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# Business Associations and Professions

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# Business Associations and Professions

## Business Associations and Professions; attorneys—misconduct, incompetent representation, willful misrepresentation

Business and Professions Code §6086.7 (new).

AB 1191 (Katz); STATS. 1982, Ch 181

Support: Department of Finance; State Bar of California

Existing law empowers the Board of Governors of the State Bar<sup>1</sup> to discipline attorneys for willful violation of the Rules of Professional Conduct.<sup>2</sup> Under prior law, however, there was no systematic procedure to inform the Board of Governors that a judicial decision had been reversed<sup>3</sup> because of a conduct violation. With the enactment of Chapter 181, whenever a court reverses a judgment at least partially due to the misconduct,<sup>4</sup> incompetent representation,<sup>5</sup> or willful misrepresentation<sup>6</sup> by counsel, it must report the reversal to the State Bar of California for investigation into the appropriateness of disciplinary action against the attorney.<sup>7</sup> In addition, the court must notify the attorney that the matter has been referred to the State Bar for investigation.<sup>8</sup> Although under existing law a formal complaint is not a condition precedent<sup>9</sup> to any State Bar investigation,<sup>10</sup> Chapter 181 now requires that

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1. See generally CAL. BUS. & PROF. CODE §6010 (State Bar is governed by the Board of Governors).

2. See generally *id.* §6077. The rules of professional conduct are binding on all members of the State Bar. The Board may discipline attorneys by public or private reproof, or by recommendation to the Supreme Court that practice be suspended for a period not exceeding three years. *Id.* RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA (1982) (for example, see Rule 6-101 that prohibits an attorney from willfully or habitually performing legal services when the attorney knows or should know that learning or skill is lacking; and failing to use reasonable diligence to accomplish the task for which the attorney was employed).

3. See Assemblyman Richard Katz, Press Release, No. 12, March 18, 1981 (copy on file at *Pacific Law Journal*) [hereinafter referred to as Katz release].

4. CAL. BUS. & PROF. CODE §6086.7.

5. *Id.*; see *People v. Pope*, 23 Cal. 3d 412, 427-28, 590 P.2d 859, 868, 152 Cal. Rptr. 732, 741 (1979) (definition of incompetent representation).

6. CAL. BUS. & PROF. CODE §6086.7; see *Codiga v. State Bar of California*, 20 Cal. 3d 788, 792, 575 P.2d 1186, 1187, 144 Cal. Rptr. 404, 405 (1978) (definition of willful misrepresentation).

7. CAL. BUS. & PROF. CODE §6086.7; see Katz release, *supra* note 3. Chapter 181 may deter reversals since courts may reconsider before employing this "loophole" if a decision will result in potential disciplinary sanctions against the attorney. *Id.* See generally *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (murder case reversed due to defendant's inadequate legal representation—a denial of his Sixth and Fourteenth Amendment right to effective assistance of counsel).

8. CAL. BUS. & PROF. CODE §6086.7.

9. RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA (1982), Rule 503 (investigation may be commenced by the State Bar in the absence of a complaint).

the Bar be notified of the alleged misconduct.<sup>11</sup>

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10. *Id.* Rule 502 (purpose of investigation is to determine whether there is reasonable cause to believe that the attorney should be held to answer for conduct that violates the State Bar Act or the Rules of Professional Conduct).

11. *See* CAL. BUS. & PROF. CODE §6086.7.

## **Business Associations and Professions; contingency fee agreement, arbitration of attorneys' fees**

Business and Professions Code §6147 (new); §§6201, 6202, 6203, 6204 (amended).

AB 490 (Nolan); STATS. 1982, Ch 415

Support: Association for California Tort Reform

Opposition: California Applicants Attorney Association

SB 1924 (Petris); STATS. 1982, Ch 979

Support: State Bar of California

Chapters 415 and 979 are enacted in an apparent attempt to offer greater protection to the client concerning attorneys' fees.<sup>1</sup> Chapter 415 relates specifically to contingency fee agreements<sup>2</sup> while Chapter 979 pertains to actions against the client for the collection of attorneys' fees.<sup>3</sup>

Prior to the enactment of Chapter 415, contingency fee agreements were unrestricted in content and in the amount of the fee except in the medical injury tort claims area.<sup>4</sup> Chapter 415 expands this exception by providing that when the contingency agreement is for a medical injury tort claim, the agreement must contain a statement that the statutorily set rate is the maximum allowable fee for this type of action and that the attorney and client may negotiate a lower fee.<sup>5</sup> Furthermore, Chapter 415 requires *all* contingency fee agreements to contain (1) a

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1. Telephone conversation with Joyce Parsons, member of the California State Bar, Committee on Business Associations (June 29, 1982) (notes on file at the *Pacific Law Journal*) [hereinafter referred to as Parsons conversation]. *See generally* CAL. BUS. & PROF. CODE §6147.

2. *See* CAL. BUS. & PROF. CODE §6147.

3. *See id.* §§6201-6204.

4. *See* *Krieger v. Bulpitt*, 40 Cal. 2d 97, 100, 251 P.2d 673, 674 (1953) (contingency fee agreements in divorce actions found as void against public policy); *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788, 789 (1930) (where an attorney had a conflict of interest in the action, the attorney's contingent fee agreement was held void as against public policy); *Kyne v. Kyne*, 60 Cal. App. 2d 326, 329, 140 P.2d 886, 888 (1943) (contingent fee agreement in a filiation proceeding which sought to assign 45 percent of all sums allowed for the support of an illegitimate child was void as against public policy). *Compare id.* §6146 with *id.* §6147. Contingency fee agreements, however, have been limited by case law.

5. CAL. BUS. & PROF. CODE §6147(a)(5).

statement that the fee is not set by law but is negotiable between the attorney and the client,<sup>6</sup> (2) a statement of how the disbursements and costs will affect the fee and the client's recovery,<sup>7</sup> (3) a statement indicating the extent, if any, to which the client could be required to compensate the attorney for related matters that arise out of their relationship not covered by the agreement,<sup>8</sup> and (4) a disclosure of the contingency fee rate that was agreed on by the client and the attorney.<sup>9</sup> In addition, Chapter 415 requires that the attorney provide the client with a copy of the contingency fee agreement signed by both the client and the attorney.<sup>10</sup> Failure to comply with these provisions will render the contract voidable at the client's option, leaving the attorney entitled to collect only a reasonable fee.<sup>11</sup> Chapter 415 specifically states, however, that these provisions do not apply to agreements for the recovery of workers' compensation benefits.<sup>12</sup>

Under prior law, before an attorney filed an action against the client for recovery of fees, the State Bar could, at its option, require the attorney to give written notice to the client and the State Bar.<sup>13</sup> Chapter 979 mandates that the Bar *require* the attorney, when filing an action against the client, to provide written notice to the client of the intent to commence an action and to include in the notice a statement of the client's right to arbitrate prior to or at the time of the service of summons.<sup>14</sup> The failure to give written notice is grounds for dismissal of the action.<sup>15</sup> Chapter 979, however, specifically excludes the requirement of written notice to the client when the action is filed in small claims court.<sup>16</sup>

Under existing law, when an attorney files a civil action for recovery of fees in any state court, other than a small claims court, the client can obtain a stay of those proceedings by filing a request that the matter be submitted to arbitration prior to the filing of an answer.<sup>17</sup> Chapter 979 requires that the Board of Governors adopt a rule that provides for a

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6. *Id.* §6147(a)(4).

7. *Id.* §6147(a)(2).

8. *Id.* §6147(a)(3).

9. *Id.* §6147(a)(1).

10. *Id.* §6147(a).

11. *See id.* §6147(b); *see also* *Still v. Plaza Marina Commercial Corp.*, 21 Cal. App. 3d 378, 387, 98 Cal. Rptr. 414, 418 (1971) (definition of *reasonable fees*). *See generally* *Block Lawrence Co. v. England*, 211 Cal. App. 2d 318, 27 Cal. Rptr. 362 (1962); *Cline v. Zappettini*, 131 Cal. App. 2d 723, 281 P.2d 35 (1955).

12. CAL. BUS. & PROF. CODE §6147(c); CAL. INS. CODE §§11550-11874 (definition of workers' compensation benefits).

13. *See* CAL. STATS. 1979, c. 878, §1, at 3062 (amending CAL. BUS. & PROF. CODE §6201).

14. *See* CAL. BUS. & PROF. CODE §6201(a).

15. *Id.*

16. *Id.*

17. *Id.* §6201(b).

waiver of the client's right to arbitration if the client fails to make a demand for arbitration within 30 days after the receipt of the written notice.<sup>18</sup> Chapter 979 also provides that the client's right to arbitration cannot be waived unless the client has been notified of that right in the written notice from the attorney.<sup>19</sup>

Existing law provides that an arbitration award becomes final if neither party to the arbitration seeks a timely judicial review and a new trial.<sup>20</sup> Either party, however, may have the award confirmed,<sup>21</sup> corrected,<sup>22</sup> or vacated<sup>23</sup> by petition to the court.<sup>24</sup> Prior to Chapter 979, the costs of confirming, correcting, or vacating the arbitration award could negate the benefits of the arbitration award to the prevailing party in the arbitration.<sup>25</sup> Chapter 979, therefore, provides that the party obtaining a judgment confirming, correcting, or vacating the arbitration award is entitled to collect reasonable fees and costs incurred, including, if applicable, fees or costs on appeal.<sup>26</sup> Furthermore, to encourage participation in the arbitration proceedings, Chapter 979 provides that if the party obtaining a judgment confirming, correcting, or vacating the arbitration award, does not appear at the arbitration hearing, that party will not be entitled to attorneys' fees or other costs incurred.<sup>27</sup>

In summary, by enacting Chapter 415 the client is afforded more protection when negotiating attorneys' fees.<sup>28</sup> In addition, Chapter 979 now offers protection to both the client and the attorney when the attorney takes action to collect attorneys' fees.<sup>29</sup>

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18. *Id.* §6201(a).

19. *Id.* §6201(b).

20. *See id.* §6203(b); CAL. CIV. PROC. CODE §656 (definition of new trial).

21. CAL. CIV. PROC. CODE §1285 (method of confirming an award).

22. *Id.* §1286.6 (grounds for correction).

23. *Id.* §1286.2 (grounds for vacating).

24. *See* CAL. BUS. & PROF. CODE §6203(b).

25. Parsons conservation, *supra* note 1.

26. *See* CAL. BUS. & PROF. CODE §6203(b).

27. *See id.*

28. *See generally id.* §6147.

29. *See generally id.* §§6201-6204.

## **Business Associations and Professions; close corporations, record number of shareholders**

Corporations Code §§158, 418 (amended).

SB 1283 (Beverly); STATS. 1982, Ch 448

Support: Department of Corporations

Prior to the enactment of Chapter 448, few small businesses were taking advantage of the statutory close corporation status<sup>1</sup> available to them under the code.<sup>2</sup> Under prior law, a small business could elect statutory close corporation status only if it had no more than ten shareholders and specifically stated in the articles of incorporation that it was a close corporation.<sup>3</sup> Chapter 448 now permits small businesses to elect statutory close corporation status if they have no more than 35 shareholders.<sup>4</sup> Chapter 448 apparently was enacted to increase the availability of the many benefits<sup>5</sup> offered to a corporation with statutory close corporation status. In addition, Chapter 448 conforms the number of shareholders required for close corporation status with another section of the corporations code.<sup>6</sup>

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1. See CAL. STATS. 1979, c. 711, §1, at 2192 (amending CAL. CORP. CODE §158).

2. See Wang, *The California Statutory Close Corporation: Gateway to Flexibility or Trap for the Unwary?*, 15 SAN DIEGO L. REV. 687, 689 (1978).

3. CAL. STATS. 1979, c. 711, §1, at 2192. See generally Jordan, *The Close Corporation Provisions of the New California General Corporation Law*, 23 U.C.L.A. L. REV. 1094, 1097 (1976) (the apparent reason for the rule limiting statutory close corporations to ten shareholders is to eliminate the need for corporate norms to protect shareholders); O'Neal & Magill, *California's New Close Corporation Legislation*, 23 U.C.L.A. L. REV. 1155 (1976).

4. CAL. CORP. CODE §158(a). Compare *id.* with DEL. CODE ANN. tit. viii §342(a) (1980). The original proposal by the State Bar of California, Committee on Corporations, was to set the number of shareholders at 35 to conform more closely with the Delaware code. See *State Bar of California, Committee on Corporations, Exposure Draft: General Corporation Law*, §159(a) (1974).

5. See CAL. CORP. CODE §§186 (shareholders' agreements), 418(c) (restraints on voluntary inter vivos transfers), 706(a) (close corporation pooling agreements and continuation of pooling agreements after the termination of close corporation status). See generally Berger, *Statutory Close or Closely Held Corporation?*, 11 PAC. L. J. 699 (1980); Berger, *California's New General Corporation Law: Close and Closely-Held Corporations*, 7 PAC. L. J. 585 (1976).

6. CAL. CORP. CODE §1800(b)(5) (grounds for the involuntary dissolution of a corporation with 35 or fewer shareholders). See 1 H. BALLANTINE & G. STERLINE, CALIFORNIA CORPORATION LAWS (4th ed. 1977) reviewed by Seigel, Book Review, 24 U.C.L.A. L. REV. 914, 917 (1977) (citing CAL. CORP. CODE §1800(b)(5)).

## **Business Associations and Professions; religious corporations, trusts**

Corporations Code §9143 (new); §9142 (amended).

SB 1178 (Petris); STATS. 1982, Ch 242

Support: First Freedom, Inc.

Case law requires that when a charitable organization,<sup>1</sup> including a religious corporation,<sup>2</sup> accepts a gift, either for the organization's declared purposes or for purposes specified by the donor, a charitable

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1. CAL. CORP. CODE §10200 (definition of nonprofit charitable organization).

2. *Id.* §5061 (definition of religious corporation).

trust<sup>3</sup> is created.<sup>4</sup> Chapter 242 limits this rule, however, by specifically stating that the assets of a religious corporation cannot be impressed with any trust, express or implied, unless one of the following circumstances exist: (1) the assets are received by the religious corporation with an express commitment by resolution of its board of directors<sup>5</sup> to hold the assets in trust;<sup>6</sup> (2) the donor expressly imposes a trust at the time of the gift or donation;<sup>7</sup> or (3) there is a provision in the articles, bylaws, or other governing instrument of the corporation which expressly provides that the assets are to be held in trust.<sup>8</sup> Chapter 242 further provides that the trust created by the articles or bylaws<sup>9</sup> may be changed or dissolved by amendment to the articles or bylaws.<sup>10</sup> Amendments to the articles or bylaws for the purpose of changing or dissolving the trust, however, are limited by certain conditions.<sup>11</sup>

When a religious corporation uses property received from a person who is directly affiliated with the religious corporation in a manner contrary to the donor's designated purpose, Chapter 242 provides that an action<sup>12</sup> may be brought by the donor, the corporation, any member or former member, or an officer or director of the corporation.<sup>13</sup> Before any action can be brought, however, Chapter 242 requires that the person notify the corporation that an action will be brought unless it corrects the contrary use of the assets.<sup>14</sup> In addition, Chapter 242 provides that property donated by a person directly affiliated with the corporation may be used for the general purposes of the corporation rather than for the specific purpose for which it was contributed when the

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3. *In re Huebner's*, 127 Cal. App. 244, 246, 15 P.2d 758, 759 (1932); *In re Vance's Estate*, 118 Cal. App. 163, 164, 4 P.2d 977, 977-78 (1931); *In re Graham's Estate*, 63 Cal. App. 41, 43, 218 P. 84, 85 (1923) (definition of charitable trust).

4. *Lynch v. Spilman*, 67 Cal. 2d 251, 263, 431 P.2d 636, 644, 62 Cal. Rptr. 12, 20 (1967).

5. CAL. CORP. CODE §§155, 164 (definition of board of directors).

6. *Id.* §9142(c)(1).

7. *Id.* §9142(c)(3).

8. *Id.* §9142(c)(2).

9. *Id.* §9150(a) (definition of bylaw).

10. *Id.* §9142(d).

11. *Id.*; CAL. REV. & TAX. CODE §214.01. In order for the religious corporation to retain its tax exempt status, the articles or bylaws may not be amended to eliminate the statement in the articles that the assets given to the corporation are irrevocably dedicated to the religious purposes of the corporation. *Id.*

12. See generally *Lynch v. Spilman*, 67 Cal. 2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1967) (action to impress a charitable trust upon real property and to obtain incidental relief); *Holt v. College of Osteopathic Physicians and Surgeons*, 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964) (action to enjoin breach of a charitable trust and for declaratory relief with regard to operation of a charitable corporation).

13. See CAL. CORP. CODE §9143(a). Chapter 242 also provides that a public officer may not bring an action in an official capacity, even on behalf of a private person. *Id.* §9143(c).

14. *Id.* §9143(a).

board of directors find, in good faith,<sup>15</sup> that the specified purpose is now impractical or impossible or is no longer in accord with the policies or best interests of the corporation.<sup>16</sup> It is also possible that Chapter 242 will be interpreted to allow property donated by *any* person to be used for the general purposes of the corporation when the specified purpose is determined to be impractical or impossible.<sup>17</sup>

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15. *Id.* §9240 (factors to be considered by a director when making a good faith determination).

16. *Id.* §9143(b).

17. *See id.*

## **Business Associations and Professions; loans—directors and officers; dissenting shares**

Corporations Code §§194, 315, 1300, 1501, 5056 (amended).

AB 2201 (Imbrecht); STATS. 1982, Ch 36

(*Effective February 17, 1982*)

Support: Business Law Section of the State Bar; Department of Corporations

### *Loans to Corporate Directors and Officers*

The high cost of housing in California prevents many potential corporate officers<sup>1</sup> from moving to this state.<sup>2</sup> Prior to Chapter 36, corporations<sup>3</sup> had to follow stringent regulations when making loans to their officers or directors.<sup>4</sup> Chapter 36 provides an incentive that may now encourage corporate officers to move to California by relaxing loan restrictions for the purpose of offsetting housing costs.<sup>5</sup>

Existing law prohibits a corporation from making loans of money<sup>6</sup> or property to, or guaranteeing the obligations of, any director or officer of the corporation or its parent<sup>7</sup> or subsidiary<sup>8</sup> unless the transaction is

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1. BLACK'S LAW DICTIONARY 977 (5th ed. 1979) (definition of corporate officers).

2. Telephone conversation with Hank Massey, member of the State Bar Committee on Corporations (June 28, 1982) (copy on file with *Pacific Law Journal*) [hereinafter referred to as telephone conversation]; CAL. STATS. 1982, c. 36, §6, at —.

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

4. *Id.* §164 (definition of director). Compare *id.* §315 with CAL. STATS. 1980, c. 501, §1, at 1048 (amending CAL. CORP. CODE §315).

5. See CAL. STAT. 1982, c. 36, §6, at —; telephone conversation, *supra* note 2.

6. Taylor v. Philadelphia & Reading R. Co., 7 F. 386, 390 (1881) (characteristics of a loan); see also Vanderlip v. Los Molinos Land Co., 56 Cal. App. 2d 747, 758, 133 P.2d 467, 474 (1943) (describing the nature of a loan).

7. CAL. CORP. CODE §175 (definition of *parent*).

8. *Id.* §189 (definition of subsidiary).



approved<sup>9</sup> by a vote of the majority of the shares at a meeting where a quorum is present.<sup>10</sup> The shares owned by the prospective borrower, however, cannot be voted.<sup>11</sup> If the prospective borrower holds a large percentage of the shares, it is possible that the number of shares needed to approve the loan will be greater than the number of shares eligible to vote on the loan.<sup>12</sup> Chapter 36, therefore, provides that the loan or guaranty<sup>13</sup> may also be made if the loan or guaranty is approved by a unanimous vote of the shareholders.<sup>14</sup>

Existing law provides that a loan secured by the shares of the corporation may be made to *any* person if the loan or guaranty is otherwise adequately secured<sup>15</sup> or if it is approved by a majority of the shares voting at a meeting where a quorum is present excluding the shares of the prospective borrower who is not entitled to vote.<sup>16</sup> Chapter 36 also allows a loan or guaranty secured by the shares of the corporation to be made if it is approved by a unanimous vote of the shareholders<sup>17</sup> or if it is made pursuant to an employee benefit plan.<sup>18</sup>

In addition, when the loan or guaranty, secured by the shares of the corporation, is made pursuant to an employee benefit plan that authorizes these loans to an officer or director, Chapter 36 requires that the corporation disclose to the shareholders the fact that the employee benefit plan includes officers and directors.<sup>19</sup> After the disclosure, the employee benefit plan must either be approved by a majority of the shares that are eligible to be voted<sup>20</sup> or by a unanimous vote of the shareholders.<sup>21</sup>

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9. *See id.* §153 ("approved" means an affirmative vote of a majority of the shares entitled to vote represented at a duly held meeting at which a quorum is present).

10. *Id.* §315(a). *See generally* Wulfjen v. Dolton, 24 Cal. 2d 878, 151 P.2d 840 (1944) (purpose of statute is to prevent directors from taking advantage of their positions); Wang, *The California Statutory Close Corporation: Gateway to Flexibility or Trap for the Unwary?*, 15 SAN DIEGO L. REV. 687 (1978). California law has permitted shareholders to waive or alter any statutory provision relating to corporations with a few limited exceptions. Commentators, however, have suggested that the requirement of shareholder approval for corporate loans to officers and directors may be unwaivable in spite of the statutory provision to do so. *Id.*

11. *See* CAL. CORP. CODE §315.

12. *See id.* For example, if the prospective borrower owns 75% of the shares and 60% of the shares are needed for a quorum, the loan cannot be approved since one-half of the quorum shares have to be voted affirmatively (i.e., 30%) to approve the loan and only 25% would be eligible to vote. *See id.* §602.

13. BLACK'S LAW DICTIONARY 634 (5th ed. 1979) (definition of guaranty).

14. *See* CAL. CORP. CODE §§185, 315(a).

15. *Compare id.* §315(c) with CAL. STATS. 1980, c. 501, §1, at 1048 (amending CAL. CORP. CODE §315(a)).

16. *See* CAL. CORP. CODE §153. *Compare id.* §315(c) with CAL. STATS. 1980, c. 501, §1, at 1048.

17. CAL. CORP. CODE §185 (definition of shareholders).

18. *See id.* §§315(c), 408 (definition of employee stock purchase or stock option plan).

19. *Id.* §315(a).

20. *See id.* §153.

21. *Id.* §315(a), (c).

Under prior law, when an *unsecured* loan of money or property to, or the guaranty of an obligation of, any officer, director, or employee of a corporation was made pursuant to an employee benefit plan, the employee benefit plan had to be approved by a majority of the shareholders *and* the board was required to determine that *each* loan or guaranty could reasonably be expected to benefit the corporation.<sup>22</sup> Chapter 36 eliminates the corporate benefit determination for each loan or guaranty, in this circumstance, when there is full disclosure to the shareholders that the employee benefit plan includes directors and officers.<sup>23</sup> After disclosure, the employee benefit plan must either be approved by a majority of the shares that are eligible to be voted<sup>24</sup> or by a unanimous vote of the shareholders.<sup>25</sup>

Chapter 36 adds a new provision for a loan or guaranty made to an officer, director, or employee of the corporation when a corporation has outstanding shares of record<sup>26</sup> held by one hundred or more persons.<sup>27</sup> Chapter 36 permits the board to approve the loan or guaranty, without approval of the shareholders when (1) the corporation has a bylaw, approved by the outstanding shares, authorizing the board of directors alone to approve a loan or guaranty, (2) there are sufficient board votes without counting the vote of any interested director, and (3) the board determines that each loan or guaranty may reasonably be expected to benefit the corporation.<sup>28</sup> The grant of a loan or guaranty to persuade the prospective borrower to become a director or officer of the corporation by helping to offset housing costs would appear to satisfy the benefit requirement for the making of corporate loans.<sup>29</sup>

### *Dissenting Shareholders*

Under prior law, if the approval of the outstanding shares of a corporation was required for reorganization,<sup>30</sup> each of the dissenting shareholders could have required the corporation to purchase their shares<sup>31</sup>

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22. CAL. STATS. 1980, c. 501, §1, at 1048 (amending CAL. CORP. CODE §315(b)). *See generally* Leroy v. Bella Vista Inv. Co., 22 Cal. App. 2d 369, 35 Cal. Rptr. 128 (1963) (example of a loan benefitting a corporation).

23. *See* CAL. CORP. CODE §315(a).

24. *Id.* §153.

25. *Id.* §315(a), (c). *Compare id.* §315(a) with CAL. STATS. 1980, c. 501, §1, at 1048.

26. CAL. CORP. CODE §605 (shares deemed "held of record").

27. *Id.* §315(b) (permits board of directors to approve the loan or guaranty without approval of the shareholders).

28. *Id.* §315(b).

29. *See* CAL. STATS. 1982, c. 36, §6, at —.

30. *See* CAL. CORP. CODE §1201(a), (b), (e).

31. *See id.* §1300(b) (definition of dissenting shareholder). *See generally* Barton, *Business Combinations and the New General Corporation Law*, 9 LOY. L. REV. 738 (1976) (discussion of dissenter's rights).

for cash at fair market value.<sup>32</sup> Chapter 36 limits this right to those shareholders entitled to vote on the transaction.<sup>33</sup> Shareholders are excluded from voting on a reorganization, except under specified circumstances,<sup>34</sup> if they own preferred shares of the surviving or acquiring corporation, and the rights, preferences, privileges, and restrictions of those shares remain unchanged,<sup>35</sup> or if the corporation or its shareholders will own, immediately after the reorganization, enough equity securities in the surviving corporation or its parent to possess more than five-sixths of the voting power of the surviving corporation.<sup>36</sup>

In conclusion, Chapter 36 attempts to provide corporations with greater flexibility in making loans to prospective officers.<sup>37</sup> Furthermore, Chapter 36 limits the rights of dissenting shareholders under corporate reorganizations.<sup>38</sup>

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32. CAL. STATS. 1976, c. 641, §21.3, at 1551 (amending CAL. CORP. CODE §1300); see CAL. CORP. CODE §1300(a) (definition of *fair market value*). See generally *Gallois v. West End Chem. Co.*, 185 Cal. App. 2d 765, 8 Cal. Rptr. 596 (1960). The purpose of *fair market value* determination is to protect a dissenting shareholder from being paid a price that reflects a distortion of the value of the stock by reason of the proposed merger. *Id.* The California code has provided appraisal rights for those shareholders who do not consent to a proposed reorganization when shareholder approval is required unless the shares of the corporation are listed on a national securities exchange. Oldham, *California Regulates Pseudo-Foreign Corporations—Trampling upon the Tramps?*, 17 SANTA CLARA L. REV. 85 (1977).

33. CAL. CORP. CODE §1300(a).

34. See *id.* §1201(c) (when there is any amendment made to the surviving corporation's articles which would otherwise require shareholder approval), 1201(d) (when a corporation, which is a party to a merger or sale-of-assets reorganization, whose shareholders of any class of shares receive shares of the surviving or acquiring corporation or parent party having different rights, preferences, privileges, or restrictions than those shares surrendered), 1201(e) (when a close corporation receives the shares of a non-close corporation).

35. *Id.* §1201(a).

36. *Id.* §1201(b).

37. See *id.* §315.

38. See *id.* §1300.

## **Business Associations and Professions; Uniform Limited Partnership Act**

Corporations Code §§15511, 15512, 15515, 15521, 15522, 15523, 15524, 15525, 15527, 15528, 15531, 15532, 15533, 15534, 15535, 15536, 15537, 15541, 15542, 15551, 15552, 15554, 15561, 15562, 15564, 15565, 15566, 15574, 15575, 15581, 15582, 15583, 15584, 15585, 15592, 15593, 15595, 15601, 15602, 15612, 15613, 15614 (amended); Government Code §12209 (amended); Cal. Stats. 1981, c. 807, §8, at — (amended).

AB 2544 (Imbrecht); STATS. 1982, Ch 997

Support: Department of Corporations; Secretary of State; State Bar Committee on Partnerships

In 1949, California enacted the Uniform Limited Partnership Act.<sup>1</sup> In 1981, California extensively revised the law governing the formation, finances, distributions, withdrawals, and dissolution of limited partnerships<sup>2</sup> and the rights and liabilities of those who form limited partnerships.<sup>3</sup> The 1981 revisions, however, were not to become operative until January 1, 1983.<sup>4</sup> The reason for the delay was to await an anticipated Internal Revenue Service ruling on the tax effects of the Model Uniform Limited Partnership Act,<sup>5</sup> the basis of many provisions of the California Uniform Limited Partnership Act.<sup>6</sup> Chapter 997 further postpones the effective date of the 1981 revisions until January 1, 1984, because the Internal Revenue Service ruling is still pending.<sup>7</sup> Chapter 997 also makes various technical and clarifying changes in the law affecting partnerships.<sup>8</sup> These clarifying revisions include (1) requiring the certificate of limited partnership<sup>9</sup> to contain the words "a California limited partnership" at the end of the name of the partnership;<sup>10</sup> (2) requiring a creditor to have actual notice of a dissolution before a limited partnership can avoid liability;<sup>11</sup> (3) providing a procedure to determine record date;<sup>12</sup> and (4) allowing existing limited partnerships to elect to be governed by this Chapter.<sup>13</sup>

Prior to the enactment of Chapter 997, after dissolution, a general partner<sup>14</sup> retained the power to bind the limited partnership in any transaction that would bind the limited partnership if the dissolution

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1. See CAL. STATS. 1949, c. 383, §1, at 674, 688-97 (enacting CAL. CORP. CODE §§15501-15531).

2. CAL. CORP. CODE §15511(j) (defining limited partnerships).

3. See CAL. STATS. 1981, c. 807, §§1, 2, at 149 (repealing CAL. CORP. CODE §§15501-15532, enacting *id.* §§15511-15614). See generally 13 PAC. L. J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 543 (1982).

4. CAL. STATS. 1981, c. 807, §8, at 170.

5. UNIF. LIMITED PARTNERSHIP ACT, 6 U.L.A. pocket part. (1976).

6. Telephone conversation with Professor Richard Buxbaum, Professor of Law, University of California, Boalt Hall, Member of the Partnership Committee of the Business Law Section of the State Bar (July 27, 1982) (notes on file at the *Pacific Law Journal*) [hereinafter cited as Buxbaum].

7. CAL. CORP. CODE §15614; see Buxbaum, *supra* note 6.

8. See CAL. CORP. CODE §§15511, 15512, 15515-15525, 15527, 15528, 15531-15537, 15541, 15542, 15551, 15552, 15554, 15561, 15562, 15564, 15565, 15566, 15574, 15575, 15581-15585, 15592, 15593, 15595, 15601, 15602, 15612, 15613, 15614; Buxbaum, *supra* note 6.

9. *Id.* §§15511(c), 15521 (defining certificate of limited partnership).

10. *Id.* §15512(a).

11. *Id.* §15585(b)(1).

12. *Id.* §15537(j).

13. *Id.* §15612(d).

14. *Id.* §15511(g) (defining general partner).

had not taken place, provided that (1) the other party had previously extended credit to the partnership and had no knowledge or notice of the dissolution, or (2) the other party had known of the partnership prior to dissolution, had no knowledge or notice of the dissolution, and a certificate of dissolution had not been filed.<sup>15</sup> Chapter 997 provides more protection to third parties in these post dissolution transactions by permitting the partnership to escape liability only if the third party had *actual* knowledge or notice of the dissolution.<sup>16</sup>

Chapter 997 provides a procedure to establish record date in order to determine the partners that are entitled to (1) notice of meetings, (2) voting powers, (3) the receipt of distributions or (4) exercise any rights regarding any other lawful action.<sup>17</sup> Under Chapter 997, the general partners, or limited partners representing more than 10 percent of the interests of limited partners, may fix a record date that is not more than 60 nor less than 10 days prior to the date of a meeting nor more than 60 days prior to any other action.<sup>18</sup> Chapter 997 also provides that when the partners do not fix a record date, the record date will vary according to the entitlements of the partners that the record date is to determine. The possible record dates are as follows: (1) for notice of and voting powers at meetings, the record date will be on the close of the business day preceding the day notice of the meeting is given or, if notice is waived, at the close of the business day preceding the day the meeting is held;<sup>19</sup> (2) for written consent powers to partnership actions, the record date will be on the day a partner first gives written consent;<sup>20</sup> and (3) for any other purpose the record date will be the close of the business day when the general partners adopt that purpose or the 60th day prior to the date of the other action, whichever is later.<sup>21</sup>

Chapter 997 allows a California limited partnership existing on January 1, 1984, to elect to be governed by the new law instead of by the previously applicable law.<sup>22</sup> This election must be by the unanimous written consent of the partners, or, if the partnership agreement contains a provision allowing election by fewer than all the partners, then

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15. CAL. STATS. 1981, c. 807, §2, at — (enacting CAL. CORP. CODE §15585).

16. See CAL. CORP. CODE §15585(b)(1).

17. *Id.* §15537(j).

18. *Id.*

19. *Id.* §15537(j)(1).

20. *Id.* §15537(j)(2).

21. *Id.* §15537(j)(3).

22. *Id.* §15612(d).

by the designated number of consenting partners.<sup>23</sup> Chapter 997 declares that this election will be prospective only and will not affect the preexisting rights of third parties.<sup>24</sup>

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23. *Id.*

24. *Id.*

