

First Supplement to Memorandum 2004-27

**2004 Legislative Program:
SB 1746 (Ackerman) — Unincorporated Associations**

SB 1746 (Ackerman) would implement the Commission's recommendation on *Unincorporated Associations* (September 2003). The bill is scheduled to be heard by the Assembly Judiciary Committee on June 1. The Committee consultant analyzing the bill made a number of suggestions for its improvement. After discussing the proposals with the Commission's chair, Senator Ackerman's office, and Bradbury Clark of the State Bar Nonprofit Organizations Committee, the staff agreed to the amendments described below. With these changes the bill will be on the proposed consent calendar.

Corp. Code § 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.~~

The proposed amendment would not affect the basic rule, that property acquired for an association is the association's property. It would simply restore the presumption that title reflects beneficial ownership. See Evid. Code § 662. This amendment would not require revision of the Commission's Comment.

Corp. Code §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, in a signed writing that specifically identifies the obligation assumed.

(b) The member expressly authorizes or ratifies the specific contract, as evidenced by a writing. 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.

(d) The member executes the contract without disclosing that the member is acting on behalf of the association.

(e) The member executes the contract without authority to execute the contract.

Subdivision (a) would be amended to make clear that an assumption of liability must be expressed in a signed writing that specifically identifies the obligation assumed. That is consistent with existing Corporations Code Section 21101. The added language was not included in the Commission's recommendation because it is redundant — the Statute of Frauds already requires that an agreement to assume an obligation be in a signed writing. See Civ. Code § 1624(a)(2). However, there is no harm in restating the requirement here, and there may well be educational value in doing so.

Subdivision (b) would be amended to require written evidence of the authorization or ratification of a contract. This will avoid disputes over alleged oral authorization or ratification.

Subdivisions (d) and (e) would be added to make clear that the exclusive language used in the introduction to Section 18610 (“is not liable ... unless”) does not preclude liability that might attach if the member were acting as an agent of the nonprofit association. Those subdivisions reiterate the bases for agent liability stated in Section 18615(b) and (c).

Consistent with these changes, **the staff recommends that the Commission revise the Comment to Section 18610 to read:**

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.~~ is consistent with former Section 21101 and with the Statute of Frauds. See 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.

Subdivisions (d) and (e) provide for liability where the member is acting as an agent of the nonprofit association. Compare Section 18615(b) & (c). See also 2 B. Witkin, Summary of California Law Agency §§ 144-48, at 141-44 (9th ed. 1987) (agent not liable for contract on behalf of disclosed principal); id. §§ 144-45, at 141-42 (agent liable for contract if agent lacked authority); Civ. Code §§ 2342 (warranty of authority), 2343(2) (bad faith representation of authority).

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

Corp. Code § 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, in a signed writing that specifically identifies the obligation assumed.

(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.

Subdivision (a) would be amended to parallel the proposed change to Section 18610(a), for the reasons discussed above. Consistent with this change, **the staff recommends that the Commission revise the Comment to Section 18615 to read:**

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. is consistent with former Section 21101 and with the Statute of Frauds. See 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).

Corp. Code § 18630. Application of alter ego doctrine to nonprofit association

18630. Notwithstanding any other provision of this chapter, a member or person in control 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 the differences in form between a nonprofit association and a corporation.

Section 18630 would be amended in two ways: (1) The application of alter ego principles would be extended to include a “person in control” of a nonprofit association. This recognizes the possibility that the form of the nonprofit association could be misused by a director or officer. (2) The language instructing a court to consider differences between a nonprofit association and a corporation in applying common law alter ego principles would be revised to avoid an overly-narrow construction. Consistent with these changes, **the staff recommends that the Commission revise the Comment to Section 18630 as follows:**

Comment. ... 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. ...

Respectfully submitted,

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