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# Commercial Transactions

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# Commercial Transactions

## Commercial Transactions; works of improvement

Civil Code §3267 (new).

SB 229 (Harmer); STATS 1971, Ch 1267

Section 3267 is added to the Civil Code to provide that Title 15 (works of improvement) shall not be construed to give any person any right of action on any original contractor's private or public work payment bond (as described in §§3235 *et seq.*, or 3247 *et seq.*). However, if the work forming the basis for his claim was performed by such person for the principal on such payment bond, or one of his subcontractors, pursuant to the contract between the original contractor and the owner the provisions of §3267 do not apply.

Nothing in this section shall affect the stop notice rights of, and relative priorities among, architects, registered engineers or licensed land surveyors and holders of secured interests on the land.

This act is prospective in its application.

## Commercial Transactions; nonprofit corporations

Corporations Code §§9700-9703 (new); §§9300, 9400 (amended).  
SB 488 (Alquist); STATS 1971, Ch 940

*Provides for indefinite number of directors of a nonprofit corporation; modifies procedure for adoption, amendment or repeal of bylaws of nonprofit corporations; establishes provisions for merger or consolidation of such corporations.*

Section 9300 of the Corporations Code contains the required provisions for articles of incorporation for nonprofit corporations and is amended to include a provision that the articles or a bylaw duly adopted by the members, unless the articles provide otherwise, may state that the number of directors shall not be less than a stated minimum (which in no case shall be less than five) nor more than a stated maximum (which in no case shall exceed such stated minimum by more than three).

In the event that the articles or bylaws permit such an indefinite number of directors, the exact number shall be fixed and subsequently

changed, within the limits specified in the articles or bylaws, by a bylaw or amendment thereof duly adopted by the members or by the board of directors.

When the articles provide for an indefinite number of directors, unless the articles provide otherwise, such indefinite number may be changed, or a definite number fixed, without provision for an indefinite number, by a bylaw duly adopted by the members.

Prior to this amendment, section 9300 required that the articles must state the number of directors, not less than three. Chapter 940 adds to section 9300, relating to nonprofit corporations, a provision for an indefinite number of directors that was already a part of the General Corporation Law of this state. [See 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 28 (7th ed. 1960).]

Section 9400 is amended to provide that the bylaws of a nonprofit corporation may be adopted, amended, or repealed by any of the following:

a) By the written consent of members entitled to exercise a majority of the voting power, or by the vote of a majority of a quorum at a meeting duly called for the purpose according to the articles or bylaws.

b) Except as provided in subdivision (c), by the board of directors, subject to the power of the members to change or repeal the bylaws.

c) A bylaw or a bylaw amendment fixing or changing the authorized number of directors may be adopted only by the members and may not be adopted by the board of directors except where the articles or bylaws provide for an indefinite number of directors pursuant to section 9300.

However, the articles or bylaws may require the vote or written consent of members entitled to exercise a greater fraction or percentage of the voting power for the amendment or repeal of bylaws generally, or of particular bylaws, or for the adoption of new bylaws, than would otherwise be required under this section. The articles or a bylaw adopted by the members may limit or restrict the power of the directors to adopt, amend, or repeal bylaws, or may deprive them of the power.

Subdivisions (a) and (b) are restatements of prior law. Subdivision (c) is added to accommodate the amendment to section 9300, and to enable a corporation to require more than a majority of the voting

power of the members to adopt, amend, or repeal bylaws, and to restrict or deprive the directors of such power.

Section 9700 is added to the Corporations Code to provide that the provisions of the General Corporation Law relating to merger and consolidation shall apply to nonprofit corporations, except as to matters specifically otherwise provided for in sections 9701, 9702, and 9703.

Section 9701 provides that an agreement to merge or consolidate shall be approved by the members of each corporation. Where the members have equal voting rights, the agreement shall be approved by a resolution adopted by the vote of a majority of the members or be approved by the written consent of two-thirds of the members. Where the members have unequal voting rights, the agreement shall be approved by a resolution adopted by the vote of members entitled to exercise a majority of the voting power or be approved by the written consent of members entitled to exercise two-thirds of the voting power. This section shall be applicable regardless of any limitations or restrictions on the voting power of any class or classes of membership.

Section 9701 is a departure from existing law in that Section 4107 of the General Corporation Law provides that an agreement for merger or consolidation must be approved by the vote of the holders of not less than two-thirds of the issued and outstanding shares of each class of each corporation.

Under the provisions of section 9702, where the members act by vote, such votes shall be cast at a meeting duly called upon notice of the time, place, and purpose thereof, and duly given to each member at least 20 days prior to the date of the meeting, except that such notice may be waived as provided in section 2209. Unless the notice is waived, there shall be mailed with such notice a statement of the general terms of the proposed agreement.

Section 9703 provides that the articles of incorporation may require the vote or written consent of a greater percentage or fraction of the members than would otherwise be required under this chapter, but in no case may the articles prohibit any merger or consolidation authorized by this chapter or by the General Corporation Law (§4100 *et seq.*).

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See Generally:

- 1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §§33, 85, 105 (7th ed. 1960); 105B (Supp. 1969).
- 2) CONTINUING EDUCATION OF THE BAR, *Advising California Business Enterprises* §§20, 33, 34, 85 (1958).

### Commercial Transactions; transfer of alcoholic beverages license

Business and Professions Code §§24070, 24079 (amended).

AB 1571 (Johnson, Harvey); STATS 1971, Ch 1072

*Eliminates restrictions on price or consideration for transfer of "off-sale" or "on-sale" general alcoholic beverages license after a period of at least 5 years has elapsed from the date of the transfer.*

Section 24079 of the Business and Professions Code provides that the purchase price or consideration that may be paid or received for an on-sale or off-sale general license originally issued on or after June 1, 1961 shall not exceed \$6,000. Chapter 1072 amends this section to provide that there shall be no restrictions as to the purchase price or consideration that may be paid or received for such a license after a period of 5 years has elapsed from the date of the original issuance of the license.

Section 24070 of the Business and Professions Code provides for the restrictions on, and the requirements for, the transfer of an on-sale or off-sale general license from one county to another. Subsection (d) of this section provides that no off-sale or on-sale general license, transferred from one county to another, may be made for a consideration of more than \$10,000; or \$6,000 if such a license was issued after June 1, 1961. Chapter 1072 amends this section to conform with the provisions of section 24079 (*supra*). Subsection (e) is added to 24070 to provide that "notwithstanding the provisions in subsection (d) of this code section, any off-sale or on-sale general license transferred from one county to another pursuant to this section may be transferred with no restrictions as to the purchase price or consideration, after a period of 5 years from the date of the intercounty transfer of the license has elapsed."

Prior to the enactment of Chapter 1072, there was a ceiling on the purchase price or consideration that could be paid or received for the sale of an off-sale or on-sale general license. Chapter 1072 removes this ceiling when 5 years have elapsed from the date of the transfer.

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See Generally:

- 1) 51 OPS. ATT'Y GEN. 12 (1968).

### Commercial Transactions; variable interest rates

Civil Code §1916.5 (amended).

AB 2859 (Powers); STATS 1971, Ch 1265

Section 1916.5 of the Civil Code is amended to provide that no in-

crease in interest as provided in any provision for a variable interest rate contained in a security document, or evidence of debt issued in connection therewith, shall be valid unless such provision is set forth in such security document, and in any evidence of debt, and such document or documents contain the following provisions:

1) A requirement that when an increase in the interest rate is required or permitted by a movement in a particular direction of a prescribed standard an identical decrease is required in the interest rate by a movement in the opposite direction of the prescribed standard.

2) The rate of interest shall change not more often than once during any semiannual period, and at least six months shall elapse between any two such changes.

3) The change in the interest rate shall not exceed one-fourth of 1 percent in any semiannual period.

4) The rate of interest shall not change during the first semiannual period.

5) The borrower is permitted to prepay the loan in whole or in part without a prepayment charge within 90 days of notification of any increase in the rate of interest.

6) A statement attached to the security document and to any evidence of debt issued in connection therewith printed or written in a size equal to at least 10-point type, consisting of the following language:

**NOTICE TO BORROWER: THIS DOCUMENT CONTAINS  
PROVISIONS FOR A VARIABLE INTEREST RATE.**

As amended, section 1916.5 defines "semiannual period" as each of the successive periods of six calendar months commencing with the first calendar month in which the instrument creating the obligation is dated. "Security document" is defined as a mortgage contract, deed of trust, or real estate sales contract, and "evidence of debt" means a note or negotiable instrument.

The provisions of section 1916.5 shall be applicable only to instruments executed on or after the effective date of this section, and this section shall not apply to non profit public corporations.

For a discussion of the law prior to this amendment, *see* 2 PAC. L. J. REVIEW OF SELECTED 1970 CODE LEGISLATION 356 (1971).

**COMMENT**

The most significant aspects of this amendment appear to be the re-

quirement that at least six months shall elapse between any two changes in the rate of interest, and that the rate of interest shall not change during the first semiannual period.

### **Commercial Transactions; late payment charges**

Civil Code §2954.5 (amended).

AB 1502 (Beverly); STATS 1971, Ch 813

Section 2954.5 of the Civil Code is amended to provide that failure of a lender to comply with the notice requirements of this section does not excuse or defer the borrower's performance of any obligation incurred in a loan transaction other than his obligation to pay a late payment charge; nor does it impair or defer the right of the lender to enforce any other obligations, including the costs and expenses incurred in any enforcement authorized by law.

Prior to amendment, section 2954.5 only provided that before the first default, delinquency, or late payment charge could be assessed by any lender on a delinquent payment of a loan secured by real property, the borrower must be given notice of such charges. Before a late charge could be imposed on subsequent delinquent payments, similar notice was required. [For a discussion of Section 2954.5 before amendment, see 2 PAC. L.J., REVIEW OF SELECTED 1970 CODE LEGISLATION 335 (1971).]

#### *COMMENT*

This amendment was not intended to constitute a change in the existing law, but was enacted as an urgency statute to resolve any questions of interpretation involving existing secured loan transactions affected by section 2954.5.

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**See Generally:**

- 1) 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions* §73 (Supp. 1969).

### **Commercial Transactions; contractor's performance bond**

Insurance Code §§12095, 12096, 12097 (new).

AB 2175 (Brathwaite); STATS 1971, Ch 1427

Section 12095 is added to the Insurance Code to prohibit any insurer admitted in this state to issue surety insurance from refusing to accept an application for a contractor's performance bond, failing to issue such a bond, or cancelling such a bond because of the contrac-

tor's race, color, religion, ancestry, national origin, or geographic location. Section 12095 further provides that these factors shall not constitute grounds for exacting a greater premium, charge, guaranty, or collateral from the applicant for such bond.

Under the provisions of section 12096 of this code, any applicant for a contractor's performance bond who believes that the insurer to whom he has applied did not comply with section 12095 may file a written complaint with the Insurance Commissioner. If the Commissioner finds that there are reasonable grounds for believing that discrimination has occurred, he may set the complaint for a hearing at which each of the parties to the complaint shall have an opportunity to be heard in person or through their witnesses. Any determination of the Commissioner upon such complaint and hearing shall be judicially reviewable.

Section 12097 provides that whoever denies a contractor's performance bond solely on the grounds specified in section 12095 is liable for the actual damages suffered by the contractor, and two hundred fifty dollars (\$250) in addition to such damages for each offense.

### **Commercial Transactions; corporate securities**

Corporations Code §25534 (new); §§25003, 25100, 25103, 25133, 25503, 25800 (amended).

AB 1122 (Knox); STATS 1971, Ch 1008

*Extends exemption from specified qualification provisions of the corporate security law to securities on commissioner-certified exchanges; requires written consent of the Commissioner for transfer of securities subject to specified conditions; establishes the measure of damages for violation of provisions regulating the sale of securities; changes the effective date for curative permits; modifies exemption for transactions related to merger or consolidation.*

Section 25100 of the Corporations Code sets forth certain securities exempted from the qualification provisions of §§25110, 25120, and 25130. Prior to amendment, subsection 25100(o) defined as exempt: "Any security listed or approved for listing upon notice of issuance on the New York Stock Exchange; and any warrant or right to purchase or subscribe to any such security."

Chapter 1008 amends this subsection to delete the reference to the New York Stock Exchange, and to provide that the exemption extends

to any security listed, or approved for listing upon notice of issuance, on any stock exchange certified by the Commissioner as:

- 1) Imposing all of specified requirements on companies seeking to list common stock on such exchange; and
- 2) Having established each of certain specified criteria as a basis for the consideration of suspension or removal from listing on the exchange.

The specified listing requirements definitive of an exchange which may be certified by the Commissioner are:

- 1) Net tangible assets of at least two million dollars;
- 2) Net income before federal income taxes of five hundred thousand annually, and net income after taxes of two hundred fifty thousand dollars;
- 3) Minimum distribution of 250,000 shares among not less than 900 holders, including at least 600 holders of lots of 100 shares or more, and such securities must *not* be held largely by institutional investors;
- 4) Minimum price per share of \$4.00 for a reasonable period of time prior to the filing of a listing application;
- 5) The aggregate market value for publicly held shares must be at least one million five hundred thousand dollars (\$1,500,000).

The specified criteria for consideration of suspension or removal are:

- 1) If a company which has net tangible assets of less than one million dollars has sustained net losses in each of its two preceding fiscal years, or if it has net tangible assets of less than three million dollars and has sustained net losses in three of its last four fiscal years.
- 2) If publicly held shares drop below 150,000; shareholders drop below 450 in number; the number of shareholders of lots of 100 shares or more is less than 300; or the aggregate market value of publicly held shares drop below \$750,000.
- 3) If shares of common stock sell at a price of less than four dollars per share for a substantial time, and the issuer fails to effectuate a reverse stock split within a reasonable time after requested to do so by the exchange. [See REVIEW OF SELECTED 1968 CODE LEGISLATION, CONTINUING EDUCATION OF THE BAR 121].

Chapter 1008 adds §25534 to the Corporations Code to provide that whenever any securities are sold or offered for sale in violation of §§25110, 25120, and 25130, (which prohibit sale of securities not qualified or exempted as therein provided), the Commissioner may or-

der the issuer to print on the face of certificates evidencing the securities a restriction on the transfer of such securities.

If after such order is given, a request for a hearing is filed by the person to whom the order was given, a hearing will be held in accordance with the provisions of the Administrative Procedures Act (Government Code §11500 *et seq.*) to determine the validity of the order. Unless a hearing is commenced within 15 days after the request for hearing is received by the Commissioner, such order is rescinded.

To give effectiveness to the legend requirement of the new §25534, §25533 has been amended to make it unlawful for any person to consummate the transfer of securities without the written consent of the Commissioner when he has ordered that each certificate evidencing the securities be stamped a legend as provided in §25534.

Section 25503 of the Corporations Code is amended to provide that any person who violates §§25110 or 25130 is liable to any person who acquires securities sold in violation of such sections, and the measure of liability shall be as follows:

1) Upon the tender of the securities, the plaintiff may sue to recover the consideration paid, with interest at the legal rate, less the amount of any income received from the securities.

2) If the plaintiff no longer owns the securities, damages will be the purchase price plus interest, minus the income received on the securities and the value received when the securities were disposed of by the plaintiff.

3) If the consideration given for the securities is not capable of being returned, damages will be the value of that consideration plus interest from the date of purchase, provided the security is tendered.

4) When the plaintiff no longer owns the securities and the consideration is not capable of being returned, damages will be the difference between the value of the consideration plus interest from date of purchase, and value of the securities at the time of disposal plus any income received while held by the plaintiff.

The provision relating to damages for violation of §25120 of this code remains unchanged; that is, the difference between the value of the consideration received by the seller, and the value of the security at the time it was received by the buyer, with interest from the date of purchase. [See CONTINUING EDUCATION OF THE BAR, *California Stock Qualification and Exemption* §§2.1-3.2, 3.5, 3.6 (1969)].

Section 25800, relating to the issuance of curative permits is amended

to except applications filed on or before January 2, 1972, from the provision that after such date this law shall have no force or effect.

Section 25003, as amended, defines the word "agent" as an individual who represents a broker-dealer, or who for compensation represents an issuer in effecting purchases or sales of securities. Prior to this amendment, §25003 referred to an agent as a person (rather than individual), and "person" is defined in Section 18 of the Corporations Code as including a corporation as well as a natural person.

Section 25103 specifies transactions which are exempt from the qualification provisions of §§25110 and 25120. One such transaction is an exchange of securities incident to a merger, consolidation, or sale of corporate assets in consideration of the issuance of securities of another corporation.

Prior to amendment, such transaction was exempt unless at least 25 percent of the outstanding shares of any class, the holders of which were *to receive securities of the surviving, consolidated or purchasing corporation*, were held by persons who had addresses in this state according to the records of the corporation of which they are shareholders.

As amended, an exchange incident to a merger, consolidation, or sale of assets in consideration of the issuance of securities of another corporation is exempt unless the holders of at least 25 percent of the outstanding shares of any class have addresses in this state and are to receive securities *in the exchange*. This amendment deletes the specification that such holders are to receive securities in the surviving, consolidated or purchasing corporation.

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See Generally:

- 1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §§66, 67, 72 (7th ed. 1960); §§122A, 123A, 132A, 132A-137A, 149A, 160A (Supp. 1969).
- 2) REVIEW OF SELECTED 1968 CODE LEGISLATION, CONTINUING EDUCATION OF THE BAR 115.
- 3) CONTINUING EDUCATION OF THE BAR, *California Corporate Securities Law and Rules* (1968).
- 4) Bickford, *California Corporate Securities Law of 1968*, 2 PAC. L.J. 497 (July 1971).
- 5) 24 OPS. ATT'Y GEN. 35 (1954).
- 6) Olson, *The California Corporate Securities Law of 1968*, 9 SANTA CLARA LAW. 75 (1969).

### Commercial Transactions; automobile sales financing

Civil Code §2984.2 (amended).

AB 2156 (Knox); STATS 1971, Ch 689

Chapter 689 amends Civil Code §2984.2 by specifying that the provision of the Rees-Levering Act which voids agreements in connection

with a conditional sale of a motor vehicle calling for inclusion of a security interest in property other than the vehicle or accessories or special equipment therefor, does not apply to an agreement relating to an insurance policy on a vehicle required by a seller, or to proceeds of a policy, or to return of life insurance premiums on such policy when financed by the seller.