

APPENDIX 4

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON CHAPTER 116 OF THE STATUTES OF 2005 (SENATE BILL 702)

Unincorporated Association Governance

Chapter 116 of the Statutes of 2005 was introduced as Senate Bill 702 by Senator Dick Ackerman, on recommendation of the California Law Revision Commission. The measure implements the Commission's recommendations on *Unincorporated Association Governance*, 34 Cal. L. Revision Comm'n Reports 231 (2004) and *Nonprofit Association Tort Liability*, 34 Cal. L. Revision Comm'n Reports 257 (2004). The revised Comments set out below supersede the comparable Comments in the recommendations and reflect amendments made to Senate Bill 702 in the legislative process.

Corp. Code §18320 (added). Expulsion or suspension of membership

Comment. Section 18320 is new. It requires good faith and use of a fair procedure before terminating or suspending membership in an unincorporated association, where membership involves a property right or where expulsion or suspension of a member would affect "an important, substantial economic interest," for example, the right to carry on one's trade or profession. See generally *Potvin v. Metropolitan Life Ins. Co.*, 22 Cal. 4th 1060, 997 P.2d 1153, 95 Cal. Rptr. 2d 496 (2000) (expulsion of doctor from list of insurance company's preferred providers could impair ability of competent physician to practice medicine and affected "important, substantial economic interest"). See also *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 254 P.2d 587 (1953) (member may not be expelled from local realty board without fair procedure).

Section 18060 provides that a statutory rule specific to a particular type of unincorporated association prevails over an inconsistent provision of this title. Thus, Section 18320 is superseded to the extent

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

Nothing in this section affects the common law right of fair procedure as it applies to a decision to exclude a person from membership in a private association. See *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550, 116 Cal. Rptr. 245, 526 P.2d 253 (1974) ("Taken together, these decisions establish the common law principle that whenever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair."); *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 81 Cal. Rptr. 623, 460 P.2d 495 (1969).

To avoid state interference with the free exercise of religion, this section does not apply to an unincorporated association with a religious purpose. *Cf.* Section 7341 (expulsion, suspension, or termination of membership in nonprofit mutual benefit corporation). See also Sections 18003 ("board" defined), 18008 ("governing documents" defined), 18015 ("member" defined), 18035 ("unincorporated association" defined).

Corp. Code § 18620 (added). Tort liability

Comment. Section 18620 provides a nonexclusive list of grounds for the tort liability of a member, director, officer, or agent of a nonprofit association. See also Section 18605 (no liability based solely on status as member, director, or agent of nonprofit association).

A member, director, officer, or agent of a nonprofit association may be liable for a tort of the association if that person expressly assumes liability or that person's own tortious conduct causes the injury. The term "tortious conduct" is intended to be construed broadly and includes such conduct as negligent entrustment of a vehicle. See, e.g., *Steuer v. Phelps*, 41 Cal. App. 3d 468, 116 Cal. Rptr. 61 (1974). Tortious conduct also includes directing or authorizing an agent to engage in tortious conduct. See Cal. Jur. *Agency* § 136 (3d ed. 2004) (liability based on personal responsibility). See also *Orser v. George*, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) (nonprofit association member may be liable for "personal participation in an unlawful activity or setting it in motion").

Subdivision (b) makes clear that the grounds for liability provided in subdivision (a) are not exclusive. Other grounds for liability may exist.

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

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

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