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Business Associations and Professions

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Business Associations and Professions

Business Associations and Professions; directors, preferred shares, revised limited partnership act.

Corporations Code §§15511*, 15512*, 15513*, 15514*, 15515*, 15516*, 15517*, 15521*, 15522*, 15523*, 15524*, 15525*, 15526*, 15527*, 15528*, 15531*, 15532*, 15533, 15534, 15535, 15536, 15537, 15541, 15542, 15543, 15544, 15551, 15552, 15553, 15554, 15561, 15562, 15563, 15564, 15565, 15566, 15571, 15572, 15573, 15574, 15575, 15581, 15582, 15583, 15584, 15585, 15591, 15592, 15593, 15594, 15595, 15596, 15597, 15598, 15601, 15602, 15611, 15612, 15613, 15614, 15621, 15622, 15623, 15700, 1981 Cal. Stat. c. 807, §1, at 2784 (repealed), Corporations Code §§402.5, 15533, 15611, 15612, 15613, 15614, 15615, 15616, 15617, 15621, 15622, 15623, 15624, 15625, 15626, 15627, 15628, 15631, 15632, 15633, 15634, 15635, 15636, 15637, 15641, 15642, 15643, 15644, 15651, 15652, 15653, 15654, 15661, 15662, 15663, 15664, 15665, 15666, 15671, 15672, 15673, 15674, 15675, 15681, 15682, 15683, 15684, 15685, 15691, 15692, 15693, 15694, 15695, 15696, 15697, 15698, 15701, 15702, 15710, 15711, 15712, 15713, 15714, 15721, 15722, 15723, 15800 (new), 200, 204, 300, 311, 402, 403, Government Code §12209 (amended).

AB 1184 (Stirling); 1983 STAT. Ch 1223

(Effective July 1, 1984**)

Support: California State Bar Business Law Section; Department of Corporations; Department of Finance; Secretary of State

Chapter 1223 makes various changes regarding directors of corporations¹ and preferred shares.² Additionally, Chapter 1223 enacts the California Revised Limited Partnership Act.³

Corporations

Under prior law, when a corporation⁴ was formed, each incorporator

* Sections 15521, 15512, 15513, 15514, 15515, 15516, 15517, 15521, 15522, 15523, 15524, 15525, 15526, 15527, 15528, 15531, 15532, scheduled to be repealed on January 1, 1984, and replaced with new sections from 1981 Cal. Stat. c. 807, remain effective.

** CAL. CORP. CODE §§200, 204, 300, 311, 402, 402.5, 403, and GOV'T CODE §12209 are effective on January 1, 1984.

1. See *infra* notes 4-15 and accompanying text.

2. See *infra* notes 16-35 and accompanying text.

3. See *infra* notes 36-52 and accompanying text.

4. CAL. CORP. CODE §162 (definition of corporation).

and each director⁵ named in the articles⁶ of incorporation was required to sign and acknowledge the articles.⁷ Chapter 1223 mandates that if initial directors are named in the articles, each named director must sign the articles.⁸ If initial directors are not named in the articles, the articles must be signed by the incorporators of the corporation.⁹

Existing law permits the board of directors¹⁰ to establish committees.¹¹ These committees, to the extent permitted in the bylaws or by resolution of the board, have the same authority as the board.¹² In certain specified areas, however, the committees cannot share board authority.¹³ Chapter 1223 further restricts committee authority by providing that committees may not make a distribution¹⁴ unless the distribution is at a rate, in a periodic amount, or within a price range set forth in the articles or determined by the board.¹⁵

Under existing law, a corporation is permitted to provide for one or more classes or series¹⁶ of shares redeemable under specified conditions.¹⁷ For common shares,¹⁸ these provisions outline the only available method to redeem shares.¹⁹ Under prior law, a corporation could not issue any shares that purported to compel the corporation to redeem the shares.²⁰ Chapter 1223, however, allows a corporation to provide in the articles for one or more classes of *preferred* shares²¹ that are redeemable, in whole or in part (1) at the option of the corporation, (2) to the extent and upon the happening of one or more specified events, (3) at the option of the holder, or (4) upon the vote of at least a majority of the outstanding shares of the

5. *Id.* §164 (definition of director).

6. *Id.* §154 (definition of articles).

7. See 1975 Cal. Stat. c. 682, §7, at 1526 (enacting CAL. CORP. CODE §200(b)).

8. Compare CAL. CORP. CODE §200(b) with 1975 Cal. Stat. c. 682, §7, at 1526 (enacting CAL. CORP. CODE §200(b)).

9. Compare CAL. CORP. CODE §200(b) with 1975 Cal. Stat. c. 682, §7, at 1526 (enacting CAL. CORP. CODE §200(b)). The incorporators must be one or more individuals eligible to form a corporation. CAL. CORP. CODE §200(a).

10. CAL. CORP. CODE §155 (defining board as board of directors).

11. *Id.* §311.

12. *Id.*

13. A committee does not have the authority of the board with respect to the following: approval of any action which also requires shareholder's approval (defined, *id.* §153) or approval of the outstanding shares (defined, *id.* §152); *id.* §311(a); the filling of vacancies on the board or in any committee, *id.* §311(b); the fixing of the directors' compensation for serving on the board or on any committee, *id.* §311(c); the amendment or repeal of bylaws or the adoption of new bylaws, *id.* §311(d); the amendment or repeal of any resolution of the board, which by its express terms, is not so amendable or repealable, *id.* §311(e); or, the appointment of other committees of the board or the members thereof, *id.* §311(g).

14. *Id.* §166 (definition of distribution).

15. *Id.* §311(f).

16. *Id.* §183 (definition of series).

17. *Id.* §402(a). Chapter 1223 provides that these shares are redeemable, in whole or in part, at the option of the corporation, or to the extent and upon the happening of one or more events specified in the articles. *Id.*

18. *Id.* §159 (definition of common shares).

19. *Id.* §402(a).

20. 1975 Cal. Stat. c. 682, §7, at 1544 (enacting CAL. CORP. CODE §402(b)).

21. *Id.* §176 (definition of preferred shares).

class or series to be redeemed.²²

When shares are redeemed, existing law requires the redemption to be effected at a price, within a time period, or upon the terms and conditions stated in the articles.²³ When the articles permit a partial redemption of shares, Chapter 1223 requires the articles to specify the method for selecting the shares to be redeemed.²⁴ The shares may be selected on a pro rata basis by lot, at the discretion of the board, or upon other terms specified in the articles.²⁵ Furthermore, Chapter 1223 provides that any redemption by a corporation of its shares is subject to the provisions regulating dividends and reacquisition of shares.²⁶

Chapter 1223 creates rights that may be granted to a class or series of preferred shares.²⁷ To approve corporate action, the articles may include a provision requiring the vote of a specified percentage or proportion of the outstanding shares of the class or series.²⁸ This percentage may be less than a majority of the class or series, unless a majority or greater vote is required under the General Corporation Law.²⁹

Existing law permits a corporation to voluntarily wind up operations and dissolve upon a vote of the shareholders holding fifty percent or more of the voting power.³⁰ Under Chapter 1223, a corporation may further restrict this procedure by providing for dissolution only upon the vote of a specified percentage of preferred shares.³¹ Furthermore, the articles may provide that provisions regarding the distribution of shares junior to the class of preferred shares are inapplicable to the preferred shares.³²

Chapter 1223 also makes related changes to provisions governing convertible shares.³³ Prior law permitted a corporation to issue shares convertible into any class or series of shares at the option of only the holder, or automatically upon the happening of one or more specified events.³⁴

22. *Id.* §402(a). The articles of an open-ended investment company registered under the United States Investment Company Act of 1940, 15 U.S.C. sections 80a-1--80a-52 (1981), may provide the authority to issue shares redeemable at the option of the shareholders. CAL. CORP. CODE §402(a). The redemption value of these shares is a price approximately equal to the proportionate interest of the shares in the net assets of the corporation. A shareholder may compel redemption of these shares in accordance with their terms. *Id.*

23. *Id.* §402(b).

24. *Id.*

25. *Id.*

26. *Id.* §402(d); *see id.* §§500-510 (dividends and reacquisitions of shares). A corporation may create a sinking fund or similar provision for redemption or purchase of shares. *Id.* §402(d). Also, unless the purchase or redemption is permitted as a reacquisition, the holder of shares is not a creditor of the corporation. *Id.*

27. *See id.* §402.5.

28. *Id.* §402.5(a).

29. *Id.*; *see id.* §100 (General Corporation Law). *See generally id.* §§100-2315.

30. *Id.* §402.5(b); *see id.* §1900(a) (required vote).

31. *Id.* §402.5(b). The specified percentage may not exceed 66 2/3%. *Id.*

32. *Id.* §402.5(c).

33. *See id.* §403.

34. *See* 1975 Cal. Stat. c. 682, §7, at 1545 (enacting CAL. CORP. CODE §403).

Under Chapter 1223, convertible shares now are issued at the option of the holder, or automatically upon *either* the vote of at least a majority of the class or series to be converted, or upon the happening of one or more specified events.³⁵

California Revised Limited Partnership Act

In 1949 the California Legislature enacted the Uniform Limited Partnership Act.³⁶ The Legislature extensively revised the law relating to limited partnerships in 1981, by enacting the California Limited Partnership Act.³⁷ The provisions of the California Limited Partnership Act were to be effective January 1, 1983.³⁸ In 1982, the legislature changed the effective date of the California Limited Partnership Act to January 1, 1984.³⁹ Chapter 807 of the 1981 legislative session enacting the California Limited Partnership Act contained a provision stating that on the effective date of the Act, the Uniform Limited Partnership Act would be repealed.⁴⁰ Chapter 1223 repeals this provision, leaving the Uniform Limited Partnership Act in effect.⁴¹ Chapter 1223 provides, however, that the Uniform Limited Partnership Act only applies to limited partnerships existing on July 1, 1984.⁴²

Additionally, Chapter 1223 replaces the California Limited Partnership Act with the California Revised Limited Partnership Act.⁴³ The California Revised Limited Partnership Act is effective on July 1, 1984,⁴⁴ and governs all limited partnerships formed after the effective date.⁴⁵ Furthermore, the California Revised Limited Partnership Act governs all limited partnerships existing on the effective date, if all members of a partnership give their written consent to be governed by the new Act.⁴⁶

The California Revised Limited Partnership Act contains the same provisions of the California Limited Partnership Act, with minor clarifi-

35. Compare CAL. CORP. CODE §403(a)(1) with 1975 Cal. Stat. c. 682, §7, at 1545 (enacting CAL. CORP. CODE §403)(a)(1).

36. See 1949 Cal. Stat. c. 383, §1, at 688 (enacting CAL. CORP. CODE §§15501-15531); see CAL. CORP. CODE §15521 (short title).

37. See 1981 Cal. Stat. c. 807, §§1, 2 at 3114 (repealing CAL. CORP. CODE §§15501-15532, enacting *id.* §§15511-15614). See generally *Review of Selected 1981 California Legislation*, 13 PAC. L.J. 543 (1982).

38. See 1981 Cal. Stat. c. 807, §8, at 3140.

39. See 1982 Cal. Stat. c. 997, §44, at 5297; see also *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 392 (1983).

40. 1981 Cal. Stat. c. 807, §1, at 3114 (repealing CAL. CORP. CODE §§15501-15532).

41. See 1983 Cal. Stat. c. 1223, §14, at — (repealing 1981 Cal. Stat. c. 807, §1, at — 3114).

42. See CAL. CORP. CODE §§15712(a)(1), 15714.

43. *Id.* §§15611-15723; see *id.* §15721 (short title).

44. *Id.* §15714.

45. *Id.* §§15533, 15711.

46. *Id.* §15712(a)(1).

cations.⁴⁷ While the California Limited Partnership Act permitted limited partners to vote on specified matters without incurring general partnership liability,⁴⁸ the California Revised Limited Partnership Act permits limited partners to participate in an election to continue the limited partnership when no general partner remains.⁴⁹ The vote required to continue the limited partnership under these circumstances is an affirmative vote of a majority of the limited partners.⁵⁰ Furthermore, the California Revised Limited Partnership Act states that a general partner has the same liability to third persons as a partner in an ordinary partnership.⁵¹ Finally, the California Revised Limited Partnership Act provides that a limited partnership is not dissolved when a general partner is removed.⁵²

47. Compare *id.* §15632 with 1982 Cal. Stat. c. 997, §12, at — (amending CAL. CORP. CODE §15532); CAL. CORP. CODE §15635 with 1982 Cal. Stat. c. 997, §15, at — (amending CAL. CORP. CODE §15535); CAL. CORP. CODE §15636(f) with 1982 Cal. Stat. c. 997, §16, at — (amending CAL. CORP. CODE §15636(f)), CAL. CORP. CODE §15643 with 1981 Cal. Stat. c. 807, §2, at 3131 (enacting CAL. CORP. CODE §15543); CAL. CORP. CODE §15681 with 1982 Cal. Stat. c. 997, §30, at — (amending CAL. CORP. CODE §15581).

48. See 1982 Cal. Stat. c. 997, §§12, 15, at —, — (enacting CAL. CORP. CODE §15531, 15535).

49. Compare CAL. CORP. CODE §15632 with 1982 Cal. Stat. c. 997, §12 at — (enacting CAL. CORP. CODE §15532); CAL. CORP. CODE §15635 with 1982 Cal. Stat. c. 997, §15, at — (enacting CAL. CORP. CODE §15535).

50. CAL. CORP. CODE §15636(f).

51. *Id.* §15643(b).

52. *Id.* §15681(c).

Business Associations and Professions; corporate securities, dealer certification, franchise investment

Corporations Code §§25102, 25148, 27002, 31101, 31104, 31500 (amended).

SB 988 (Beverly), 1983 STAT. Ch 442

Support: Department of Corporations; Department of Finance

Chapter 442 addresses the regulation of the sale of corporate stock when the corporation has a limited number of shareholders.¹ In addition, Chapter 442 expands the category of security dealers exempt from the requirement of certification,² and amends provisions of the Franchise Investment Law regarding franchise registration and filing fees.³

1. CAL. CORP. CODE §§ 25102, 25148.

2. *Id.* §27002.

3. *Id.* §§31101, 31104, 31500.

Corporate Securities and Small Offering Exemptions

Existing law exempts certain securities⁴ transactions⁵ from the requirement of being qualified⁶ prior to an offer⁷ or sale⁸ of the security.⁹ Under prior law, any offer or sale of voting common stock in a corporation whose stock was owned beneficially by no more than ten persons¹⁰ and met certain criteria,¹¹ was exempt from the qualification requirement.¹² By increasing the number of beneficial owners to thirty-five,¹³ Chapter 442 conforms these provisions with 1982 legislative changes regarding statutory close corporations.¹⁴

Under prior law, the Commissioner of Corporations¹⁵ (hereinafter referred to as the Commissioner) could require, as a condition of qualification for a security, that a prospectus¹⁶ or proxy statement¹⁷ be sent or given to each person to whom an offer was made before, or concurrently with, the earlier of¹⁸ (1) the first offer made to a person by or for the account of the issuer,¹⁹ (2) the written confirmation of any sale made by or for the account of the person,²⁰ (3) payment pursuant to the sale,²¹ or (4) delivery of the security pursuant to the sale.²² Chapter 442 requires that the prospectus or proxy statement be given to each person to whom an offer is made *before the sale of the security*.²³ This change appears to permit corporations to take advantage of Securities and Exchange Commission Rule D,²⁴ requiring delivery of the disclosure document prior to sale.²⁵

4. *Id.* §25019 (definition of security).

5. *See id.* §25102 (transactions listed).

6. *See id.* §§25110-25113; *see People v. Hoshor*, 92 Cal. App. 2d 250, 254, 206 P.2d 882, 885 (1949); *see also* Comment, *Fine Tuning the California Small Offering Exemption*, 13 U.C.D. L. REV. 587, 592-97 (1980) (discussing methods for qualification). The purpose of qualification is to protect the public against purchase of worthless securities. *Id.*

7. *See* CAL. CORP. CODE §25017(b) (definition of offer).

8. *See id.* §25017(a) (definition of sale).

9. *See id.* §25110.

10. *See* 1982 Cal. Stat. c. 1524, §3, at ____ (amending CAL. CORP. CODE §25102), 10 CAL. ADMIN. CODE §260.102.5 (beneficial ownership explained).

11. CAL. CORP. CODE §25102(h) (requirements for one class of stock exemption).

12. *See* 1982 Cal. Stat. c. 1524, §3(h), at ____ (amending CAL. CORP. CODE §25102(h)).

13. *Compare* CAL. CORP. CODE §25102(h) with 1982 Cal. Stat. c. 1524, §3(h), at ____ (amending CAL. CORP. CODE §25102).

14. CAL. CORP. CODE §158, 418; *see Review of Selected 1982 California Legislation*, 14 PAC. L.J. 386 (1983).

15. CAL. CORP. CODE §25005 (definition of Commissioner).

16. *Id.* §31114 (prospectus explained).

17. *Id.* §178 (definition of proxy).

18. *See* 1968 Cal. Stat. c. 88, §2, at 263 (enacting CAL. CORP. CODE §25148).

19. *See id.* c. 88, §2, at 263 (enacting CAL. CORP. CODE §25148(1)); *see* CAL. CORP. CODE §25010 (definition of issuer).

20. 1968 Cal. Stat. c. 88, §2, at 263 (enacting CAL. CORP. CODE §25148(2)).

21. *Id.* c. 88, §2, at 263 (enacting CAL. CORP. CODE §25148(3)).

22. *Id.* c. 88, §2, at 263 (enacting CAL. CORP. CODE §25148(4)).

23. *Compare* CAL. CORP. CODE §25148 with 1968 Cal. Stat. c. 88, §2, at 263 (enacting CAL. CORP. CODE §25148).

24. 17 C.F.R. §§230.500-.506 (limited offer and sale of securities).

25. *Id.* §230.504(l). By requiring a disclosure statement prior to sale of the securi-

Dealer Certification

The Security Owners Protection Law²⁶ prohibits individuals from soliciting or receiving consideration for the purpose of protecting, enforcing, or representing the rights of a security owner or holder, unless the individual has obtained a certificate from the Commissioner authorizing these acts.²⁷ Under existing law, the definition of individual excludes (1) a licensed practicing attorney performing services in connection with the practice of law,²⁸ (2) a person holding a broker's or investment advisor's certificate and performing services,²⁹ (3) a holder of a permit allowing the issuance of certificates of deposit,³⁰ or (4) a security depository.³¹ Chapter 442 expands the class of exempted individuals to include (1) a broker licensed by the California Real Estate Commission performing services related to securities,³² (2) a person found by the Commissioner not to require certification for the protection of investors,³³ and (3) security owners or holders who, without compensation of any kind, induce or attempt to induce other holders of the same issuer to enter into agreements with exempt individuals.³⁴

Franchise Investment Law

The existing Franchise Investment Law³⁵ provides that a person may not offer or sell a franchise³⁶ unless the franchise offer either has been registered with the Commissioner, or is exempt from registration.³⁷ Exemptions are granted if the franchisor³⁸ complies with certain qualifications and restrictions concerning (1) net worth,³⁹ (2) the number of franchises,⁴⁰

ties, a corporation is not limited in its ability to advertise or solicit for an unregistered security. *See id.* §230.502(c), 230.504(b)(1).

26. CAL. CORP. CODE §§27000-27203.

27. *See id.* §27000.

28. *See id.* §27002(a).

29. *See id.* §27002(b).

30. *See id.* §27002(c).

31. *See id.* §27002(d); CAL. FIN. CODE §§30004 (definition of security depository), 30200 (licensing requirements for security depository), 30005-30006 (exemptions from licensing requirements).

32. CAL. CORP. CODE §27002(e). The broker must not be subject to the broker-dealer certification requirements for effecting transactions in securities. *Id.* §§25210-25220 (requirements for certification), 27002(e).

33. *See id.* §27002(f).

34. *See id.* §27002(g). Although brokers are exempt under Chapter 442, other provisions still protect security holders. *See* CAL. BUS. & PROF. CODE §§10131(e) (real estate broker, on behalf of another, sells, buys or exchanges real property sales contract or a promissory note), 10237-10237.8 (real property securities dealer provisions), 10238.6 (offenses, punishment).

35. CAL. CORP. CODE §§31000-31516.

36. *Id.* §31005 (definition of franchise).

37. *Id.* §31110.

38. *Id.* §31007 (definition of a franchisor).

39. *Id.* §31101(a).

40. *See id.* §31101(b).

(3) length of time in business,⁴¹ and (4) the disclosure of specified information.⁴² In addition to these restrictions, Chapter 442 requires the filing of a notice of exemption with the Commissioner,⁴³ and the payment of a \$450 filing fee for the initial notice of exemption,⁴⁴ or a \$150 fee for consecutive subsequent notices.⁴⁵

41. *Id.*

42. *Id.* §31101(c), (d) (listing specified information). An exemption also may be granted to a petroleum corporation which has done business continuously for the last five years. *See id.* §31104.

43. *Id.* §§31101(e), 31104(b).

44. *Id.* §§31101(b), 31104(f).

45. *Id.* §31500(c), (f). The fee for filing an application for registration of the sale of franchises is increased to \$450 from \$250. *Id.* §31500(b). Registration renewal fees are increased to \$150 from \$50. *Id.* §31500(c).

Business Associations and Professions; prevention of dissolution

Corporations Code §2000 (amended).

SB 285 (Rosenthal); 1983 STAT. Ch 247

Support: Beverly Hills Bar Association; State Bar Conference of Delegates

Existing law permits a corporation or stockholders controlling at least fifty percent of the corporate voting power to prevent voluntary or involuntary dissolution by purchasing the shares owned by the parties initiating the dissolution for fair value.¹ The court must appoint three appraisers to assess the fair value of the shares in controversy.² Chapter 247 specifies that the valuation date is the date upon which the suit for involuntary dissolution was commenced,³ or the date upon which the suit for voluntary dissolution was initiated.⁴ Chapter 247 authorizes the court to designate an alternative date for valuation upon a showing of good cause by any party to the suit.⁵

1. CAL. CORP. CODE §2000(a) (fair value is determined on the basis of the liquidation value but takes into account the possibility of the sale of the business as a going concern). *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAWS, *Corporations* §184 (8th ed. 1974).

2. CAL. CORP. CODE §2000(c).

3. *Id.* §2000(f); *see id.* §1800 (regulating proceedings for involuntary dissolution).

4. *Id.* §2000(f).

5. *Id.*

Business Associations and Professions; appointment of a receiver

Business and Professions Code §§10233.1 (repealed); 10058, 10081, 10237, 10237.1 (amended).

SB 1110 (Ellis); 1983 STAT. Ch 443

Support: Department of Corporations; Department of Real Estate

Existing law empowers the Real Estate Commissioner (hereinafter referred to as Commissioner) to bring an action in superior court to enjoin any person from violating the Real Estate Law.¹ A preliminary injunction or temporary restraining order may not be granted, however, without first providing at least five days notice to the defendant.² Chapter 443 enhances the Commissioner's power by permitting the court to appoint a receiver to manage the defendant's business upon a showing that the prohibited conduct threatens funds and properties belonging to others but subject to the defendant's control.³

Under prior law, meetings of the Real Estate Advisory Commission are regulated by the Ralph M. Brown Act.⁴ Chapter 443 revises prior law to make meetings of the Commission subject to the Bagley-Keene Open Meeting Act.⁵ Finally, Chapter 443 eliminates the requirement imposed by prior law that real estate brokers give written notice⁶ of payments made to protect the security of notes or property sales contracts with funds other than those received from the obligor.⁷

1. CAL. BUS. & PROF. CODE §10000 (short title). *See generally id.* §§10000-10602 (Real Estate Law); *id.* §10081(a).

2. *Id.* §10081(a).

3. *Compare id.* with 1978 Cal. Stat. c. 1080, §1, at 3310 (amending CAL. BUS. & PROF. CODE §10081).

4. CAL. BUS. & PROF. CODE §54950.5 (short title). *See generally id.* §§54950-54961. (local agency open meeting law)

5. *Id.* §11120 (short title). *See generally id.* §§11120-11131 (state open meeting law); *id.* §10058.

6. CAL. BUS. & PROF. CODE §10233.1 (notice to mortgagees, beneficiaries, or owners of property sales contracts or notes secured by a lien on real property).

7. 1983 Cal. Stat. c. 443, §3, at — (repealing CAL. BUS. & PROF. CODE §10233.1).

Business Associations and Professions; franchises

Business and Professions Code §20027 (new).

AB 850 (McAlister); 1983 STAT. Ch 374

Support: California Association of Franchises

The Franchise Relations Act,¹ governing franchise² terminations³ and nonrenewals,⁴ was enacted in 1980 to foster continuity in franchisee⁵-franchisor⁶ relationships.⁷ Chapter 374 supplements the continuity provisions of existing law⁸ by prohibiting a franchisor from denying the surviving spouse, heirs, or estate⁹ of a deceased franchisee¹⁰ the opportunity to participate in franchise ownership for a reasonable time after the franchisee's death.¹¹ During this reasonable period of time, the decedent's surviving spouse, heirs, or estate must maintain all franchise standards and obligations,¹² and either (1) satisfy the franchisor's then current qualifications for franchise purchasers, or (2) sell, transfer, or assign the franchise to a qualified person.¹³ If a bona fide offer from a potential buyer is received, Chapter 374 expressly permits the franchisor to exercise a right of first refusal.¹⁴ Finally, with the exception of agreements or contracts of an indefinite duration, Chapter 374 does not apply to agreements, contracts, intestate succession, or bequests taking effect prior to January 1, 1984.¹⁵

1. CAL. BUS. & PROF. CODE. §20000 (short title). *See generally id.* §§20000-20043 (Franchise Relations Act).

2. *Id.* §20001 (definition of franchise).

3. *See id.* §20020, 20030 (termination provisions).

4. *See id.* §§20025, 20030, 20035 (nonrenewal provisions).

5. *Id.* §20002 (definition of franchisee).

6. *Id.* §20003 (definition of franchisor).

7. 1980 Cal. Stat. c. 1355, §7, at 4896 (enacting CAL. BUS. & PROF. CODE §§20000-20043); *see also* CAL. VEH. CODE §3060 (new car dealerships); CAL. BUS. & PROF. CODE §§21140-21149 (petroleum franchises).

8. *See* CAL. BUS. & PROF. CODE §§20000-20043 (Franchise Relations Act); CAL. CORP. CODE §§31000-31516 (Franchise Investment Law).

9. *See* Estate of Glass, 164 Cal. 765, 767, 130 P. 868, 869 (1913) (definition of estate).

10. This includes a majority stockholder in the franchise. CAL. BUS. & PROF. CODE §20027(a).

11. *Id.* §20027(a).

12. *Id.*

13. *Id.* §20027(b).

14. *Id.*

15. *Id.* §20027(c).

Business Associations and Professions; carryover of new business losses

Revenue and Taxation Code §§17202.7, 24343.9 (new).

AB 32 (Katz); 1983 STAT. Ch 959

(Effective September 20, 1983)

Support: California Society of Certified Public Accountants; Department of Economic and Business Development; Department of Fi-

nance; Department of General Services

Existing state tax laws unduly penalize small businesses that suffer large initial losses but which have the potential to undergo future growth and provide additional employment opportunities.¹ Chapter 959 was enacted to create a more favorable environment for small businesses² and to encourage small business development by permitting carry over of net operating losses suffered during the first twenty-four months of operation.³

Existing law requires net operating loss deductions to be taken in only one taxable year, thus precluding the taxpayer from carrying these losses over to following years.⁴ Chapter 959 permits new small businesses to carry over net operating losses incurred within the first two years of operation to each of the following fifteen taxable years.⁵ The entire amount of the net operating loss for one taxable year must be carried over to the earliest taxable years permitted by Chapter 959.⁶ In addition, the aggregate amount of income tax loss carried over may not exceed \$100,000 for all taxable years.⁷

Chapter 959 excludes from the definition of a small business any corporation or business that liquidates assets in anticipation of an operating loss, and which subsequently reorganizes under a new name.⁸ Furthermore, if a corporation is controlled by another corporation,⁹ or is part of a controlled group,¹⁰ that corporation also is excluded from the small business definition.¹¹

1. 1983 Cal. Stat. c. 959, §1(a), at ____ (language of the legislature).

2. CAL. GOV'T. CODE §14837(c) (definition of small business). Chapter 959 applies the definition of small business established by the Department of General Services. Existing law merely provides guidelines that must be employed in forming the definition of small business. CAL. REV. & TAX. CODE §§17202.7(b), 24343.9(b); see CAL. GOV'T. CODE §14837(c).

3. See 1983 Cal. Stat. c. 959, §1(b), at ____ (start-up expenditures applies only to the first 24 months of operation beginning after December 31, 1983). Net operating loss deduction only is permitted in the first 24 months of active operation. This time period begins the first month following the last month in which start-up expenses may no longer be treated as deferred expenses. CAL. REV. & TAX. CODE §§17202.7(b), 24343.9(b). See *id.* §17267.

4. CAL. REV. & TAX. CODE §§17591(c). Net operating loss is defined as the excess of the deductions attributable to the business over the total of gross income. *Id.* §§17202.7(e), 24343.9(e).

5. *Id.* §§17202.7(c), 24343.9(c).

6. *Id.* §§17202.7(d), 24343.9(d).

7. *Id.* §§17202.7, 24343.9.

8. *Id.* §§17202.7(9)(g), 24343.9(g)(l) (only excluded if the business liquidates its assets for tax purposes only).

9. "Controlled" is defined as the ownership of stock possessing more than half of the total voting power of all stock entitled to vote. *Id.* §24343.9(g)(3).

10. *Id.* §24343.9(g)(2).

11. *Id.* § 24343.9(g).

Business Associations and Professions; restraint of trade— prejudgment interest, notice

Business and Professions Code §§16750.2, 16761 (new); §§16750, 16760 (amended).

AB 272 (Waters); 1983 STAT. Ch 765

Support: Attorney General

SB 790 (Lockyer); 1983 STAT. Ch 1069

Support: Attorney General

Existing law provides that in an action for restraint of trade, an injured person may recover treble damages and the costs of the suit, including reasonable attorneys' fees.¹ Similarly, a court may award damages and the costs of the suit, including reasonable attorneys' fees, in actions for restraint of trade brought by the Attorney General on behalf of the state, or as *parens patriae* on behalf of natural persons residing in the state.² In an apparent attempt to conform state law to federal law,³ Chapter 765 permits a court to award prejudgment interest⁴ on damages,⁵ upon a finding that the award is just under the circumstances.⁶ The court can make this award on the motion of an injured person who has recovered damages, or on a motion of the Attorney General who has secured monetary relief.⁷ To determine whether an award is just, the court must consider whether the person, the Attorney General, the opposing party, or the representative of any of those parties (1) made motions or asserted claims or defenses so

1. CAL. BUS. & PROF. CODE §16750(a).

2. *Id.* §16760(a)(2).

3. 15 U.S.C. §15(a).

4. *See* CAL. BUS. & PROF. CODE §16761. Prejudgment interest accrues at the rate of 10 percent per annum for the period beginning on the date of service of the complaint and ending on the date of judgment, or for any shorter period therein. *Id.*

5. A person may be awarded prejudgment interest on *actual* damages; however, the Attorney General may only be awarded prejudgment interest on *total* damages. Total damages consist of monetary relief provided for injury sustained by persons to their property by reason of any restraint of trade violation less monetary relief that (1) duplicates amounts already awarded for the same injury, or (2) is properly allocable to natural persons who have elected to exclude their claims from adjudication and to any business entity. *See id.* §§16750(a), 16760(a)(1). It has been contended that prejudgment interest should be based on *actual* damage, not treble damages. Although awarding prejudgment interest on the full amount of the judgment might be an even greater financial disincentive to delay, the magnitude of such an award would raise serious questions concerning its fairness and workability. REPORT OF PRESIDENT'S NATIONAL COMM'N TO REVIEW ANTITRUST LAWS AND PROCEDURES, (Jan. 1979), at 91.

6. CAL. BUS. & PROF. CODE §§16750(a), 16760(a)(2), 16761. *Compare id.* §16761 with 15 U.S.C. §15(a). Awarding interest on damages from the date of service of a complaint, rather than from the actual date of judgment, would provide an incentive to expedite cases, or at least remove a possible disincentive to expedition. REPORT, *supra* note 5, at 90.

7. CAL. BUS. & PROF. CODE §§16750(a), 16760(a)(2).

lacking in merit as to show that the party intentionally delayed the trial, or otherwise acted in bad faith,⁸ (2) violated any applicable rule, statute, or court order establishing sanctions for dilatory behavior,⁹ or (3) engaged in conduct primarily for the purpose of delaying or increasing the costs of litigation.¹⁰

Additionally, with the enactment of Chapter 1069, any person other than the Attorney General or a district attorney who commences, by writ or appeal, any proceeding in the Supreme Court of California or a state court of appeal relating to a restraint of trade violation, must serve notice of the action upon the Attorney General within three days after commencement of the proceeding.¹¹ Temporary or permanent relief may not be granted until proof of this service is filed with the court.¹²

8. *Id.* §16761(a).

9. *Id.* §16761(b).

10. *Id.* §16761(c).

11. *Id.* §16750.2.

12. *Id.*

Business Associations and Professions; counterfeit trademarks

Business and Professions Code §14340 (amended).

AB 1565 (Davis); 1983 STAT. Ch 569

Support: California State Bar, Patent, Trademark & Copyright Section; Department of Consumer Affairs; Institute of Trademark Agents

Existing law authorizes the owner of any trademark¹ or service mark² registered under trademark law³ to commence an action to enjoin the manufacture, use,⁴ display, or sale of counterfeit⁵ goods or services.⁶ Prior law allowed the court to use discretion in requiring a defendant to pay the owner of a trademark either all profits resulting from, *or* all damages suf-

1. CAL. BUS. & PROF. CODE §14207 (definition of trademark); *see* *Dollcraft Co. v. Nancy Ann Storybook Dolls*, 94 F.Supp. 1, 4 (1951) (the purpose of a trademark is to distinguish the goods of one person from those of another, and the primary and proper function is to identify the origin or ownership of the article to which the trademark is affixed).

2. CAL. BUS. & PROF. CODE §14206 (definition of service mark).

3. The trademark law constitutes the chapter in the Business and Professions Code relating to trademarks. *Id.* §§14200-14342.

4. A trademark shall be deemed to be "used" (a) when the trademark is placed in any manner on goods or the containers, displays, tags, or labels of goods sold or distributed in the state, and (b) when the trademark is used on or displayed in the sale or advertising of services rendered in California. *Id.* §14209.

5. *See id.* §14340(h) (counterfeit is defined as a spurious mark that is identical with, or substantially indistinguishable from, a registered mark that is used on or in connection with goods or services for which the genuine mark is registered).

6. *Id.* §14340(a).

ferred because of, the wrongful conduct.⁷ In an apparent attempt to curtail the widespread practice of trademark infringement,⁸ Chapter 569 increases the liability of defendants by requiring that a defendant pay the owner of a trademark up to three times the profits from the wrongful manufacture, use, display, or sale of the counterfeit goods or services, and up to three times all resulting damages the plaintiff suffers.⁹

Under existing law, a court is authorized to order the destruction of counterfeit goods in the possession or under the control of the defendant.¹⁰ Chapter 569 specifies that after determining a mark¹¹ is counterfeit, a court may order the destruction of all counterfeit marks, all means of making those marks, and all goods, articles, or other matters bearing the marks which are in the possession or control of the court or any party to the action.¹² As an alternative, Chapter 569 authorizes the court, after destruction of the counterfeit marks, to order the disposal of the goods by transfer to the State of California, a civil claimant, a charitable institution, or any appropriate private person other than the person from whom the goods were obtained.¹³

With the enactment of Chapter 569, a court is authorized upon the motion or ex parte application of a plaintiff seeking to enjoin the sale of counterfeits, to order the seizure of alleged counterfeit goods from persons¹⁴ manufacturing, displaying for sale, or selling the goods.¹⁵ In addition, the plaintiff must post an undertaking in an amount set by the court that approximates the probable recovery of damages, costs, and expenses by the defendant if the seized goods ultimately are determined to be noncounterfeit.¹⁶ Pursuant to Chapter 569, the motion or ex parte application must include a statement advising the person from whom goods are seized that (1) the undertaking has been filed,¹⁷ (2) an objection to the undertaking may be made on grounds that the surety is insufficient,¹⁸ and (3) this objection to the undertaking must be made within thirty days after

7. 1967 Cal. Stat. c. 1556, §2, at 3731 (enacting CAL. BUS. & PROF. CODE §14340).

8. Trademark infringement occurs in all types of industries. Brand-name counterfeiting alone has now become a \$16 billion industry. Pollard, *Three Bills to Watch*, CAL. LAW., July 1983, at 46.

9. Compare CAL. BUS. & PROF. CODE §14340(a) with 1967 Cal. Stat. c. 1556, §2, at 3731 (enacting CAL. BUS. & PROF. CODE §14340).

10. CAL. BUS. & PROF. CODE §14340(a).

11. *Id.* §14203 (a mark includes a trademark or service mark that is entitled to registration).

12. *Id.* §14340(a).

13. *Id.*

14. *Id.* §14204 (definition of person).

15. *Id.* §14340(b). The plaintiff must show good cause for the seizure, and a probability of success on the merits. *Id.*

16. *Id.* §14340(e).

17. *Id.* §14340(g).

18. *Id.*

the date of seizure.¹⁹ Moreover, the court may waive this requirement of notice if the ex parte application indicates that good cause can be shown for proceeding without first notifying the defendant.²⁰

Chapter 569 requires an order of seizure to be served upon any person from whom seizure is effected.²¹ This seizure order must specifically set forth (1) the date on which the seizure is ordered to take place,²² (2) a description of the alleged counterfeit goods to be seized,²³ (3) the identity of the persons to effect the seizure,²⁴ (4) a description of the location in which the seizure is to occur,²⁵ and (5) a hearing date that permits any person from whom goods are seized to appear and seek release of the seized goods.²⁶

With the enactment of Chapter 569, a person who causes the seizure of noncounterfeit goods is liable in an amount equal to the damages proximately caused to persons having a financial interest in the seized goods, and the costs incurred in defending against the seizure of those goods.²⁷ Furthermore, upon a showing that the person causing the seizure acted in bad faith, that person also will be liable for expenses, including reasonable attorneys' fees, incurred while defending against the seizure.²⁸ In addition, a person who causes the seizure of noncounterfeit goods may be liable under Chapter 569 for punitive damages.²⁹

19. *Id.* §14340(f), (g).

20. *Id.* §14340(b).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* §14340(c). A person entitled to recover may seek a recovery by cross-claim or motion made in the trial court and served pursuant to existing law. *Id.* See CAL. CIV. PROC. CODE §1011. The person may join any surety on a posted undertaking. *Id.* §14340(d). Any judgment of liability shall bind the person liable for the seizure of the noncounterfeit goods and the surety jointly and severally. The liability of the surety, however, shall be limited to the amount of the undertaking. *Id.*

28. *Id.* §14340(c).

29. *Id.*

Business Associations and Professions; computer trade secrets

Penal Code §499c (amended); Evidence Code §1500.5 (new).

SB 835 (Doolittle); 1983 STAT. Ch 933

Support: Department of Finance; Department of Corrections

In an apparent effort to increase the protection afforded computer in-

formation,¹ Chapter 933 expands criminal provisions relating to trade secrets.² Under Chapter 933, computer programs,³ information stored in a computer, and information in transit are subject to the law governing the theft of trade secrets.⁴ Existing provisions state that any person who steals, takes, or carries away an article representing a trade secret is guilty of theft.⁵ In response to the unusual nature of computer information, Chapter 933 augments these provisions to include the unauthorized use of a trade secret.⁶

Chapter 933 also adds evidentiary provisions for proving the existence and content of computer information or computer programs.⁷ Existing law, under the best evidence rule, states that no evidence other than the original of a writing is admissible to prove the content of the writing.⁸ Pursuant to Chapter 933, a printed representation of computer information or programs is not rendered inadmissible by the best evidence rule.⁹ If admitted into evidence, a printed representation of computer information will be presumed to be an accurate representation of the information or program at issue.¹⁰ If, however, evidence is introduced alleging the printed representation is inaccurate or unreliable, the party introducing the computer printout bears the burden of proving the legitimacy of the representation.¹¹

1. See Nycum, *Computer Abuse Raises New Legal Problems*, 61 A.B.A.J. 444 (1975) (discussing abuse of computerized assets, including programs and data).

2. Compare CAL. PENAL CODE §499c with 1976 Cal. Stat. c. 1139, §226, at 5126 (amending CAL. PENAL CODE §499c).

3. CAL. PENAL CODE §499c(a)(6) (definition of computer program). Chapter 933 also provides definitions for access, computer system, and computer network. *Id.* §499c(l),(4),(5). In addition, the definition of an article is augmented to include a tangible representation of computer information or programs. Compare CAL. PENAL CODE §499c(a)(2) with 1976 Cal. Stat. c. 1139, §226, at 5126 (amending CAL. PENAL CODE §499c(a)(l)).

4. CAL. PENAL. CODE §499c(a)(9).

5. *Id.* §499c(b).

6. Compare *id.* §499c(b)(l) with 1976 Cal. Stat. c. 1139, §226, at 5126 (amending CAL. PENAL CODE §499c).

7. CAL. EVID. CODE §1500.5.

8. *Id.* §1500.

9. *Id.* §1500.5.

10. *Id.*

11. *Id.*

Business Associations and Professions; trade names

Business and Professions Code §14417 (new).

AB 1869 (Farr), 1983 STAT. Ch 1317

Support: California Department of Finance; State Bar of California

Under existing law, a corporation must file articles of incorporation¹ setting forth, among other requirements,² the name of the corporation.³ These articles must be filed with the Secretary of State.⁴ The filing of a fictitious business name statement⁵ creates a rebuttable presumption that the registrant has an exclusive right to the use of that name.⁶ Chapter 1317 provides, however, that the mere filing of the articles of incorporation does not authorize the use of a corporate name in violation of the federal Trademark Act,⁷ the California Trademark Act,⁸ the Fictitious Business Name Act,⁹ or the common law.¹⁰ Furthermore, the Secretary of State must notify each newly formed corporation or limited partnership of the limitations created by Chapter 1317.¹¹

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1. CAL. CORP. CODE §200 (formation and articles).
 2. *Id.* §202 (required provisions of articles).
 3. *Id.* §202(a).
 4. *Id.* §§169 (“filed” defined as filed with the Secretary of State), 200(c) (filing begins corporate existence).
 5. *See* CAL. BUS. & PROF. CODE §17910 (persons required to file fictitious name statement).
 6. *Id.* §14411.
 7. 15 U.S.C. §§1051-1127.
 8. CAL. BUS. & PROF. CODE §§14200-14342.
 9. *Id.* §§17900-17930.
 10. *Id.* §14417 (common law rights include rights in a trade name).
 11. *Id.*

Business Associations and Professions; attorneys

Business and Professions Code §§6007, 6180.12 (amended). Code of Civil Procedure §§353.1, 473.1 (new).

AB 1587 (Isenberg); 1983 STAT. Ch 254

Support: State Bar of California

Existing law requires the Board of Governors of the State Bar¹ (hereinafter referred to as the Board) to enroll a member of the State Bar² as an inactive member,³ without a State Bar hearing, when (1) a court deter-

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1. CAL. BUS. & PROF. CODE §6010 (creation of Board of Governors of State Bar).
 2. *Id.* §6002 (definition of members of State Bar); *see id.* §6001 (creation of State Bar). The State Bar is a public corporation created by the Legislature as an administrative arm of the California Supreme Court to assist in matters of admission and discipline of attorneys. *Emslie v. State Bar of California*, 11 Cal. 3d 210, 224, 520 P.2d 991, 998, 113 Cal. Rptr. 175, 182 (1974).
 3. CAL. BUS. & PROF. CODE §§6005, 6006 (definition of inactive member). An inactive member is not entitled to hold State Bar offices, to vote in the State Bar, or to practice law. *Id.*

mines that the member is insane or mentally incompetent⁴ and confined for treatment,⁵ or (2) a guardian or conservator has been appointed for the member as a result of the member's mental condition.⁶ The State Bar also is authorized to enroll members as inactive if the Board, after a hearing, determines that because of the mental infirmity, illness, or habitual use of intoxicants or drugs, the member (1) is unable or habitually fails to perform duties competently,⁷ or (2) is unable to practice law without endangering the interests of clients and the public.⁸ In an apparent effort to protect the clients of attorneys who are declared insane or mentally incompetent,⁹ Chapter 254 requires the Board, without a hearing, to enroll members on inactive status when (1) the member judicially is determined insane or mentally incompetent and placed on outpatient status,¹⁰ (2) the court assumes jurisdiction over the member's law practice,¹¹ or (3) the member asserts a claim of insanity or mental incompetency by alleging an inability to understand the nature of a pending action or proceeding, or an inability to assist counsel in representing the member's case.¹²

Pursuant to existing law, a superior court may assume jurisdiction over a law practice as a result of the attorney's death, resignation, disbarment, suspension, or enrollment as an inactive member of the State Bar.¹³ If the court assumes jurisdiction, one or more active members of the State Bar may be appointed to oversee the affected law practice.¹⁴ Although the appointed attorney is entitled to reimbursement for necessary expenses incurred in the performance of these duties,¹⁵ prior law disallowed

4. See *People v. Drew*, 22 Cal. 3d 333, 345, 583 P.2d 1318, 1324, 149 Cal. Rptr. 275, 281 (1978). The court repudiated the *M'naughten* test for insanity and adopted the American Law Institute formulation, specifying that persons are not responsible for criminal conduct if, at the time of that conduct, as a result of a mental disease or defect, they lack substantial capacity either to appreciate the criminality (wrongfulness) of their conduct or to conform their conduct to the requirements of the law. *Id.*

5. CAL. BUS. & PROF. CODE §6007(a); see CAL. PENAL CODE §1026 (provisions for confinement for treatment on findings of insanity).

6. CAL. BUS. & PROF. CODE §6007(a); see *Hyland v. State Bar of California*, 59 Cal. 2d 765, 774, 382 P.2d 369, 374, 31 Cal. Rptr. 329, 334 (1963). The court concluded that if an attorney's mental incompetency renders him unable to form the intent that is an element of the offense charged, the appropriate remedy is not disbarment or suspension, but enrollment as an inactive member, with the opportunity of becoming an active member upon a determination that mental competence has been restored. *Id.*

7. CAL. BUS. & PROF. CODE §6007(b)(3).

8. *Id.*

9. See Assemblyman Phillip Isenberg, Press Release (Mar. 4, 1983) (copy on file at the *Pacific Law Journal*); see also *Hyland*, *supra* note 6 (the purpose of a disciplinary proceeding under the State Bar Act is to protect the public, not to punish the offending attorney).

10. CAL. BUS. & PROF. CODE §6007(a); see CAL. PENAL CODE §§1026(b), 1026.3 (placement on outpatient status on findings of insanity).

11. CAL. BUS. & PROF. CODE §6007(b)(2).

12. *Id.* §6007(b)(1).

13. *Id.* §§6180, 6180.2, 6180.5.

14. *Id.* §6180.5. The appointed attorney acts under the direction of the State Bar. *Id.*

15. *Id.* §6180.12.

compensation for the appointee's services.¹⁶ Chapter 254 endows the State Bar with the discretion to pay the appointed member reasonable compensation when the member devotes extraordinary time and services necessary to perform the appointed duties.¹⁷

With the enactment of Chapter 254, if a court assumes jurisdiction over an attorney's law practice, a client of that practice who is entitled to bring an action or other proceeding has an additional six months to file or otherwise institute the matter, provided that (1) the application to assume jurisdiction over the practice¹⁸ is filed prior to the expiration of the applicable statute of limitation or claim statute,¹⁹ and (2) the applicable statute of limitation otherwise would have expired.²⁰ The additional six month time period runs from the date of the court order assuming jurisdiction over the law practice.²¹

Additionally, Chapter 254 provides the courts with discretion to relieve a party from an adverse judgment, order, or other proceeding, including a dismissal for lack of prosecution²² (hereinafter referred to as a judgment), when a court assumes jurisdiction over the law practice of the attorney representing the party.²³ For this provision to apply, an application asking the court to assume jurisdiction over the practice must have been filed before the judgment was rendered.²⁴ In addition, under Chapter 254, a party must file for this relief within a reasonable period of time, not to exceed six months, after the court assumes jurisdiction over the practice.²⁵ In cases involving the right of possession or ownership of real or personal property, however, the time to file for relief may be reduced to ninety days.²⁶ This reduction in the time to file may only take place if the party filing for relief personally serves written notice upon the party against whom the judgment has been taken and upon the court appointed attorney.²⁷ This notice must inform the party and attorney that a judgment has been taken, and stipulate that any right of the party to file for relief expires ninety days after service of the notice.²⁸ Finally, Chapter 254 states that affidavits or declarations of merit are not required from the party filing

16. 1974 Cal. Stat. c. 589, §1, at 1410 (enacting CAL. BUS. & PROF. CODE §6180.12).

17. Compare CAL. BUS. & PROF. CODE §6180.12 with 1974 Cal. Stat. c. 589, §2, at 1410 (enacting CAL. BUS. & PROF. CODE §6180.12).

18. See CAL. BUS. & PROF. CODE §6180.2 (procedure for application to assume jurisdiction).

19. CAL. CIV. PROC. CODE §353.1.

20. *Id.*

21. *Id.*

22. See *id.* §§581, 581a, 583.

23. *Id.* §473.1.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

for relief.²⁹

29. *Id.*

Business Associations and Professions; professional competence

Business and Professions Code §§2292, 2293, 2294 (new); §§803, 2234 (amended).

SB 109 (Watson); 1983 STAT. Ch 398

Support: Attorney General; Board of Medical Quality Assurance; Department of Consumer Affairs; Department of Finance

Under existing law, if a California court renders a judgment that a licensed¹ or certified² person³ has committed a crime or is liable for the death or injury of a patient because of (1) negligence, error, or omission in practice, or (2) the rendering of unauthorized professional services, the court clerk must report the judgment to the agency that issued the license or certificate to the person.⁴ Prior to the enactment of Chapter 398, the presiding judge could order the clerk to dispense with the report if a determination was made that the judgment did not relate to the person's professional competence or integrity.⁵ Chapter 398, however, removes this power to dispense with the report.⁶ In addition, the clerk of the court is now required to report only civil judgments exceeding \$30,000.⁷

Existing law requires the Division of Medical Quality⁸ to take action⁹ against any licensee who is charged with unprofessional conduct.¹⁰ The

1. CAL. BUS. & PROF. CODE §2041 (definition of licensee). The licensing agencies include the (1) Board of Medical Quality Assurance, (2) Board of Dental Examiners, (3) Board of Osteopathic Examiners, (4) Board of Chiropractic Examiners, (5) California Board of Registered Nursing, (6) Board of Vocational Nurse and Psychiatric Technician Examiners, (7) State Board of Optometry, (8) Board of Examiners in Veterinary Medicine, and (9) State Board of Pharmacy. CAL. BUS. & PROF. CODE §800(a). Existing law, however, exempts persons licensed pursuant to the provisions for Clinical Laboratory Technology from the reporting requirement. *Id.* §803. *See id.* §§1200-1322 (licensing requirements for clinical laboratory personnel).

2. The terms *licensed* and *certified* are used interchangeably. *Id.* §2040.

3. *Id.* §2032 (definition of person).

4. *Id.* §803; *see id.* §490 (an agency may suspend or revoke a license once informed of the judgment).

5. 1975 Cal. Stat. c. 1, §2.3, at 3950 (enacting CAL. BUS. & PROF. CODE §803).

6. Compare with 1975 Cal. Stat. c. 1, §2.3, at 3950 (amending CAL. BUS. & PROF. CODE §803).

7. CAL. BUS. & PROF. CODE §803.

8. The Division of Medical Quality is one of three branches of the Board of Medical Quality Assurance. *See id.* §§2001, 2003.

9. *Id.* §§2227, 2228 (modes of disciplinary action).

10. *Id.* §2234.

definition of unprofessional conduct, under prior law, included repeated *similar* negligent acts.¹¹ Chapter 398 broadens this definition¹² by removing the requirement that the repeated negligent acts be similar in nature.¹³

Finally, Chapter 398 details a procedure¹⁴ for conducting an oral clinical examination¹⁵ of the physician's competency upon a finding of reasonable cause.¹⁶ This procedure takes effect on January 1, 1985.¹⁷ Furthermore, Chapter 398 requires the Division of Medical Quality to consult with specified agencies¹⁸ to develop an alternative to the oral examination procedure.¹⁹ The Division must report²⁰ its findings to the Legislature by March 1, 1984.²¹

11. 1980 Cal. Stat. c. 1313, §2, at 4473 (enacting CAL. BUS. & PROF. CODE §2234).

12. Compare CAL. BUS. & PROF. CODE §2234(c) with 1980 Cal. Stat. c. 1313, §2, at 4473 (enacting CAL. BUS. & PROF. CODE §2234).

13. CAL. BUS. & PROF. CODE §2234(c).

14. Chapter 398 states that if, after an investigation, two medical consultants find reasonable cause to believe that the physician cannot practice medicine, the physician may be required to submit to a competency examination. *Id.* §2292(a).

15. Chapter 398 specifically describes the following examination format: (1) the clinical examination must be orally administered by two physicians chosen by the Division of Medical Quality; (2) if necessary, a second opportunity to pass the examination will be allowed, administered by different examiners; (3) an accusation of incompetency may be made after two unsuccessful attempts to pass the examination, or may be founded on other bases; and (4) the examination will be tape recorded, and the results, if insufficient for an accusation of incompetency, will be held strictly confidential. *Id.* §§2293, 2294.

16. Chapter 398 includes within its definition of "reasonable cause" (1) a single incident of gross negligence, (2) a pattern of inappropriate prescribing, (3) an act of incompetence or negligence causing death or serious bodily injury, or (4) a pattern of substandard care. *Id.* §2292(a).

17. 1983 Cal. Stat. c. 398, §6, at ____.

18. The agencies include the California Medical Association, the Union of American Physicians and Dentists, the Golden State Medical Association, and other appropriate agencies. *Id.* c. 398, §7(a), at ____.

19. *Id.*

20. The Board of Medical Quality Assurance must discuss in its report (1) whether the method used to select outside medical consultants and physician examiners adequately protects the rights of the accused physician, (2) whether the opportunity to file an oral opposition to the allegation of incompetency should be permitted in addition to a written opposition, and (3) any other results of Division consultations. *Id.* c. 398, §7(b), at ____.

21. *Id.* c. 398, §7(a), at ____.

Business Associations and Professions; polygraph examiners

Business and Professions Code §§9300, 9301, 9302, 9303, 9304, 9305, 9306, 9307, 9308, 9309, 9310, 9311, 9312, 9313, 9314, 9315, 9316, 9317, 9318, 9319, 9320, 9321 (new).

SB 279 (Dills); 1983 STAT. Ch 1107

Chapter 1107 enacts the Polygraph Examiners Act (hereinafter referred

to as the Act)¹ to provide licensing and regulations for persons² who conduct polygraph examinations.³ Furthermore, Chapter 1107 creates the Polygraph Examiners Board (hereinafter referred to as the Board)⁴ which is empowered to adopt, repeal, or amend any regulations reasonably necessary for administering the provisions of the Act.⁵

Licensing

Upon the recommendation of the Board, the Act requires the Director of Consumer Affairs (hereinafter referred to as the Director)⁶ to issue, suspend, or revoke licenses of polygraph examiners.⁷ Persons must obtain a license if they (1) conduct polygraph examinations, (2) refer to themselves as polygraph examiners,⁸ or (3) offer or advertise their services as polygraph examiners.⁹

Under the Act, a polygraph examiner may obtain either an intern license¹⁰ or a general license.¹¹ To obtain an intern license, the applicant must possess a high school diploma or its equivalent, and must have graduated from an approved¹² polygraph examiner's course.¹³ An individual

1. CAL. BUS. & PROF. CODE §§9300 (short title), 9300-9321 (Polygraph Examiners Act).

2. *Id.* §9302(c) (definition of person).

3. *Id.* §9301(a). The provisions of the Act apply to all persons who use instruments to determine the truthfulness of statements regardless of the terminology used for themselves or their instruments. *Id.* §9301(b). *See id.* §9302(h) (definition of polygraph examination). The Act authorizes the Director of Consumer Affairs to administer and enforce these regulations. *Id.* §9304.

4. *Id.* The Board will consist of two polygraph examiners and three members of the public. *Id.* §9304(a). One polygraph examiner will be from a governmental organization and the other will be from the private sector. *Id.* In addition, both examiners must have been engaged as polygraph examiners for the two years immediately preceding their appointment to the board. *Id.* Each of the five Board members is required to have been a citizen of the United States and a California resident for at least two consecutive years prior to their appointment. *Id.* §9304(a). No two board members may be employed by the same person or agency, and all board members are to serve at the pleasure of the appointing authority. *Id.* The Act states that a majority of the board members is sufficient to pass any board business. *Id.* §9304(f). Each board member will receive a daily allowance and expenses. *Id.* §9304(e). *See id.* §103 (expenses and daily allowance).

5. CAL. BUS. & PROF. CODE §9304(d); *see also* CAL. GOV'T CODE §§11340-11370.5 (guidelines for adoption, amendment, or repeal of regulations). A violation of the provisions of the Act is punishable as a misdemeanor. *Id.* §9303. The Act requires the Board to prescribe the form and content of licensing examinations. CAL. BUS. & PROF. CODE §9304(i). Furthermore, the Board must meet in January 1984 to elect board officers and to specify dates, spaced at three month intervals, for licensing examinations. *Id.*

6. *Id.* §9302(a) (definition of Director).

7. *Id.* §9304(j). When a licensee demands a hearing within thirty days of the denial, suspension, or revocation of the license, the Board must be convened for such a hearing. *Id.* §9304(k). *See* CAL. GOV'T CODE §§11500-11525 (regulations for conducting hearings).

8. CAL. BUS. & PROF. CODE §9302(f) (definition of polygraph examiner).

9. *Id.* §9303. The licensing requirement does not apply to employees of the United States engaged in the performance of their official duties. *Id.*

10. *Id.* §§9302(d) (definition of intern), 9305(a).

11. *Id.* §9305(b).

12. The Act requires the Board to establish a course of training and a standard of instruction. *Id.* §9304(g), (h).

13. *Id.* §9306.

may obtain a general polygraph examiner's license by (1) satisfying the requirements for an intern license, (2) completing not less than 200 polygraph examinations,¹⁴ and (3) passing an examination administered by the Board.¹⁵ The Act allows a general license to be issued to an individual who meets all the requirements for a general license, excluding the Board examination requirement, as of January 1, 1984.¹⁶ This license, however, is conditional upon the individual passing an examination by the Board within twelve months after the date the license is issued.¹⁷

The Act requires a nonresident of California who seeks to obtain or renew a general polygraph examiner's license to include in the application a written statement irrevocably permitting the Board to act as an agent for the service of process in California.¹⁸ The Act also provides that a general license may be granted to a polygraph examiner licensed in another state or territory of the United States without examination by the Board.¹⁹ The other state or territory, however, must have had substantially similar licensing requirements as California at the time the other license was issued.²⁰ In addition, the other state or territory must grant similar reciprocity to California license holders.²¹ A general or intern license is valid for two years, and may be renewed only upon a showing that the licensee successfully completed twenty-four hours of approved polygraph training within the two years before the expiration of the license.²²

Moreover, the Act states that the Director may refuse to renew a polygraph examiner's license if the licensee has committed any of several specified acts.²³ In addition, any unlawful act or violation by a polygraph

14. One hundred of the examinations must be "specific" examinations. *Id.* §9307(c).

15. *Id.* §9307.

16. *Id.* §9307(e).

17. *Id.*

18. CAL. BUS. & PROF. CODE §9308(a). The Act states that service of process in any California action may be made upon a nonresident polygraph examiner by mailing two registered copies of the process to the secretary of the Board. *Id.* §9308(b). The secretary then must retain one copy and send the other, by certified mail, to the polygraph examiner at the most current address indicated by the secretary's records. *Id.*

19. CAL. BUS. & PROF. CODE §9309.

20. *Id.*

21. *Id.*

22. *Id.* §9310. The Act allows renewal without examination of an expired license upon application within two years of the license expiration, and upon (1) payment of a fee, and (2) proof of at least 24 hours of approved polygraph training within the previous two years. *Id.* §9311. Similarly, persons whose licenses expired while they were (1) employed by any governmental agency, (2) active members of the United States Armed Forces, or (3) active members of the California National Guard may have their licenses renewed without examination, upon application within two years after the date of discharge from active duty or termination of employment. *Id.* §9312. These persons, however, must pay the required fee, and provide proof of at least 24 hours of approved polygraph training within the previous two years. *Id.*

23. CAL. BUS. & PROF. CODE §9313(a). The acts specified by the Act include (1) failing to inform a polygraph examinee of the nature of the examination, (2) failing to inform the examinee, the examinee's representative, or the representative of the agency requesting the examination, of the examination results, (3) failing to inform the examinee that par-

examiner or intern does not constitute grounds for the revocation of the license of another examiner who employs the offending examiner or intern, unless the employer negligently or willfully aids or abets the illegal act.²⁴

Regulation

The Act requires polygraph examiners to inform examinees²⁵ that (1) the taking of a polygraph examination is voluntary, (2) the examinee may decline to take the examination, and (3) a refusal to take the examination will not be used to incriminate the examinee.²⁶ The subject matter and questions to be asked during the examination must also be disclosed to the examinee.²⁷ Furthermore, examiners must prominently display their licenses at their places of business, and notify the Director in writing of any changes in their principal place of business within thirty days of the change.²⁸ Finally, the Act directs polygraph examiners to retain all examination records for at least two years,²⁹ and to use only approved polygraph instruments³⁰ in their examinations.³¹

ticipation in the examination is voluntary, (4) making a material misstatement in the application for an examiner's license, (5) demonstrating physical or emotional inability to carry out the duties of a polygraph examiner, (6) willfully disregarding or violating any provision of the Act, (7) permitting an examiner's license to be used by an unauthorized person, (8) being found guilty of the commission of any felony or any crime involving moral turpitude, or (9) failing to provide any requested information to the Director, after the Director has received a complaint alleging that the person has violated any provision of the Act or any regulation adopted pursuant thereto. *Id.*

24. *Id.* §9314. Once the Director receives written notification of the revocation or suspension of an examiner's license, the examiner must surrender the license to the Director. *Id.* §9315. The Director may restore a license to the holder if the Board has completed a hearing on the matter and has recommended reinstatement. *Id.*

25. *Id.* §9302(j) (definition of examinee).

26. *Id.* §9316.

27. *Id.* (polygraph examiner may ask the examinee to sign a statement that (1) acknowledges compliance with this section, and (2) consents to the disclosure of the examination results).

28. *Id.* §9318. A failure to comply with this section is grounds for suspension. *Id.* §9318(b).

29. *Id.* §9319.

30. To be approved, an instrument must record visually, permanently, and simultaneously the cardiovascular, respiratory, and galvanic skin resistance of the examinee. *Id.* §9317(a). The Act does not intend to restrict the development of improved equipment or techniques. *Id.* §9317(b).

31. *Id.* §9317.

Business Associations and Professions; professional advertising

Business and Professions Code §651 (amended)
SB 440 (Torres); 1983 STAT. Ch 691

Support: Attorney General; Department of Consumer Affairs

Prior to the enactment of Chapter 691, business and professions licensees were allowed only to include specifically listed items in their advertisements.¹ In accord with a recent U.S. Supreme Court decision,² Chapter 691 permits the advertising of any factual information that is not false, fraudulent, misleading, or likely to be deceptive.³ Consequently, advertisements by these licensees are no longer limited to a specified list.⁴ Under prior law, licensees were not permitted to include in their advertising persons, parts of persons, or their facsimiles to demonstrate a medical or dental condition, injury, disease including obesity, or recovery therefrom.⁵ Chapter 691 deletes these restrictions.⁶ Existing law allows practitioners certified by a private or public board⁷ or agency to state in their advertisements the specific fields to which the practice is limited.⁸ Dentists, whose practices are limited to a specific field, however, can include only a statement that they are either certified or eligible for certification by a private or public board.⁹ With the enactment of Chapter 691, optometrists also are subject to this restriction.¹⁰

Finally, existing law provides that the Attorney General may commence legal proceedings to enjoin an advertisement that violates these restrictions.¹¹ Prior to the enactment of Chapter 691, the cost of enjoining the advertisements could not be charged to the licensing board or committees.¹² Chapter 691 states that these costs may be awarded against any licensee found in violation of the advertisement restrictions.¹³

1. 1979 Cal. Stat. c. 659, §2, at 2006 (enacting CAL. BUS. & PROF. CODE §651).

2. See *In the Matter of RMJ*, 455 U.S. 191, 203 (1982). Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than *reasonably necessary* to prevent the deception. *Id.*

3. CAL. BUS. & PROF. CODE §651.

4. Compare CAL. BUS. & PROF. CODE §651(h) with Cal. Stat. c. 659, §2, at 2006 (enacting CAL. BUS. & PROF. CODE §651). The word "only" was stricken from the list of permissible advertising. *Id.*

5. 1979 Cal. Stat. c. 659, §2, at 2006 (enacting CAL. BUS. & PROF. CODE §651).

6. Compare CAL. BUS. & PROF. CODE §651 with 1979 Cal. Stat. c. 659, §2, at 2006 (enacting CAL. BUS. & PROF. CODE §651).

7. CAL. BUS. & PROF. CODE §452 (definition of Board).

8. *Id.* §651(h)(5).

9. *Id.*

10. *Id.*

11. *Id.* §651(j).

12. 1979 Cal. Stat. c. 659, §2, at 2006 (enacting CAL. BUS. & PROF. CODE §651).

13. Compare CAL. BUS. & PROF. CODE §651(j) with 1979 Cal. Stat. c. 659, §2, at 2006.

Business Associations and Professions; restrictions on licensing

Business and Professions Code §2185 (repealed); §§496, 497 2185(new); §§2221, 2222, 2228 (amended).
AB 492 (Moorhead); 1983 STAT. Ch 95
Support: Board of Medical Quality Assurance; Department of Consumer Affairs; Department of Real Estate

Existing law empowers licensing boards¹ that regulate the licensing and certification of businesses and professions to deny a license² to an applicant who has (1) been convicted of a crime,³ (2) engaged in dishonest or fraudulent conduct with the intent to benefit oneself or another,⁴ (3) engaged in any conduct that would be grounds for suspension or revocation if done by a licensee,⁵ or (4) knowingly made a false statement of fact on the application for the license.⁶ With the enactment of Chapter 95, a licensing board is expressly authorized to deny, suspend, revoke, or otherwise restrict a license if the applicant or current licensee has attempted to subvert or has actually subverted a licensing examination or the administration of an examination.⁷ Additionally, if an applicant or licensee engages in or attempts to engage in conduct that violates the provisions of Chapter 95, the board, Attorney General, or district attorney may apply to the superior court for an order enjoining the prohibited conduct.⁸

Under prior law, if an applicant for a physician's and surgeon's certifi-

1. Existing law defines "board" to encompass bureaus, commissions, departments, divisions, and agencies. CAL. BUS. & PROF. CODE §477(a). Chapter 95 extends this definition to include committees and examining committees. *Compare id.* with 1974 Cal. Stat. c. 1321, §2, at 2874 (amending CAL. BUS. & Prof. CODE §477).

2. *Id.* §477(b) (definition of license.).

3. *Id.* §480(a)(1).

4. *Id.* §480(a)(2).

5. *Id.* §480(a)(3).

6. *Id.* §480(c).

7. CAL. BUS. & PROF. CODE §496. Actions that constitute subversion of a licensing examination include (1) unauthorized reproduction of any portion of the actual licensing exam, (2) paying or using professional or paid examination-takers to reconstruct any portion of the licensing exam, (3) obtaining or using any exam materials, without authorization, for the purpose of instruction or preparing applicants for the examinations, or (4) selling, buying, distributing or having unauthorized possession of a portion of any past, present, or future licensing exam. *Id.* §496(a). Actions that violate the standard of examination administration include (1) communicating with any other examinee during the examination, (2) copying from another examinee or permitting other examinees to copy, (3) possessing any unauthorized notes or materials during the administration of the exam, or (4) impersonating an examinee or having an impersonator take the exam in the examinee's place. *Id.* §496(b).

8. CAL. BUS. & PROF. CODE §497. The proceedings are governed by existing pro-

cate failed part of the licensing examination, but obtained passing scores⁹ in seven subjects, reexamination was required in only those areas where the scores were inadequate.¹⁰ New fees were not levied against the applicant for subsequent reexamination.¹¹ Chapter 95 authorizes licensing boards to require either complete reexamination or partial reexamination covering only the portions failed.¹² Furthermore, language forbidding the board to charge fees for the second exam is deleted, indicating the possibility that the board may now levy reexamination fees.¹³

Existing law permits the Division of Licensing (hereinafter referred to as the Division) to deny a physician's and surgeon's certificate to any applicant who is guilty of unprofessional conduct.¹⁴ Existing law also permits the Podiatry Examining Committee (hereinafter referred to as the Committee) to order the denial, revocation, suspension, or other restriction of a podiatrist's certificate.¹⁵ Chapter 95 affords the Division and the Committee discretion to issue probationary certificates to applicants who otherwise would have been denied certificates under the provisions of the Medical Practice Act.¹⁶ With the enactment of Chapter 95, the Division of Medical Quality has jurisdiction to monitor and enforce conditions imposed by these probationary certificates.¹⁷ Furthermore, the Division or Committee has the authority to initiate disciplinary actions revoking or suspending probationary licenses if conditions are violated.¹⁸ Finally, the Division or Committee must remove the probationary status of a certificate upon the licensee's satisfactory completion of probation.¹⁹

visions for injunctions. *Id.* See CAL. CIV. PROC. CODE §§525-533 (provisions for court orders).

9. See CAL. BUS. & PROF. CODE §2185 (passing score is at least 75%).

10. 1980 Cal. Stat. c. 1313, §2, at 4470 (enacting CAL. BUS. & PROF. CODE §2185).

11. *Id.*

12. CAL. BUS. & PROF. CODE §2185.

13. Compare *id.* §2185 with 1980 Cal. Stat. c. 1313, §2, at 4470 (enacting CAL. BUS. & PROF. CODE §2185).

14. CAL. BUS. & PROF. CODE §2221.

15. Compare *id.* with 1980 Cal. Stat. c. 1313, §2, at 4471 (enacting CAL. BUS. & PROF. CODE §2221). CAL. BUS. & PROF. CODE §2222.

16. CAL. BUS. & PROF. CODE §2000 (short title). Compare *id.* §2221 with 1980 Cal. Stat. c. 1313, §2, at 4471 (enacting CAL. BUS. & PROF. CODE §2221). Chapter 95 provides a nonexclusive list of terms and conditions that are appropriate to include in a probationary certificate, including (1) limiting practice to a supervised, structured environment where a licensee's activities will be supervised by another physician, (2) total or partial restrictions on drug prescribing privileges related to controlled substances, (3) restrictions against engaging in certain medical practices, (4) abstention from the use of alcohol or drugs, (5) continuing medical or psychiatric treatment, (6) enrollment and successful completion of a clinical training program, and (7) compliance with all the provisions of Chapter 95. CAL. BUS. & PROF. CODE §2221.

17. *Id.*

18. *Id.*

19. *Id.*

Business Associations and Professions; secondhand dealers— licensing, grounds for denial and forfeiture

Business and Professions Code §§21641, 21642 (amended).

SB 414 (Davis); 1983 STAT. Ch 340

Support: Attorney General; California Peace Officers Association;
City of Los Angeles

Existing law requires the chief of police, sheriff, or police commission to accept applications and grant licenses for persons to engage in the business of a secondhand dealer.¹ These licenses may not be granted, however, to applicants who have been convicted of any offense involving stolen property.² Under California case law, the word “conviction” has various meanings.³ In an apparent attempt to clarify the meaning of “conviction” for purposes of licensing secondhand dealers, Chapter 340 defines a conviction as a plea or verdict of guilty, or a conviction following a plea of nolo contendere.⁴ With the enactment of Chapter 340, the chief of police, sheriff, or police commission may take appropriate actions following a defendant’s conviction of a stolen property offense *only* when⁵ (1) the time for appeal has lapsed,⁶ (2) the judgment of conviction has been affirmed on appeal,⁷ or (3) an order granting probation has been made.⁸

Comment

The use of the nolo contendere plea in California criminal practice is a comparatively new phenomenon,⁹ and the effects of the plea beyond the

1. CAL. BUS. & PROF. CODE §21626 (definition of secondhand dealer).

2. *Id.* §21641; *see also* CAL. PENAL CODE §496(1) (offenses involving stolen property include felonies and misdemeanors). Existing law also requires the forfeiture of a secondhand dealer’s license and the enjoining of the licensee’s activities for any violation of specified circumstances. *Id.* §§21642(b), 21646.

3. *See* *Truchon v. Toomey*, 116 Cal. App. 2d 736, 740, 254 P.2d 638, 640 (1953); *Stephens v. Toomey*, 51 Cal. 2d 864, 869, 338 P.2d 182, 184 (a plea of guilty constitutes a conviction); *Ready v. Grady*, 243 Cal. App. 2d 113, 119, 52 Cal. Rptr. 303, 307-08 (1966) (definition of conviction for purposes of licensing insurance agents).

4. CAL. BUS. & PROF. CODE §§21641, 21642(b)(5).

5. *See* telephone conversation with Jill Pascal, Legislative Representative to the Los Angeles City Council (August 26, 1983) (notes on file at the *Pacific Law Journal*) [hereinafter cited as Telephone conversation, Pascal].

6. CAL. BUS. & PROF. CODE §21642(b)(5).

7. *Id.*

8. *Id.* This provision applies irrespective of a subsequent order pursuant to existing law provisions pertaining to probation. *Id.* *See* CAL. PENAL CODE §1203.4 (provisions regarding discharge of probationers).

9. *See* Klein, *Nolo Contendere And Administrative Penalties*, 49 L.A. Bar B. 149; *see also* 1963 Cal. Stat. c. 2128, §1, at 4418 (amending CAL. PENAL CODE §1016(3)). The California Supreme Court, in *Cartwright v. Board of Chiropractic Examiners*, 16 Cal. 3d 762,

criminal case often are misunderstood.¹⁰ In the context of licensing, secondhand dealers previously convicted of an offense involving stolen property following a plea of *nolo contendere* have successfully argued that their convictions were insufficient for purposes of license denial or revocation.¹¹ The California Supreme Court has held that absent express legislative authority, a *nolo* conviction is unreliable as an indicator of guilt and should not be considered when imposing discipline.¹² When the legislature has amended statutes to permit consideration of *nolo* convictions as a ground for administrative discipline, however, the court has upheld the law, provided the requisite substantial relationship is shown between the offense and the person's qualifications to engage in the activity in question.¹³

548, P.2d 1134, 129 Cal. Rptr. 462, (1976), argued that the reliability of a conviction based on a *nolo contendere* plea, as an indicator of actual guilt, is substantially reduced. *Id.* at 773, 548 P.2d at 1142, 129 Cal. Rptr. at 470.

10. See Klein, *supra* note 9, at 149. The effect of a *nolo contendere* plea in an administrative hearing is a subject that produces little unanimity of opinion in legal circles. Kirby v. Alcoholic Beverage Appeals Board, 3 Cal. App. 3d 209, 219-21, 83 Cal. Rptr. 89, 95 (1969). A conviction following a plea of *nolo contendere* is deemed to be a conviction within the meaning of Business & Professions Code section 2383 regarding unprofessional conduct in the medical field. Cadilla v. Board of Medical Examiners, 26 Cal. App. 3d 961, 965, 103 Cal. Rptr. 455, 456 (1972). *But see* Grannis v. Board of Medical Examiners, 19 Cal. App. 3d 551, 96 Cal. Rptr. 863 (1971). Conversely, after analyzing California's treatment of the effect of a *nolo contendere* plea in the context of administrative hearings, the California Court of Appeal found that under Business & Professions Code section 2390, the petitioner was not convicted based on a plea of *nolo contendere* and subsequent dismissal. *Id.* at 560, 96 Cal. Rptr. at 867, 870.

11. See Telephone conversation, Pascal, *supra* note 5.

12. See Cartwright v. Board of Chiropractic Examiners, 16 Cal. 3d 762, 772-74, 129 Cal. Rptr. 462, 469-70 (1976).

13. See Arneson v. Fox, 28 Cal. 3d 440, 448-52, 170 Cal. Rptr. 778, 782-85 (1980); see also CAL. BUS. & PROF. CODE §490 (requirements for license revocation). Failure of the legislature to specifically amend a statute, therefore, will be interpreted by California courts as a desire to immunize certain kinds of licensees from administrative penalties. Unless the statute providing for the administrative sanction mentions the conviction entered upon the *nolo* plea, the fact of such conviction will have no collateral effect. See Grannis v. Board of Medical Examiners, 19 Cal. App. 551, 559, 96 Cal. Rptr. 863, 869 (1971). In 1982, the legislature amended the Penal Code to state that the legal effect of a *nolo* plea, to a crime punishable as a felony, will be the same as that of a plea of guilty for all purposes. CAL. PENAL CODE §1016(3); see also *Review of Selected 1982 California Legislation*, 14 PAC. L. J. 600-01 (1983). It should be noted that Chapter 340 clarifies licensing aspects regarding secondhand dealers in relation to misdemeanors as well as felonies. See Telephone conversation, Pascal, *supra* note 5.

Business Associations and Professions; retail installment accounts

Civil Code §1810.12 (new).

SB1037 (Robbins); 1983 STAT. Ch 763

Support: California Home Furnishing Council; Department of Con-

sumer Affairs; General Election Credit Corporation

Existing law distinguishes a retail installment contract¹ from a retail installment account.² The provisions governing retail installment contracts permit a seller to impose a delinquency charge for each installment in default for ten days or more.³ Only one delinquency charge may be collected on any installment, regardless of the length of the period the installment remains in default.⁴

Prior to the enactment of Chapter 763, the collection of a delinquency charge from a buyer for a payment in default on a retail installment account was prohibited.⁵ Chapter 763 allows the holder of a retail installment account to provide for the payment of a delinquency charge.⁶ This delinquency charge is subject to the same limitations imposed upon charges arising out of defaults on retail installment contracts.⁷ Chapter 763 also allows the holder of a retail installment account to impose upon the buyer any actual and reasonable costs of collection occasioned by (1) removal of the goods from the state without the written permission of the holder, (2) failure of the buyer to notify the holder of any change of address, or (3) failure of the buyer to communicate with the holder for a period of 45 days after defaulting on payments due under the contract.⁸

1. CAL. CIV. CODE §1802.6 (definition of retail installment contract).

2. *Id.* §1802.7 (definition of retail installment account).

3. *Id.* §1803.6 The amount of the delinquency charge is limited to five dollars, or five percent of the amount of the delinquent installment, whichever is less. *Id.* A minimum charge of one dollar is permissible. *Id.*

4. *Id.*

5. *Id.* §1810.4.

6. To collect the delinquency charge, a written agreement between the holder and the buyer must be signed by the buyer, and the buyer must be given or furnished a copy of the agreement. *Id.* §1810.12.

7. *Id.*

8. To charge the buyer for the collection costs incurred under these circumstances, a written agreement must contain a provision allowing for the collection. *Id.*