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Business Associations Review of Selected 1972 California Legislation

University of the Pacific; McGeorge School of Law

Business Associations

Business Associations; number of required directors for corporations

Corporations Code §§300, 301, 501, 800, 816, 819 (amended); §809.5 (new).
AB 1928 (Knox); STATS 1972, Ch 486
Support: State Bar of California

Reduces from three to one the number of directors required for incorporation; reduces the minimum number of authorized directors for corporations prior to issuance of shares, and for one-shareholder and two-shareholder corporations.

Corporations Code §300, prior to amendment, provided that a corporation may be formed under the General Corporation Law (Commencing with §100) for any lawful purpose by the execution of articles of incorporation by *three* or more persons, and the filing of the articles in the manner provided by Chapter 1 (§§300-313). As amended, §300 provides that the articles of incorporation may be executed by *one* or more persons.

Prior to amendment, §301(d) required the articles of incorporation to set forth the number of directors, *which could not be less than three*, and the name and address of the persons who were appointed to act as first directors. The number so stated constituted the authorized number of directors until changed by amendment of the articles or, unless the articles provide otherwise, by a bylaw duly adopted by the shareholders.

As amended, §301 provides that the minimum number of directors authorized remains three; provided, however, that any corporation need have only one director before shares are issued, and if the corporation has only one shareholder, the minimum number of directors shall be one. A corporation need only have two directors if it has only two shareholders.

Corporations Code §800 provided, before amendment, that subject to the limitations of the articles of incorporation and of Division 1 (commencing with §100 of the Corporations Code) as to actions which must be authorized or approved by the shareholders, all corporate powers shall be exercised by or under the authority of, and the business

and affairs of every corporation shall be controlled by, a board of *not less than three directors.* Section 800 has been amended to delete reference to a board of not less than three directors.

Section 809.5 has been added to the Corporations Code to provide that if a corporation has not issued shares and all the directors resign, die or become incompetent, or in the case of a nonstock corporation, if a corporation has no members other than the directors and all the directors resign, die or become incompetent, the superior court of the county in which the principal office of the corporation is or was located may appoint directors of the corporation upon petition of a creditor of the corporation, the personal representative of a deceased director, or of the guardian or conservator of an incompetent director.

Corporations Code §816 provides that a majority of the authorized number of directors constitutes a quorum of the board for the transaction of business unless the articles or bylaws provide that a different number, which in no case shall be less than one-third the authorized number of directors, nor less than two, constitutes a quorum. This section has been amended to provide that if a corporation has only one director, one director constitutes a quorum.

Section 819 of the Corporations Code provides for the appointment, by the superior court of the county in which the principal office of the corporation is located, of a provisional director to resolve deadlock situations. The action for such an appointment may now be filed by *any* director rather than by *one-half* of the directors as previously required, or by the holders of not less than 33 1/3 percent of the outstanding shares.

COMMENT

In recent years a number of states have modernized their corporation law to permit one or two directors in a "one man" corporation, and two directors in a "two man" corporation [Kessler, *Hooray for the Model Act—The 1969 Revision and the Close Corporation,* 38 FORDHAM L. REV. 743, 750 (1970); STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 2-5b]. Such modernization is said to have the effect of ending the wasteful use of dummy incorporators and dummy directors and avoiding the imposition of possibly unwarranted liability on dummy directors. Chapter 486 is in accord with such modernization and is to a degree consistent with Corporations Code §13403 regarding professional corporations.

However, while Corporations Code §13403 allows a professional corporation with only one or two shareholders to have one or two direc-

tors, in the case of a "one man" professional corporation, the director must also be the shareholder and must serve as the president, vice-president, secretary and treasurer. These further qualifications are not required by Chapter 486.

Chapter 486 increases the possibility of a situation developing in which the only owners of the corporation who have sole authority to either fill vacancies or run the offices of the corporation may be killed or incapacitated all at the same time. Section 809.5 has been added to allow the superior court of the county in which the corporation is or was located to appoint directors of the corporation upon petition if there are no directors because of death, resignation or incompetency in a nonstock corporation or a corporation which has not issued shares.

Chapter 486 poses another potential problem by allowing a two man board of directors in that this increases the possibility of deadlock. However, Corporations Code §819 allows the superior court of the county where the principal office of the corporation is located to appoint a provisional director to break the deadlock.

See Generally:

1) States which have enacted similar provisions include the following:
   a) Arkansas—ARK. STAT. ANN. §64-302 (1966);
   b) Connecticut—CONN. GEN. STAT. ANN. §33-314(a) (Supp. 1972);
   c) Delaware—DEL. CODE ANN. tit. 8, §141(b) (Supp. 1970);
   d) Illinois—ILL. ANN. STAT. ch. 32, §157.34 (Smith-Hurd Supp. 1972);
   e) Minnesota—MINN. STAT. ANN. §301.28(1) (1969);
   f) Nebraska—NEB. REV. STAT. §21-2036 (Supp. 1972);
   g) Nevada—NEV. REV. STAT. §§78.035(5), 78.115 (1969);
   h) New York—N.Y. BUS. CORP. LAW §702 (a) (Supp. 1972);
   i) Oregon—ORE. REV. STAT. §57.185 (1970);
   j) South Carolina—S.C. CODE ANN. §12-18.3(a) (Supp. 1971);
   k) Wyoming—WYO. STAT. ANN. §17-36.34 (1965).
2) At least the following three states permit less than three directors regardless of the number of shareholders:
   a) Iowa—IOWA CODE ANN. §§496A.34-.35 (1962);
   b) Kentucky—KY. REV. STAT. §§271.035(1)(i), 271.345(1) (Supp. 1968);
   c) Montana—MONT. REV. CODES ANN. §351.315(1) (1966).
3) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §§28, 37 (7th ed. 1960), (Supp. 1969).
4) 1 H. OLECK, MODERN CORPORATION LAW §§178, 226 (1958).
5) Kessler, *Hooray for the Model Act—The 1969 Revision and the Close Corporation*, 38 FORDHAM L. REV. 743 (1970).

Business Associations; amendments to limited partnership certificates—formalities

Corporations Code §15525.5 (amended).
AB 361 (Knox); STATS 1972, Ch 63
(Effective May 2, 1972)
Support: California State Bar

Corporations Code §15525 prescribes the formalities required to

amend or cancel limited partnership certificates. Subdivision (1), paragraph (b) provides that the writing to amend a certificate must be signed and acknowledged by all members, and that an amendment adding a limited or general partner must also be signed by the member to be added or substituted and by the assigning limited partner if a limited partner is to be substituted.

In 1967, §15525.5 was added to provide that notwithstanding the provisions of paragraph (b), subdivision (1) of §15525, if the certificate so permits, only a general partner need sign if the amendment reflects the retirement, death or insanity of a general partner. If a limited or general partner is to be added, or if a limited partner is to be substituted, the amendment may be signed by a general partner and the member to be added or substituted. The amendment must also be signed by the assigning limited partner if a limited partner is to be substituted [CAL. STATS. 1967, c. 896, at 2347, *as amended*, CAL. STATS. 1970, c. 839, at 1574].

Section 15525.5 has now been amended to specifically allow the signatures pursuant to this section to be made either personally or by an attorney in fact. An attorney in fact is a person authorized by another to act in his place and stead, either for some particular purpose or for the transaction of business in general, not of a legal character [BLACK'S LAW DICTIONARY 164 (rev. 4th ed. 1968)]. The court in *People v. Malone* quoted the following language from 2 C.J.S. *Agency* §4 (1936) with approval:

> An attorney in fact is one who is given authority by his principal to do a particular act not of a legal character. The term "attorney in fact" is, in loose language, used to include agents of all kinds, but in its strict legal sense it means an agent having a special authority created by deed [232 Cal. App. 2d 531, 536, 42 Cal. Rptr. 888, 892 (1965)].

The court in distinguishing an attorney in fact from an attorney at law pointed out that an attorney in fact need not be an attorney at law.

COMMENT

Chapter 63 was intended to resolve confusion as to whether an attorney in fact could sign a written amendment under §15525.5 [A.B. 361, CAL. STATS. 1972, c. 63, §3]. In large public partnerships, having hundreds of substitutions, general partners normally require the limited partner to sign a power of attorney for purposes of amending the certificate. Certain title companies had refused to recognize amend-

ments to limited partnership certificates accomplished through the use of powers of attorney [STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 2-6].

It should be noted that the term "attorney in fact" has both a loose definition and a strict legal meaning. Presumably, as used in §15525.5, the term should be taken in its strict legal sense to require that the "attorney in fact" have specific authority regarding amendment of the partnership certificate in his power of attorney.

Business Associations; denial, suspension and revocation of licenses

Business and Professions Code §§475-477, 480-488, 490-492 (new).
SB 1349 (Deukmejian); STATS 1972, Ch 903
Support: National Clearinghouse on Offender Employment Restrictions

Division 1.5 (commencing with §475) has been added to the Business and Professions Code to establish uniform standards to be applied by licensing boards under regulation of the Business and Professions Code. Notwithstanding any other provisions of the Business and Professions Code, the provisions of this division shall govern the denial of licenses, certificates, registrations, or other means to engage in a business or profession regulated by this code, on the grounds of a lack of good moral character and of knowingly making a false statement of fact required to be revealed in an application for such licenses, certificates, or registrations. In addition, the provisions of this division shall govern the suspension or revocation of such licenses, certificates, or registrations on the grounds of conviction of a crime. The State Bar of California and the Department of Alcoholic Beverage Control are exempt from these provisions. Prior to the enactment of Chapter 903, various licensing agencies were using differing sets of procedures and standards to deny, suspend or revoke licenses.

Pursuant to Division 1.5, an applicant may be denied a license if it is found that he lacks good moral character. Section 481 provides that a person *possesses* good moral character unless he has done any one of the following:

(1) Any act, which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation. No act shall be grounds for denial, however, which does not have a substantial relationship to the functions and responsibilities of the licensed business or profession.

(2) Any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself, or substantially injure another.

Section 482 requires each board, when considering the denial of a license under §481, to take into account all competent evidence of rehabilitation furnished by the applicant.

Section 483 provides that a person may also be denied a license if he has knowingly made any false statement of fact which is required to be revealed in his application for a license. Section 484 provides that no person shall be required to furnish any attestation by other persons to his good moral character except a person who has previously been denied a license by the board on the basis that he did not possess good moral character.

Chapter 903 makes provision for notice and an administrative hearing pursuant to §11500 *et seq.* of the Government Code (Administrative Adjudication) in cases of denial of a license for any of the above reasons (§§485, 486).

Sections 490 to 492 deal with suspension or revocation of a license for conviction of a crime. Section 490 requires the board to take into account the relationship of the crime to the licensed activity. Section 491 requires disclosure of requirements for rehabilitation to the licentiate and provides for notice to the licentiate of an opportunity for a hearing. Section 492 requires the various boards to develop criteria to evaluate the rehabilitation of one whose license has been suspended or revoked on the ground of conviction of a crime.

See Generally:

1) Note, *Administrative Law: Professional and Occupational Licensing: Standard of Conduct for Administrative License Revocation*, 44 CALIF. L. REV. 403 (1956).

Business Associations; contractors bonds—inactive licensees

Business and Professions Code §§7071.6, 7071.9 and 7071.11 (amended); Section 3, Chapter 669, STATS 1971 (amended).
SB 117 (Song); STATS 1972, Ch 7
(Effective February 29, 1972)

Business and Professions Code §7071.6(b) provides that the Contractor's State License Board shall require, as a condition precedent to the issuance, reinstatement, reactivation or renewal of a license, that the applicant file or have on file a contractor's bond or a cash deposit in the sum of $2,500. Section 7071.9(b) requires, as a condition precedent in addition to the contractor's bond or cash deposit, that a qualifying *individual*, who is not a proprietor, general partner, joint

licensee, or the responsible managing officer, must file or have on file an individual's bond in the sum of $2,500 or its cash equivalent.

As amended, §§7071.6(b) and 7071.9(b) specify that no bond or cash deposit is required of the holder of an inactive license during the period the license is inactive.

Section 7071.11 formerly provided that any person claiming against the bond or cash deposit could maintain an action at law against the licensee and the surety or cash depository. The action was required to be brought within two years after the expiration of the license period or periods for which the bond or cash deposit was provided. As amended, §7071.11 specifies that any such action against a bond or cash deposit filed by an active licensee shall be brought within two years after the expiration of the license period or periods for which a bond or cash deposit has been provided, *or* within two years of the date the license of such active licensee was inactivated by the board, whichever occurs first.

Section 3, Chapter 669 of the 1971 statutes provides that notwithstanding §7071.8 (which allows the registrar of licenses to fix a higher bond or cash deposit for one whose license has been suspended or revoked) the board shall require the holder of a license to file or have on file a contractor's bond in the sum of $2,500 or an equivalent cash deposit. This has been amended to specify that no bond or cash deposit shall be required of the holder of an inactive license during the period the license is inactive.

COMMENT

Prior to Chapter 7 it was unclear whether an inactive licensee would be required to file a bond or cash deposit with the Contractor's State License Board. The purpose of Chapter 7 is to resolve possible conflicting interpretations of the law so that it comports with the original legislative intent [S.B. 117, CAL. STATS. 1972, c. 7, §6].

See Generally:

1) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 12.
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 7.

Business Associations; minimum penalty for contractor operating without a license

Business and Professions Code §§7028, 7028.1 (amended).
SB 247 (Coombs); STATS 1972, Ch 125

Support: Construction Industry Legislative Council; Contractors State Licensing Board

Business and Professions Code §7028 provides that it is a misdemeanor for any person to engage in the business or act in the capacity of a contractor in this state without a license, unless he is particularly exempted (§7040 *et seq.*). Penal Code §19 prescribes the penalty for a first offense, and Business and Professions Code §7028 prescribes the penalty for subsequent offenses. Prior to the enactment of Chapter 125, §7028 provided only a *maximum* penalty of a $2,000 fine, or imprisonment for 6 months, or both. Chapter 125 provides for a *minimum* fine of $100 or imprisonment in the county jail for 10 days, or both.

Section 7028.1 provides that any person who accepts or receives a completion certificate or other evidence that performance of a contract for a work of improvement (including but not limited to a home improvement) is complete or satisfactorily concluded, with knowledge that it is false and that performance is not substantially complete, and who utters, offers or uses such document either in connection with making or accepting any assignment or negotiation of the right to receive any payment from the owner, or for the purpose of obtaining or granting any credit or loan on security of the right to receive payment shall be guilty of a misdemeanor. Prior to amendment, §7028.1 prescribed only a *maximum* penalty of imprisonment in the county jail for up to one year or a fine of up to $5,000, or both. As amended, a *minimum* penalty of a $500 fine or imprisonment in the county jail for one month or both has been prescribed.

COMMENT

In 1971 the California Legislature, in two separate measures, attempted to discourage unlicensed persons from contracting [*See* 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 234 (1972)]. Section 7028.4 of the Business and Professions Code was amended to allow contracting associations to petition a court to enjoin an unlicensed person from engaging in contracting services [A.B. 678, CAL. STATS. 1971, c. 442, at 913], and Section 128 of the Business and Professions Code was enacted to prohibit material supply houses from knowingly selling materials to unlicensed contractors performing contracting services [S.B. 1088, CAL. STATS. 1971, c. 1052, at 2008]. The inclusion of a minimum penalty in Sections 7028 and 7028.1 appears to be yet another method intended to discourage the unlicensed contractor from performing contracting services.

Business Associations; contractors—disclosure

Business and Professions Code §§ 7029.6, 7030, 7030.5 (new).
AB 616 (Brown); STATS 1972, Ch 472
(Effective July 1, 1973)
SB 239 (Song); STATS 1972, Ch 124
AB 1034 (Townsend); STATS 1972, Ch 681
(Effective July 1, 1973)
Suppport: Department of Consumer Affairs; Contractors State License Board, Construction Industry Legislative Council

Business and Professions Code §7030.5 has been added to require, after July 1, 1973, every person licensed pursuant to Chapter 9 (§7000 *et seq.*) to include his license number in all construction contracts, subcontracts, bid calls and all forms of advertising as a contractor. Advertising as used in this section is defined in §7026.7.

Business and Professions Code §7030 has been added to require every person licensed pursuant to Chapter 9 to include the following statement in prominent type on all written contracts with respect to which such person is a prime contractor:

> Contractors are required by law to be licensed and regulated by the Contractors State License Board. Any questions concerning a contractor may be referred to the registrar of the board whose address is:
> Contractors State License Board
> 1020 N Street
> Sacramento, California 95814

The type must be at least 10-point bold face and in no event less than two points larger than the type in any other portion of the written contract.

Section 7029.6 has been added to the Business and Professions Code concerning licensed plumbing contractors. Such contractors (licensed pursuant to §7065 *et seq.*) must display their name, permanent business address, and contractor's license number, in at least one and one-half inch letters, on each side of each motor vehicle (pursuant to §9400 *et seq.* of the Vehicle Code). Such requirements are to become operative on July 1, 1973.

COMMENT

The Contractors Licensing Law is intended to protect the public from incompetent and unreliable contractors [Steinbrenner v. Waterbury

Const. Co. 212 Cal. App. 2d 661, 28 Cal. Rptr. 204 (1963)]. Sections 7030.5 and 7029.6 are apparently intended to decrease the amount of unlicensed contracting activity which accounts for about 25% of all complaints according to the Contractors State License Board. Section 7030 would bring the existence of the Contractors State License Board to the mind of consumers dealing with contractors and inform them that complaints may be directed to that agency.

See Generally:

1) 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* 172 (7th ed. 1960), (Supp. 1969).

Business Associations; real estate broker's license—savings and loan associations

Business and Professions Code §10133.1 (amended).
AB 364 (Priolo); STATS 1972, Ch 185

Subdivisions (d) and (e) of §10131 and articles 5, 6 and 7 of the Business and Professions Code provide that only a licensed real estate broker or a licensed salesman working under a licensed broker may, for a compensation or in expectation of compensation, engage in specified transactions involving real property. Section 10133.1 provides a variety of exceptions to the above provisions. These exceptions include employees of banks, trust companies, industrial loan companies and savings and loan associations. Agents of savings and loan associations, who are licensed pursuant to Division 2, Part 1, Chapter 6 of the Financial Code (commencing with Section 6200), were not exempted prior to this amendment. Chapter 185 adds agents of savings and loan associations to those exempted.

COMMENT

Savings and loan agents are self-employed individuals licensed by the Savings and Loan Commissioner who solicit borrowers for savings and loan associations on a commission basis [CAL. FIN. CODE §§5053, 6200]. Prior to Chapter 185, in order for agents to solicit borrowers for loans to be secured either directly or collaterally by liens on real property, the agent had to be licensed both as a savings and loan agent and as a real estate broker or salesman.

It may be argued that Chapter 185 has reduced public protection in the area of loans secured in realty since a real estate license requires some formal education and the passage of an examination, while a savings and loan agent's license requires merely a $5000 bond. However, savings and loan *employees* have been allowed to perform substantially

the same function in the past without having to obtain a real estate license. It appears that the prior lack of exemption for agents may have been due to an oversight.

See Generally:

1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA REAL ESTATE SALES TRANSACTIONS §5.1 (1967).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 14.
3) 31 OPS. ATT'Y GEN. 243 (1958).

Business Associations; fraudulent applications for real estate licenses

Business and Professions Code §10177.1 (amended).
SB 810 (Grunsky); STATS 1972, Ch 214
Support: California Real Estate Association

Prior to amendment, Business and Professions Code §10177.1 provided in part that the Real Estate Commissioner could after a hearing suspend the license of any real estate *licensee* who procured the issuance of a real estate license by fraud, misrepresentation, deceit or material misstatement of fact in his application, pending a final determination made after a hearing, if the right to suspend was exercised within 90 days after issuance of the original license. An *accusation* was to be served on the real estate *licensee* at the same time an order of suspension was served.

Chapter 214 provides that a *statement of issues* as defined in Government Code §11504 is to be filed and served with the order of suspension in place of an *accusation* as previously provided, and deletes references to the applicant as an existing *licensee.*

COMMENT

Under Chapter 214, the Real Estate Commissioner, if he so acts within 90 days after the issuance of a license, may ignore the fact that the license was granted and treat the person who is believed to have procured such real estate license by fraud, deceit, misrepresentation or material misstatement of fact in his application as if he had never received the license. Such person may thereafter contest what is treated as a denial of a license.

Government Code §11504, relating to administrative adjudication (*See* §11500 *et seq.*), provides that a hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a *statement of issues.* A statement

of issues is defined in this section as a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and any particular matters coming to the attention of the initiating party which would authorize a denial of the agency action sought. Section 11503 defines an *accusation* as a written statement of charges which shall set forth in ordinary and concise language the acts or omissions against which the respondent will be able to prepare his defense. An accusation is to be used to initiate a hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned.

Thus, one who is truthful in preparing his application and discloses, for example, a past criminal record is denied a license [CAL. BUS. AND PROF. CODE §10177], while, prior to amendment of Business and Professions Code §10177.1, one who fraudulently prepared his application was given a hearing as an existing licensee rather than as an applicant so that the Real Estate Commissioner had the burden of proving his case *against* the *licensee.* Chapter 214 resolves this inequity by requiring a statement of issues to be filed and served upon the applicant rather than an accusation as previously provided, so that the applicant must show that he has complied with the law.

See Generally:

1) 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §103 (7th ed. 1960), (Supp. 1969).

Business Associations; highway carriers

Public Utilities Code §3551 (new).
SB 939 (Walsh); STATS 1972, Ch 846

Chapter 846 adds §3551 to the Public Utilities Code to provide that no person or corporation, whether or not organized under the laws of this state, shall directly or indirectly acquire or control any highway carrier organized and doing business in this state without first securing authorization to do so from the Public Utilities Commission. Any such acquisition or control without such prior authorization shall be void and of no effect. Highway carriers organized and doing business under the laws of this state are prohibited from aiding and abetting any violation of this section.

"Highway carrier" is defined in Public Utilities Code §3511 as every corporation or person, their lessees, trustees, receivers or trustees appointed by any court, engaged in transportation of property for compen-

sation or hire as a business over any public highway in this state by means of a motor vehicle, with specified exceptions.

Prior to Chapter 846, §3574 merely provided that no operating permit shall be sold, leased, assigned, transferred or otherwise encumbered by the holder without first having secured an authorizing order from the Public Utilities Commission. Hence, the sale of stock by incorporated highway carriers without prior authorization by the Public Utilities Commission was not prohibited.

COMMENT

An example of the effect of Chapter 846 is that it enables the Public Utilities Commission to control the situation in which a nontrucking firm purchases a controlling interest in an incorporated highway carrier, and then requires the carrier to handle its freight and requires its suppliers in the delivery zone to use the trucking subsidiary and pay the freight costs. Prior to Chapter 846, this type of tying arrangement could not be controlled short of bringing an antitrust suit against the nontrucking firm [*See* CAL. PUB. UTIL. CODE §§3549, 3550, 3574].

See Generally:

1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §195 (7th ed. 1960).

Business Associations; time deposits

Financial Code §§855, 1206, 1383 (amended).
AB 1645 (Russell); STATS 1972, Ch 286

Prior to amendment by Chapter 286, Financial Code §855 provided that no bank shall pay any time deposit before its maturity. Chapter 286 adds a provision that a time deposit may be paid before maturity if, and to the extent, necessary to avoid hardship to the depositor.

Financial Code §1206, relating to commercial banks, and §1383, relating to savings banks, have been amended in conformity with the change in Section 855.

Business Associations; bank investments in charitable corporations

Financial Code §760.1 (new).
AB 1141 (Russell); STATS 1972, Ch 284

Chapter 284 adds §760.1 to the Financial Code to provide that a bank may invest in shares of the stock of one or more corporations

which are engaged primarily in civic, public or social welfare activities. However, the total amount invested in the stock of any one such corporation shall not exceed 2 percent of the bank's capital and surplus, and the total amount invested by a bank in the stock of all such corporations shall not exceed 5 percent of the bank's capital and surplus.

COMMENT

Financial Code §760 permits a bank to contribute to community funds or to charitable, philanthropic, or benevolent instrumentalities conducive to public welfare or civic betterment. However, Financial Code §761 prohibits banks from purchasing, acquiring, or holding the stock of any corporation except as expressly authorized or pursuant to a plan of reorganization approved by the superintendent of banks.

Thus it appears that prior to the enactment of Chapter 284 a question might have been raised as to whether Financial Code §760 could be construed as an express authorization for banks to invest in the stock of corporations engaged primarily in charitable, philanthropic, or benevolent instrumentalities conducive to public welfare or civic betterment. Chapter 284 now expressly authorizes such investment, although limited to percentages of the bank's capital and surplus.

Business Associations; corporate securities

Corporations Code §§25101, 25110, 25111, 25120, 25212, 25232, 25300, 25503, 25608, 29551 (amended).
AB 656 (Knox); STATS 1972, Ch 810

Section 25101 of the Corporations Code exempts certain securities from the qualification provisions of §25130 relating to non-issuer transactions. Prior to amendment, §25101 provided an exemption for any security registered under §12 of the Securities Exchange Act of 1934 [15 U.S.C. §78(1) (1970)], exempted from such registration by §12 (g)2(G) of that act, or issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. §§ 80a-1 - 80a-52 (1970)].

Chapter 810 amends §25101 to require that in order to be exempt under this section, the security must be of a company which has a class of equity securities held by 500 or more persons and which has total assets exceeding one million dollars, in addition to being registered under §12 of the Securities Exchange Act of 1934.

Sections 25110 and 25120 of the Corporations Code have been amended to make it unlawful for any person, rather than any issuer, to offer or sell any security in an issuer transaction connected with recapitalization or reorganization (§25120), unless such security has been properly qualified or exempted.

Section 25111, which specifies the contents of an application for qualification of a security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering, has been amended to require that the application be accompanied by "such other information as may be required to evidence compliance with any rules of the commissioner."

Sections 25212 and 25232 provide that the corporations commissioner may deny, revoke, or suspend for a period not exceeding twelve months a certificate as a broker-dealer or investment advisor upon certain specified conditions. Chapter 810 amends §§25212 and 25232 to provide that such a certificate may also be withheld, denied or suspended if the broker dealer or investment advisor has pled nolo contendere to a felony or misdemeanor.

Section 25300, which provides that no person shall publish any advertisement in this state concerning any security sold or offered for sale in this state unless a true copy of the advertisement has first been filed with the office of the commissioner, has been amended to require such filing at least three *business* days (rather than merely three days) prior to the publication, or such shorter period as the commissioner may require.

Section 25503 has been amended to provide civil liability for violations of §25133 or a condition of qualification under §25110 *et seq.* imposed pursuant to §25141, or an order suspending trading issued pursuant to §25219. Chapter 810 also provides for civil liability for the violation of a condition of qualification under §25120 *et seq.* imposed pursuant to §25141 [*See* 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 271 (1972)].

Chapter 810 also revises the provisions of §§25608 and 29551 relating to fees for certificates to act as a broker-dealer, agent, investment advisor, and commodity advisor. The amendments to these two sections become operative on July 1, 1973.

See Generally:

1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA STOCK QUALIFICATION AND EXEMPTION §§4.1, 4.6 (1969).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 269 (1972).
3) Bickford, *California Corporate Securities Law of 1968*, 2 PAC. L.J. 497 (1971).

Business Associations; unlawful acts of manufacturers, transporters, dealers and salesmen of motor vehicles

Vehicle Code §§11713, 11806 (amended).
AB 692 (Maddy); STATS 1972, Ch 475
AB 441 (Conrad); STATS 1972, Ch 799
Support: Department of Motor Vehicles
Opposition: California Teamsters Legislative Council

Vehicle Code §11713 provides that it shall be unlawful for any *manufacturer, transporter* or *dealer* licensed under article 1 (§§11700-11725) to: (a) make or disseminate or cause to be made or disseminated before the public in this state in any manner or by any means whatever, any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; or to so make or disseminate or cause to be so disseminated any such statement as part of a plan or scheme with the intent not to sell any vehicle or service so advertised at the price stated therein, or as so advertised, or (b) to advertise or offer for sale any vehicle not actually for sale at the premises of such dealer or available to said dealer from the manufacturer or distributor of such vehicle at the time of the advertisement or offer.

Chapter 475 amends subdivision (b) to provide that this subdivision does not apply to advertising or offering for sale or exchange any *used* mobilehome, as defined by Health and Safety Code §18008, or *used* commercial coach, as defined by Health and Safety Code §18012, other than a recreational vehicle, as defined by Health and Safety Code §18010.5, if such advertising or offering for sale is not contrary to any terms of a contract between the seller of the mobilehome or commercial coach and the owner of the mobilehome park, and if any one of the following conditions is met: (1) the mobilehome or commercial coach is in place on a lot rented or leased for human habitation within an established mobilehome park, as defined in Section 18214 of the Health and Safety Code; (2) the mobilehome or commercial coach is on a lot which it has lawfully occupied continuously for an uninterrupted period of at least one year immediately prior to the date of such advertising or offering; or (3) the mobilehome or commercial coach is lawfully occupying a lot at the time of such advertisement or offering and no restriction has been enacted or adopted which would prohibit it from continuing to occupy the lot on which it is located for a total and uninterrupted period of at least one year.

Prior to the enactment of Chapter 799, Section 11713(g) made it

unlawful to include within the selling price of a vehicle an amount for licensing or transfer of title of the vehicle, which amount is not due to the state unless such amount has in fact been paid by the dealer prior to the sale. Chapter 799 adds that such amount must not only have been paid prior to sale, but must also have been paid by the dealer in order to avoid penalties which would have accrued because of late payment.

In order to subject licensed motor vehicle *salesmen* to the same prohibition as manufacturers, transporters and dealers, Chapter 475 places the exact wording of §11713(a) and (b) *supra*, under Vehicle Code §11806(a) and (b), dealing with unlawful acts for *licensed motor vehicle salesmen*. Prior to Chapter 475, §11806(a) and (b) provided merely that it was unlawful for a licensed motor vehicle salesman to *intentionally* publish or circulate any advertising which is misleading or inaccurate in any material particular, and that it was unlawful to advertise or offer for sale or exchange in any manner, any vehicle not actually for sale at the premises of such dealer or available to said dealer from the manufacturer or distributor of such vehicle at the time of the advertisement or offer.

It is provided in Vehicle Code §40000 that a violation of specified sections, including the sections above, is a misdemeanor. Section 42002 provides that the penalty for a general misdemeanor shall be a fine not to exceed $500 or imprisonment in the county jail for up to six months, or both.

COMMENT

Prior to Chapter 475, a licensed motor vehicle salesman could not be prosecuted under §11806 unless an element of scienter could be shown, while a dealer, manufacturer or transporter could be punished under §11713(a) for a negligent misrepresentation. Chapter 475 makes disciplinary action available against a salesman who makes misleading statements or a negligent misrepresentation.

It should be noted that Chapter 799, which amended §11713(g), was enrolled subsequent to Chapter 475. Furthermore, in amending §11713, Chapter 799 made no mention of the amendment to subdivision (b) as specified in Chapter 475. That is, Chapter 799 retains the provisions of subdivision (b) which existed prior to the enactment of Chapter 475. Since the amendment to §11713 specified in Chapter 799 appears to be in conflict with the amendment made by Chapter 475, it could be argued that the later chapter should prevail as a more recent expression of legislative intent [*See* CAL. GOV'T CODE §9605;

45 CAL. JUR. 2d, *Statutes* §§79-81 (1968)]. Therefore, it appears that the amendment to §11713(b) has been deleted by the subsequent enactment of Chapter 799.

See Generally:

1) *Selected 1960-1961 California Legislation* 36 CAL. S.B.J. 688, 698 (1961).
2) 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Sales* §50 *et seq.* (7th ed. 1960), (Supp. 1969).

Business Associations; prorater services and fees

Financial Code §12331 (repealed); §§12314.1, 12315.1, 12331 (new); §§12002.1, 12314 (amended).
SB 1449 (Rodda); STATS 1972, Ch 999
Support: Credit Counselors Inc.
Opposition: State Credit Counselors.

A "prorater" is defined as a person who, for compensation, engages in whole or in part in the business of receiving money or evidences thereof for the purpose of distributing such money among creditors in payment of the obligations of the debtor [CAL. FIN. CODE §12002.1].

Section 12314 of the Financial Code has been amended to place additional restrictions on the fees a prorater may collect for his services. These new provisions are:

(1) An origination fee may be charged, but cannot exceed fifty dollars.

(2) A fee, not to exceed four dollars, may be charged for each disbursement on recurring obligations consisting of current rent payments or obligations which are secured by a first mortgage or first trust deed on real property.

(3) A fee for disbursement of other recurring obligations cannot exceed one dollar. Section 12314 defines those other recurring obligations as current utility payments, current telephone bills, current alimony payments, and current monthly insurance premium payments.

Section 12314 has also been amended to provide that when a debtor has not canceled or defaulted on his contract with the prorater within twelve months after execution of the contract, the prorater shall refund any origination fee. This section also provides that the minimum amount of the debtor's money which must go to the creditors each month shall be 70 per cent of the amount paid. This has been increased from 60 per cent.

Section 12314.1 has been added to forbid the prorater from charging a cancellation fee or a termination penalty to the debtor.

Section 12315.1 has been added to require the prorater to notify, in writing, all creditors listed in the prorate contract of the debtor's desire to engage the prorater's services and to give notice to the creditor of the proposed monthly payment to be made to him. This notice must be sent within five days of the effective date of the contract. This section also provides that every contract between a prorater and a debtor shall list every debt to be prorated with the creditor's name, and disclose the total of all such debts.

Section 12331, which has been repealed, dealt with the qualifications necessary to obtain a prorater's license.

The new §12331 provides that within the organization of each prorater corporation, either as an owner, officer, or employee, there shall be one or more persons possessing a minimum of five years experience in credit extension or collection activity. At least one such qualified person shall be on duty at each business location of the corporation during the time the business is open.

See Generally:

1) *Report of Senate Interim Committee on Collection Agencies, Private Detectives and Debt Liquidators, Appendix to Journal of the Senate,* Reg. Sess. 1957, vol. 1, at 13.
2) *Report of Assembly Interim Committee on Finance and Insurance, Appendix to Journal of the Assembly,* Reg. Sess. 1957, vol. 3.

Business Associations; unincorporated associations—interest of member

Corporations Code Part 1 (commencing with §21000), Part 2 (commencing with §22000), Part 3 (commencing with §23000) (amended); Part 1 (commencing with §20000), Chapter 3 (commencing with §21200) (new); Chapter 3 (commencing with §21200) (repealed).

SB 1065 (Holmdahl); STATS 1972, Ch 962

Support: California Land Title Association

Section 20000 has been added to the Corporations Code to provide that the interest of a member of an unincorporated association is personal property.

Chapter 962 also reorganizes, without substantive change, the provisions of Title 3 (commencing with §21200) of the Corporations Code governing nonprofit unincorporated associations.

COMMENT

Under common law, an unincorporated association was considered

an aggregate of individuals under a common name, and was not recognized as a separate legal entity [CONTINUING EDUCATION OF THE BAR, CALIFORNIA NONPROFIT CORPORATIONS §1.4 (1969)]. There is an increasing tendancy, however, to treat the unincorporated association as an entity and to give it most of the rights and liabilities of individuals and corporations [CONTINUING EDUCATION OF THE BAR, REVIEW OF 1967 CODE LEGISLATION 52; *see* CALIFORNIA LAW REVISION COMMISSION, *Recommendation and Study Relating To Suit By or Against An Unincorporated Association*, 8 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES, 929-931 (1966)]. For example, an unincorporated association may sue or be sued in its own name [CAL. CODE CIV. PROC. §338(a)]; it is liable to third parties for its acts or omissions and the acts or omissions of its officers, agents or employees within the scope of their employment [CAL. CORP. CODE §24001]; and only the property of an unincorporated association may be levied upon under a writ of execution to enforce a judgment against the association [CAL. CORP. CODE §24002].

Chapter 962 is apparently an attempt to bring unincorporated associations closer to the status of individuals and corporations. The addition of §20000, declaring that the interest of a member of an unincorporated association is personal property is analogous to §26 of the Uniform Partnership Act [6 U.L.A. §26 (Masters ed.)] which provides: "A partners interest in the partnership is his share of the profits and surplus, and the same as personal property." At one time, any judgment creditor of an individual partner could execute on partnership property. Upon the adoption of the Uniform Partnership Act, this right was abolished [5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §142 (2nd ed. 1971).]. Thus, under present law regarding partnerships, the remedy of a judgment creditor of an individual partner is to petition the court to "charge the *interest* of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest" [CAL. CORP. CODE §15028; CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §17.9 (1968)].

Chapter 962 would have a similar effect with regard to the membership interest in an unincorporated association by exempting the association's property from execution by a judgment creditor for a personal debt or obligation of a member.

Chapter 962 does not effect existing law when the lien is in respect to an association debt.

See Generally:
1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Partnerships* §25 (7th ed. 1960), (Supp. 1969); *Corporations* §16 (7th ed. 1960), (Supp. 1969).
2) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §142 (2d ed. 1970).
3) CONTINUING EDUCATION OF THE BAR, CALIFORNIA NONPROFIT CORPORATIONS §1.4 (1969).
4) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1967 CODE LEGISLATION 52.

Business Associations; licensed dealer bonds

Vehicle Code §11711 (amended).
AB 1320 (Foran); STATS 1972, Ch 1106

Prior to amendment, Section 11711(a) of the Vehicle Code provided that any person shall have a right of action against a licensed dealer, his salesmen, and the surety upon the dealer's bond [*See* CAL. VEHICLE CODE §11710], if such person suffers damage by reason of fraud by the dealer or his salesmen or violation by such dealer or salesmen of any provision of Division 3 of the Vehicle Code (registration of vehicles and certificates of title), or if such person, other than a licensee [*See* CAL. VEHICLE CODE §11700] is not paid for a vehicle sold to and purchased by a licensee.

Chapter 1106 amends Section 11711(a) by deleting that portion which excludes a licensee from the provision which allows a person a right of action if such person is not paid for a vehicle sold to and purchased by a licensee.

Chapter 1106 adds subsection (e) to provide that the claims under subdivision (a) of any person who is not a licensee shall be satisfied first and entitled to preference over all other claims under the subdivision. The other provisions of Section 11711 remain unchanged.

COMMENT

Section 11710 of the Vehicle Code provides that before any dealer's license is issued or renewed by the Department of Motor Vehicles, the applicant must file with the department a bond of $5,000 as surety against any fraud of the applicant which causes monetary loss to a purchaser, seller, financing agency, or governmental agency. Prior to amendment, Section 11711 appeared to reserve the $5,000 dealer's bond for payment of claims to nondealers. Chapter 1106 now appears to permit licensed dealers to initiate actions against the bond of another dealer.

See Generally:
1) 53 C.J.S. *Licenses* §§36, 60 (1948).
2) 60 C.J.S. *Motor Vehicles* §§78, 110 (1969).

Business Associations; acupuncture

Business and Professions Code §2145.1 (new).
AB 1500 (Duffy); STATS 1972, Ch 826
(Effective August 11, 1972)

Section 2145.1 has been added to the Business and Professions Code to permit an unlicensed person to perform acupuncture, alone or in conjunction with other forms of traditional Chinese medicine, if such procedure is carried on *in an approved medical school* for the primary purpose of scientific investigation of acupuncture, and under the supervision of a licensed physician or surgeon.

Section 2145.1 further provides that any medical school conducting research into acupuncture under the provisions of this section shall report to the Legislature annually concerning the results of such research, the suitability of acupuncture as a therapeutic technique and performance standards for persons who perform acupuncture.

Chapter 826 was an urgency statute, based on the finding that the recent rising interest in acupuncture and other forms of traditional Chinese medicine has stimulated a desire on the part of the practitioners of modern western medicine to explore these forms of medicine. In view of the promising possibilities of acupuncture and other forms of traditional Chinese medicine, it was necessary that Chapter 826 take effect immediately so that the investigation and selection process with respect to these forms of medicine could proceed as soon as possible [CAL. STATS. 1972, c. 826, §2].

Business Associations; alcoholic beverage licenses

Business and Professions Code §24755.1 (amended).
AB 761 (Brown); STATS 1972, Ch 1008

Section 24755.1 of the Business and Professions Code has been amended to allow the Department of Alcoholic Beverage Control to suspend or revoke the license of a person who violates the provisions of §24755 (minimum retail price schedules). Formerly, only monetary penalties were imposed for such violations.

COMMENT

Section 24755.1 was added to the Business and Professions Code in 1965 [CAL. STATS 1965 c. 742 at 2151, §1], and specified that the penalties imposed for violations of §24755 shall be confined solely to

monetary penalties. Prior to the addition of §24755.1, the Department of Alcoholic Beverage Control would file for suspension or revocation of a license, and since this remedy was deemed impractical because of the great time and expense involved in lengthy litigation and the fact that the order was stayed during the period of appeal, Section 24755.1 was added limiting the remedy to monetary penalties [CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 23]. Apparently the reasons for enacting this section have been forgotten, or the monetary sanctions have proved inadequate.

Business Associations; inactive members of State Bar—narcotics addiction

Business and Professions Code §6007 (amended).
AB 2036 (Maddy); STATS 1972, Ch 489
Support: State Bar of California

Section 6007 of the Business and Professions Code has been amended to provide for situations in which *any* member of the State Bar, rather than only *active* members, may be enrolled as an inactive member of the State Bar. Previously, a member *voluntarily* enrolled as an inactive member may have enjoyed a period of active membership before the Board had the opportunity to enroll him pursuant to §6007 [*See* STATE BAR OF CALIFORNIA, Rules and Regulations, Article I, §3.].

Chapter 489 has amended Section 6007(a) to provide for the mandatory inactive enrollment of any member of the state bar, who, because of addiction to the use of narcotics or imminent danger of addiction, has been placed in or returned to inpatient status of the California Rehabilitation Center, or its branches, pursuant to Sections 3051, 3106.5 or 3152 of the Welfare and Institutions Code.

The Board of Governors of the State Bar shall terminate the member's inactive enrollment upon the member's release from inpatient status at the California Rehabilitation Center, or its branches pursuant to Sections 3053, 3109, 3151, 5304, or 5305 of the Welfare and Institutions Code, and on the payment of all required fees. When a member is placed in, returned to or released from inpatient status at the California Rehabilitation Center or its branches, or discharged from the narcotics treatment program, the Director of Corrections or his designee shall transmit to the board of governors of the State Bar a certified notice attesting to such fact.

Section 6007(b) of the Business and Professions Code has been amended to provide that, in cases not covered by the provisions of subsection (a) *supra*, an attorney shall be enrolled as an inactive member because of mental infirmity, illness or addiction to intoxicants or drugs if, after notice and opportunity to be heard before the board, it is found that he is *either* unable or habitually fails to perform his duties, *or* is unable to practice law without danger to the interests of his clients and the public. Prior to Chapter 489, a finding of *both* conditions was required.

Prior to amendment, Section 6007(b) allowed proceedings pursuant to this subdivision to be initiated only after a preliminary investigation demonstrated that probable cause existed for such proceedings. Chapter 489 has amended Section 6007(b) to additionally allow such proceedings to be brought where probable cause has been found during the course of a disciplinary proceeding.

Business Associations; investigator and adjuster bonding

Business and Professions Code §7548 (amended).
AB 354 (Powers); STATS 1972, Ch 722

The Private Investigator and Adjuster Act [CAL. BUS. & PROF. CODE §7500 *et seq.*] provides for the licensing and regulation of four occupations: private investigators, private patrol operators, insurance adjusters, and repossessors. Section 7545 requires a $2000 surety bond as a prerequisite for a license to be issued pursuant to this act. Section 7548 provides that in lieu of this bond, a $2000 cash deposit may be made. Chapter 722 amends this section to establish a third alternative by allowing the applicant to deposit with the State, investment certificates or share accounts in the amount of two thousand dollars issued by a savings and loan institution doing business in this state and insured by the Federal Saving and Loan Insurance Corporation.

This arrangement allows the licentiate to draw interest on his money while it is serving as security also. This type of arrangement has been used for a contractor's bond [CAL. BUS. & PROF. CODE §7071.12(b)], motor vehicle dealer's bond [CAL. VEHICLE CODE §11710.1], driving school operator's bond [CAL. VEHICLE CODE §11102(a)], motor vehicle fuel distributor's bond [CAL. REV. & TAX. CODE §7456(d), cigarette distributor's bond [CAL. REV. & TAX. CODE §30145(c)], and on the bond required of persons subject to the alcholic beverage tax [CAL. REV. & TAX. CODE §32105(d)].

Business Associations; savings and loan associations

Financial Code §§5076, 6518, 6561, 6905 (amended).
AB 866 (Foran); STATS 1972, Ch 976

Section 5076 of the Financial Code has been amended to redefine the term, "statutory net worth," for purposes of Savings and Loan law relating to investments which can be made by savings and loan associations [CAL. FIN. CODE §6700 *et seq.*]. Such term is now defined as the *sum of*: (a) an association's issued and outstanding guarantee stock; (b) paid-in surplus; (c) undivided profits; (d) approved pledged shares of a mutual association; (e) general reserves and other amounts as the Savings and Loan Commissioner prescribes. Prior to amendment, the term included *any one, or the sum of* any of the above-mentioned elements.

Similarly, §6905 of the Financial Code has been amended to provide that for the purposes of imposing restrictions on dividends and issuance of shares, each association's stock, surplus, undivided profits and reserves shall consist of the *sum of*: (a) issued and outstanding guarantee stock; (b) surplus; (c) undivided profits; (d) loan reserve, federal insurance reserve, and reserve for bad debts; and (e) other reserves as the Savings and Loan Commissioner prescribes.

Chapter 976 has also amended Financial Code §§6518 and 6561, which apply to a transaction where only part of the sum evidenced by a withdrawable share or investment certificate is withdrawn from the association. Prior to amendment, §§6518 and 6561 provided that the sum withdrawn was deemed that first received by the association unless otherwise agreed between the certificate holder and the association. As amended, the two sections state that the sum withdrawn is deemed to be that *last* received by the association unless otherwise provided by resolution of the association's board of directors applicable to *any class* of the association's withdrawable shares (§6518) or association's investment certificates (§6561).

See Generally:
1) 9 CAL. JUR. 2d *Building and Loan Associations* §§1 *et seq.*, 17 *et seq.* (1953).

Business Associations; professional corporations

Business and Professions Code §§8040 *et seq.*, 9058, 9070-9078 (new); §§8018, 9042, 9047, 9056 (amended); Evidence Code §1014 (amended).

AB 970 (Foran); STATS 1972, Ch 1306
SB 1049 (Song); STATS 1972, Ch 1286

Pursuant to the "Moscone-Knox Professional Corporation Act" [CAL. CORP. CODE §§13400-13410], persons licensed under the Business and Professions Code or the Chiropractic Act may form corporations rendering professional services. Prior to the enactment of Chapters 1286, and 1306, only chiropractors [CAL. BUS. & PROF. CODE §§1050-1058], dentists [CAL. BUS. & PROF. CODE §§1800-1808], doctors [CAL. BUS. & PROF. CODE §§2500-2508], physical therapists [CAL. BUS. & PROF. CODE §§2690-2696], psychologists [CAL. BUS. & PROF. CODE §§2995-2996.6], optometrists [CAL. BUS. & PROF. CODE §§3160-3167], accountants [CAL. BUS. & PROF. CODE §§5150-5157], and attorneys [CAL. BUS. & PROF. CODE §6000 *et seq.*] could incorporate pursuant to this act.

Chapter 1306 adds §8040 *et seq.* to the Business and Professions Code to enable certified shorthand reporters to use the professional corporation form, and provides for registration and regulation of shorthand reporting corporations in a manner similar to that applicable to other corporations.

Chapter 1306 also amends §8018 of the Business and Professions Code to insure that only natural persons holding a valid certificate as a shorthand report pursuant to §8000 *et seq.*, and corporations complying with §8043, may use the title "certified shorthand reporter," or the abbreviation "C.S.R."

Chapter 1286 adds Article 5 (commencing with §9070) to the Business and Professions Code to authorize the formation of a licensed clinical social workers corporation pursuant to the "Moscone-Knox Professional Corporation Act" under specified conditions. These conditions are essentially the same as the conditions for the corporate practice of other professional services.

Section 9042 of the Business and Professions Code lists the requirements for a clinical social worker's license. This section has been amended to delete United States citizenship or the intent to become a United States citizen as a requirement. This section has also been amended to allow the Board of Behavioral Sciences to establish equivalent means of meeting experience requirements for a license.

Section 9056 has been amended to allow an unlicensed person to be employed as an apprentice clinical social worker if certain requirements are met. Such a person cannot provide services to the public

for a fee, except as an employee of a professional person specified in this section.

Evidence Code §1014, relating to confidential communications, has been amended to include communications between a clinical social workers corporation and the patient to whom it renders professional services.

See Generally:

1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §§14A-14D (Supp. 1969).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 3.
3) Peterson, *Professional Corporations*, 43 CAL. S.B.J. 884 (1968).
4) Peterson, *Professional Corporations—One Year Later*, 44 CAL. S.B.J. 819 (1969).

Business Associations; citizenship requirement—licensing laws

Business and Professions Code §§2635.1, 2914, 3056, 4089, 4511, 4514, 6060, 6062, 6885, 6886, 7526, 8020, 8023.5, 9022, 9042, 9700.5, 17862 (amended); §§3057, 8740.5, 8793, 10150.5, 10515.5 (repealed); Education Code §13575.5 (amended); Financial Code §12331 (repealed); §12331 (new); Harbors and Navigation Code §1101 (amended); Insurance Code §1643 (repealed). AB 1986 (Powers); STATS 1972, Ch 1285

Chapter 1285 is apparently intended to eliminate the United States citizenship requirement from all of the licensing laws in which such a requirement previously existed. The licensed occupations which previously required citizenship include: attorneys; certified shorthand reporters; cemetery brokers; collection agency managers; educational psychologists; insurance agents and brokers; land surveyors; mineral, oil, and gas brokers; optometrists; pharmacists; physical therapists; private investigators and adjusters; private patrol operators; psychiatric technicians; psychologists; real estate brokers; social workers; and vessel pilots.

COMMENT

In *Purdy and Fitzpatrick v. State of California* [71 Cal. 2d 566, 465 P.2d 645, 79 Cal. Rptr. 77 (1969) (hereinafter cited as *Purdy*)], the California Supreme Court determined that citizenship requirements for employment on government projects specified by Section 1850 of the Labor Code (which prohibited contractors performing public works projects from employing aliens, were invalid. In very broad language, which appears to invite similar suits, the court ruled that the state could

not require United States citizenship as a prerequisite to employment for three reasons. First, Congress has exclusive control over the admission of aliens into this country, and has exercised this control to enact a comprehensive scheme which includes the conditions under which aliens may be employed [Immigration and Nationality Act of 1952, 8 U.S.C. §1101, *et seq.* (1970)]. State legislation barring alien employment in various fields must fail because it encroaches upon, and interferes with, the comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration [*Purdy* at 572-575, 456 P.2d at 649-652, 79 Cal. Rptr. at 81-84]. Second, such citizenship requirements violate the equal protection clause of the 14th Amendment of the United States Constitution, a clause which protects all "persons," and therefore applies to aliens as well as citizens [*Purdy* at 578, 579, 585, 456 P.2d at 653, 654, 658, 79 Cal. Rptr. at 85, 86, 90]. Third, the State did not bear the burden of establishing that the classification of persons who may not work because of lack of citizenship constitutes a necessary means of accomplishing a legitimate and compelling state interest [*Purdy* at 578, 579, 585, 456 P.2d at 653, 654, 658, 79 Cal. Rptr. at 85, 86, 90].

> The state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty, and happiness; courts sustain such limitations only after careful scrutiny [*Purdy* at 579, 456 P.2d at 654, 79 Cal. Rptr. at 86].

To determine the effect *Purdy* might have on state licensing laws, an opinion of the Attorney General was sought [55 OPS. ATT'Y GEN. 80 (1972) (hereinafter cited as *Opinion*)]. The Attorney General found that statutes requiring United States citizenship as a prerequisite to license in various professional and vocational fields are invalid as violative of the 14th Amendment Equal Protection Clause. The opinion was based on the rationale that no reasonable connection exists between the requirement of citizenship and an individual's fitness to practice a given profession or vocation [*Opinion* at 81, 82].

> It is well established that the purpose behind occupational licensing is to protect the public from unqualified practitioners, and it seems clear that citizenship bears no relationship to one's professional or vocational competency or qualifications. Indeed, the patent arbitrariness of such statutes is reflected by the fact that while aliens are precluded from entering the licensed occupations being considered here, they may engage in others, such as medi-

cine, nursing, dentistry, contracting, and structural pest control, without regard to their alienage [*Opinion* at 82].

It appears that Chapter 1285 seeks to delete from the various codes, all citizenship requirements which appear to be unenforceable in view of the opinions stated above.

As a collateral matter, it is interesting to note that the Attorney General has found that statutes imposing a citizenship requirement as a prerequisite to membership on *licensing boards* may be excluded from the purview of *Purdy*. Such membership introduces the element of the state's sovereign power, since persons serving on licensing boards are appointed by the Governor and carry out statewide duties such as enforcing the provisions of the licensing acts and adopting regulations thereunder. Therefore, such persons may properly be classified as "public officers" or "state officials," rather than "employees" in the usual sense of the word. Furthermore, such persons generally receive only per diem and expenses and therefore cannot be considered as "earning a living" by fulfilling their assigned tasks [*Opinion* at 82, 83]. Therefore, it appears that the Attorney General has intimated that citizenship requirements in relation to membership on licensing boards may be based upon a compelling state interest.

See Generally:

1) Purdy and Fitzpatrick v. State of California, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).
2) 55 OPS. ATT'Y GEN. 80 (1972).
3) 53 OPS. ATT'Y GEN. 63 (1970).

Business Associations; new car dealers board

Vehicle Code §§3050.1, 3050.2, 3050.3 (new).
AB 762 (Keysor); STATS 1972, Ch 1210
Support: New Car Dealers Board; Motor Car Dealers Association of Southern California; Northern California Motor Car Dealers Association

Chapter 1210 has added Section 3050.1 to the Vehicle Code to authorize the New Car Dealers Policy and Appeals Board, or its secretary, to administer oaths, take depositions, certify to official acts, and issue subpoenas in any proceeding, hearing or in the discharge of any duties of the board. Section 3050.2 has been added to provide for the enforcement of such subpoenas by application to the superior court as set forth in Article 2 (commencing with Section 11180), of the Government Code. Section 3050.3 has been added to the Vehicle Code

to prescribe the payment of fees to witnesses who appear by order of the board.

COMMENT

The New Car Dealers Policy and Appeals Board, Chapter 6 (commencing with Section 3000) of the Vehicle Code, was created in 1967 [CAL. STATS. 1967, c. 1397, at 1361] to consider matters concerning the activities and practices of new car dealers. Prior to the enactment of Chapter 1210, the board's hearings were limited to voluntarily available witnesses and evidence. The enactment of Chapter 1210 empowers the board to have many of the general powers of an administrative, quasi-judicial hearing board.

See Generally:

1) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1967 CODE LEGISLATION 233.

Business Associations; prepaid legal services

Corporations Code §9201.2 (new).
SB 777 (Song); STATS 1972, Ch 894
(Effective August 15, 1973)
Support: State Bar of California

Section 9201.2 has been added to the Corporations Code to authorize formation of nonprofit corporations under the General Nonprofit Corporation Law [CAL. CORP. CODE §9000 *et seq.*] for the purpose of administering a system or systems of defraying the cost of professional services of attorneys. Section 9201.2 provides that any such corporation may not engage directly or indirectly in the performance of corporate purposes or objects unless all of the following requirements are met:

(a) The attorneys furnishing professional services pursuant to such system or systems are acting in compliance with the Rules of Professional Conduct of the State Bar of California concerning such system or systems.

(b) Membership in the corporation and an opportunity to render professional services upon a uniform basis are available to all active members of the State Bar.

(c) Voting by proxy and cumulative voting are prohibited.

(d) A certificate is issued to the corporation by the State Bar of California, finding compliance with the requirements of subdivisions (a), (b) and (c).

Any such nonprofit corporation shall be subject to supervision by the State Bar of California and shall also be subject to §9505 of the Corporations Code, which provides for supervision of nonprofit corporations by the State Attorney General.

Chapter 894 expressly declares that it is the intent of the Legislature that nothing in this act shall be construed to prohibit the formation and conduct of any group, prepaid, or other legal service arrangement organized as an unincorporated association or pursuant to the General Nonprofit Corporation Law, provided that attorneys furnishing legal services thereunder are acting in compliance with the Rules of Professional Conduct of the State Bar of California concerning such arrangements (Rule 20).

COMMENT

Chapter 894 appears to be a response to a decision of the Board of Governors of the State Bar of California in November of 1971, unanimously approving a committee report recommending prepaid legal services. According to David K. Robinson, former President of the State Bar of California, the proposed program was similar to those currently sponsored by the medical (Blue Shield) and dental professions, and would be operated by a nonprofit corporation composed of members of the State Bar who elect to participate. The initial financing would be through enrollment fees, supplemented by grants from foundations until monthly payments made by those covered fully support the program. Payments for covered services of participating lawyers would be made according to a schedule directly to the participating lawyer providing the service, and payments for covered services of a nonparticipating lawyer would be made to the covered client to reimburse him up to the scheduled amount [*See* Robinson, *President's Message: Prepaid Legal Services,* 47 CAL. S.B.J. 8 (1972)].

Business Associations; trade names—registration

Business and Professions Code §14411 *et seq.* (new).
AB 915 (Hayden); STATS 1972, Ch 438

Section 14411 has been added to the Business and Professions Code to create a rebuttable presumption affecting the burden of producing evidence that the registrant, who first files a fictitious name in that county, has the exclusive right to use that name or one confusingly similar thereto, as a trade name in the county in which the statement

was filed. Section 14412 specifies which occurrences render the presumption inoperative. Section 14414 provides that nothing in Chapter 3 [CAL. BUS. AND PROF. CODE §14400 *et seq.*] shall be construed to require or prohibit the filing in any county of any fictitious business name statement if such filing is not required or prohibited by §17910 (persons required to file fictitious business name statement).

Section 14415 has been enacted to provide the same protection for a corporation which first files its articles of incorporation pursuant to §308 of the Corporations Code (domestic corporations) or first obtains a certificate of qualification as a foreign corporation (Corporations Code §§6403, 6403.1) and is actually engaged in a business utilizing the corporate name set forth in such articles or certificate or a confusingly similar name. The corporation will presumptively have the exclusive right to use, as a trade name in the state, the corporate name set forth, or one confusingly similar.

Section 14416 states that in the case where a corporation is entitled to the presumption pursuant to §14415 and a registrant is entitled to the presumption established in §14411, and both are using the same or confusingly similar trade names in the same county, the entity which would be entitled to the presumption first in time shall be entitled to the presumption as against the other as to the use of the trade name in that county.

COMMENT

It should be remembered that trade names are distinguishable from trademarks (§14200 *et seq.*) in that trade names may identify not only goods, but also services or a business. A name identifying goods and *affixed* to them may be both a trademark and a trade name and the same protections would be accorded to both. Trademarks and trade names are both considered personal property and wrongful imitation may give rise to a tort action to recover damages and to enjoin wrongful use [4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §§54, 55 (7th ed. 1960)].