

## Memorandum 2004-42

**Unincorporated Association Tort Liability  
(Comments on Tentative Recommendation)**

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In September, the Commission circulated a tentative recommendation on *Nonprofit Association Tort Liability*. We received one letter commenting on the tentative recommendation, from Gary Patton of LandWatch Monterey County, a nonprofit organization. That letter is attached as an Exhibit and discussed in this memorandum. Note that the statutory revisions proposed by Mr. Patton were sent in a format that is somewhat difficult to read. That part of Mr. Patton's letter is not reproduced. Instead, his proposed changes are set out in the body of this memorandum.

## BACKGROUND

The purpose of the tentative recommendation is to restore a provision that was deleted from SB 1746 (Ackerman) (2004 Cal. Stat. ch. 178) during the legislative process. SB 1746 implemented the Commission's recommendation on *Unincorporated Associations*, 33 Cal. L. Revision Comm'n Reports 729 (2003).

The Commission's recommendation included two provisions that defined the tort liability of a member, director, officer, or agent of a nonprofit association. Corporations Code Section 18605 (which becomes operative January 1, 2005) provides:

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.

Proposed Section 18620, which was deleted, would have provided as follows:

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.

Section 18620 was deleted from SB 1746 in response to concerns that it would inadvertently change the existing scope of liability for a tort of a nonprofit association. The Commission agreed to revisit Section 18620 and see if it could be revised to address that concern.

The tentative recommendation adds a catch-all provision to Section 18620 to expressly acknowledge that the listed grounds for liability are not exclusive. Other statutory and common law grounds for liability may also exist. They would be unaffected by the proposed law. Revised Section 18620 reads as follows:

18620. A member, director, officer, or agent of a nonprofit association is 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, if any 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 the injury, damage, or harm.

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

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

#### PROPOSED REVISION

Mr. Patton has no objection to the substance of proposed Section 18620. However, he does think it would be more understandable, especially to a layperson, if it were revised as follows:

18620. A member, director, officer, or agent of a nonprofit association is not liable for any 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, if any 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 the injury, damage, or harm.

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

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

The proposed change in the introductory clause would recast the section so that it provides for *no* liability, except in the listed circumstances (rather than providing *for* liability in the listed circumstances). There is no substantive difference between these two approaches.

Mr. Patton believes that his version would be more understandable than the proposed law. He also suggests that a statute phrased in the negative (i.e., “not liable ... unless”) may provide some comfort to those who are considering participation in a nonprofit association but are worried about potential liability.

**Should we revise the introduction along the lines proposed by Mr. Patton?**

The proposed change to subdivision (b) would make that subdivision more parallel with subdivisions (a) and (c). That might make the section a little easier to read and understand. **The staff recommends that we adopt that revision.**

#### ASSUMPTION OF LIABILITY

A note following proposed Section 18620 in the tentative recommendation asked for comment on whether subdivision (a) should require a signed writing in order to expressly assume liability for another’s tort. We received no comments on that issue. Under existing law, a signed writing is not required to expressly indemnify another for that person’s negligence. See Cal. Jur. 3d *Contribution and Indemnification* § 31 (2004). **The staff recommends that we not make any change to subdivision (a).**

#### CONCLUSION

**The staff recommends that the Commission approve the tentative recommendation as its final recommendation** (with or without any of the changes proposed by Mr. Patton).

Respectfully submitted,

Brian Hebert  
Assistant Executive Secretary

# LandWatch monterey county

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October 9, 2004

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
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Law Revision Commission  
RECEIVED

OCT 13 2004

RE: Nonprofit Association Tort Liability [#B-501]

File: \_\_\_\_\_

Dear Law Revision Commission:

I would like to comment on the proposed enactment of a provision of the Corporations Code relating to the tort liability of members, directors, officers, and agents of nonprofit associations.

I am attaching a copy of the proposed legislation with a few changes I recommend (the changes I propose have been made using the "track changes" feature in Microsoft Word). If you cannot readily understand the changes I am suggesting, please contact me.

It is not my purpose to suggest any substantive change in the proposed legislation, but as the report accompanying your tentative recommendation states, the law governing nonprofit associations should be as clear and understandable to a layperson as is practicable. I believe that my phrasing would be clearer to such a layperson than the language currently proposed.

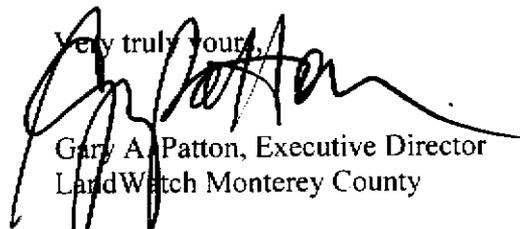
The main purpose of proposed Corporations Code Section 18620 is to state that members, directors, officers and agents of a nonprofit association shall not be liable for damages under normal circumstances, just because they hold a position with the association. I have suggested a rewording of proposed Section 18620 that states just that.

The wording currently proposed to you is not worded to state when a person is NOT liable, but rather says when a person IS liable. For the layperson, I think this will be more confusing than necessary.

LandWatch works with a number of nonprofit (and usually unincorporated) associations, and fear of liability is a real impediment to participation. Making the basic statement be that the members of nonprofit associations are NOT liable (except in the circumstances outlined) will provide much more assurance to the layperson members of such associations than a statement about when they WILL BE liable.

Thanks for taking my comments into consideration.

Very truly yours,



Gary A. Patton, Executive Director  
LandWatch Monterey County

Attachment: Proposed New Language  
cc: LandWatch Board of Directors