consequence a member of an unincorporated association may maintain a tort action against his association.”).

Corp. Code § 24002 (repealed). Enforcement of money judgment

SEC. _____. Section 24002 of the Corporations Code is repealed.

~~24002. A money judgment against an unincorporated association may be enforced only against the property of the association.~~

Comment. Former Section 24002 is continued without substantive change in Section 18260.

Corp. Code § 24003 (repealed). Statement of unincorporated association

SEC. _____. Section 24003 of the Corporations Code is repealed.

~~24003. (a) An unincorporated association may file with the Secretary of State on a form prescribed by the Secretary of State a statement containing either of the following:~~

~~(1) A statement designating the location and complete address of the association's principal office in this state. Only one such place may be designated.~~

~~(2) A statement (i) designating the location and complete address of the association's principal office in this state in accordance with paragraph (1) or, if the association does not have an office in this state, designating the complete address of the association to which the Secretary of State shall send any notices required to be sent to the association under Sections 24005 and 24006, and (ii) designating as agent of the association for service of process any natural person residing in this state or any corporation that has complied with Section 1505 and whose capacity to act as an agent has not terminated.~~

~~(b) If a natural person is designated as agent for service of process, the statement shall set forth the person's complete business or residence address. If a corporate agent is designated, no address for it shall be set forth.~~

~~(c) Presentation for filing of a statement and one copy, tender of the filing fee, and acceptance of the statement by the office of the Secretary of State constitutes filing under this section. The Secretary of State shall note upon the copy of the statement the file number and the date of filing the original and deliver or send the copy to the unincorporated association filing the statement.~~

~~(d) At any time, an unincorporated association that has filed a statement under this section may file a new statement superseding the last previously filed statement. If the new statement does not designate an agent for service of process, the filing of the new statement shall be deemed to revoke the designation of an agent previously designated. A statement filed under this section expires five years from December 31 following the date it was filed in the office of the Secretary of State, unless previously superseded by the filing of a new statement.~~

~~(e) Delivery by hand of a copy of any process against the unincorporated association (1) to any natural person~~

~~designated by it as agent, or (2) if the association has designated a corporate agent, to any person named in the last certificate of the corporate agent filed pursuant to Section 1505 at the office of the corporate agent shall constitute valid service on the association.~~

~~(f) For filing a statement as provided in this section, the Secretary of State shall charge and collect the fee prescribed in paragraph (1) of subdivision (b) of Section 12191 of the Government Code for filing a designation of agent.~~

Comment. Former Section 24003 is continued without substantive change in Section 18200.

Corp. Code § 24004 (repealed). Numbering, filing, and indexing of statements

SEC. _____. Section 24004 of the Corporations Code is repealed.

~~24004. (a) The Secretary of State shall mark each statement filed under Section 24003 with a consecutive file number and the date of filing. He or she may destroy or otherwise dispose of any such statement four years after the statement expires. In lieu of retaining the original statement, the Secretary of State may retain a copy thereof in accordance with Section 14756 of the Government Code.~~

~~(b) The Secretary of State shall index each statement filed under Section 24003 according to the name of the unincorporated association as set out in the statement and shall enter in the index the file number and the address of the association as set out in the statement and, if an agent for service of process is designated in the statement, the name of the agent and, if a natural person is designated as the agent, the address of that person.~~

~~(c) Upon request of any person, the Secretary of State shall issue a certificate showing whether, according to the records of the office of the Secretary of State, there is on file on the date and hour stated therein, any presently effective statement~~

~~filed under Section 24003 for an unincorporated association using a specific name designated by the person making the request. If such a statement is on file, the certificate shall include the information required by subdivision (b) to be included in the index. The fee for the certificate is as set forth in Section 12183 of the Government Code.~~

~~(d) When a statement has expired under subdivision (d) of Section 24003, the Secretary of State shall enter that fact in the index together with the date of the expiration.~~

~~(e) Four years after a statement has expired, the Secretary of State may delete the information concerning that statement from the index.~~

Comment. Former Section 24004 is continued without substantive change in Section 18205.

Corp. Code § 24005 (repealed). Revocation or resignation of agency

SEC. _____. Section 24005 of the Corporations Code is repealed.

~~24005. (a) An agent designated by an unincorporated association for the service of process may file with the Secretary of State a written statement of resignation as such agent which shall be signed and execution thereof shall be duly acknowledged by the agent. Thereupon the authority of the agent to act in such capacity shall cease and the Secretary of State forthwith shall give written notice of the filing of the statement by mail to the unincorporated association at its address as set out in the statement filed by the association.~~

~~(b) Any unincorporated association may at any time file with the Secretary of State a revocation of a designation of an agent for service of process. The revocation is effective when filed.~~

~~(c) Notwithstanding subdivisions (a) and (b), service made on an agent designated by an unincorporated association for service of process in the manner provided in subdivision (e) of Section 24003 is effective if made within 30 days after the~~

~~statement of resignation or the revocation is filed in the office of the Secretary of State.~~

Comment. Former Section 24005 is continued without substantive change in Section 18210.

Corp. Code § 24006 (repealed). Notice of expiration

SEC. _____. Section 24006 of the Corporations Code is repealed.

~~24006. Between the first day of October and the first day of December immediately preceding the expiration date of a statement filed under Section 24003, the Secretary of State shall send by first class mail a notice, indicating the date on which the statement will expire and the file number assigned to the statement, to the unincorporated association at its address as set out in the statement. Neither the failure of the Secretary of State to mail the notice as provided in this section nor the failure of the notice to reach the unincorporated association shall continue the statement in effect after the date of its expiration. Neither the state nor any officer or employee of the state is liable for damages for failure to mail the notice as required by this section.~~

Comment. Former Section 24006 is continued without substantive change in Section 18215.

Corp. Code § 24007 (repealed). Service of process on unincorporated association in certain cases

SEC. _____. Section 24007 of the Corporations Code is repealed.

~~24007. If designation of an agent for the purpose of service of process has not been made as provided in Section 24003, or if the agent designated cannot with reasonable diligence be found at the address specified in the index referred to in Section 24004 for delivery by hand of the process, and it is shown by affidavit to the satisfaction of a court or judge that process against an unincorporated association cannot be~~

~~served with reasonable diligence upon the designated agent by hand or the unincorporated association in the manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or subdivision (a) of Section 415.20 of the Code of Civil Procedure, the court or judge may make an order that service be made upon the unincorporated association by delivery of a copy of the process to any one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address. Service in this manner constitutes personal service upon the unincorporated association.~~

Comment. Former Section 24007 is continued without substantive change in Section 18220.

Gov't Code § 50089 (amended). Service of process on designated agent

SEC. _____. Section 50089 of the Government Code is amended to read:

50089. (a) Any employee organization primarily comprised of peace officers, as described by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, that is a chapter of, or affiliated directly or indirectly in any manner with, a general nonprofit corporation formed for the specific and primary purpose to act as an employee organization for peace officers in this state that directly or indirectly represents less than 7,000 retired or active peace officers, that has not filed with the Secretary of State an agent of the employee organization who has been designated for purposes of service of process as described in Section 1701, 6410, 8210, 9670, 12610, 24003 18200, or 25550 of the Corporations Code by the effective date of this section, shall not be qualified to be the exclusive or majority bargaining agent, as described in subdivision (a) of Section 3502.5, until January 1, 2007.

(b) Any general nonprofit corporation formed for the specific and primary purpose to act as a recognized employee organization, as defined in subdivision (b) of Section 3501, for peace officers in this state that directly or indirectly represents less than 7,000 retired or active peace officers, that has any affiliate, chapter, or member that has failed to file with the Secretary of State an agent who has been designated for purposes of service of process by the effective date of this section, shall be prohibited from establishing or recognizing any member, affiliate, or chapter that was not a bona fide member, affiliate, or chapter of the nonprofit corporation as of January 1, 2003, until January 1, 2007.

(c) This section shall not apply to any national organization that directly or indirectly represents retired or active peace officers.

Comment. Section 50089 is amended to correct a cross-reference to former Corporations Code Section 24003.

DISPOSITION TABLE

The following table shows the disposition of each section that would be repealed by the proposed law. Except as indicated, all references are to the Corporations Code.

Former Section	Disposition
20000	§ 18100
20001	§ 18105
20002 (1st para.)	§ 18115
20002 (2d para.)	§ 18120
20003	repealed
21000	repealed; but see § 18020
21100	repealed
21101	repealed; but see Civ. Code § 1624
21102	repealed; but see § 18610(b)
21103	repealed
24000	§ 18035(a), 18055(b)
24001	§ 18250
24002	§ 18260
24003	§ 18200
24004	§ 18205
24005	§ 18210
24006	§ 18215
24007	§ 18220
