Fictitious Business Name Legislation--Modernizing California's Pioneer Statute

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ADOPTION of the California Civil Code in 1872 was a triumph of the effort to reduce the unwritten law to positive legislative form. Nonetheless, even as originally enacted, that code contained significant fragments of social or regulatory legislation. Development and modernization of this aspect of the code has, of course, become a burden of the legislature that as long since overshadowed the effort to codify the common law. One of the first “fictitious business name statutes” adopted in this country was included in the Civil Code of 1872. That statute remains largely unchanged to this day. Presumably on the suspicion that the statute (Civil Code sections 2466-71) is no longer attuned to modern commercial life, the legislature has authorized the California Law Revision Commission to study the question whether the law relating to the use of fictitious names should be revised. This article was written to assist the Commission in this assignment.

Background

The common law permitted a sole proprietor\(^1\) or partnership\(^2\) to adopt and use an assumed business or trade name in transacting business. In most jurisdictions, a corporation also may do business under a name other than the one stated in its articles of incorpora-
Although transactions and contracts entered into under an assumed business name are valid and enforceable at common law, the use of a particular name may be enjoined if such usage misleads or perpetrates a fraud on the public or infringes a trademark or trade name.

Forty-two states, including California, have adopted statutes to regulate the use of “fictitious” business names. Similar statutes have been enacted in the United Kingdom, in most of the Canadian pro-


4 Cases and authorities cited noted 1–3 supra.

5 38 Am. Jur. Name § 13, n.8 (1941).

6 Id.


Several states also prohibit the assumption of any semblance of a corporate name in any sign or advertisement by an unincorporated association. 1 J. BARETT & E. SEAGO, supra note 2, at § 2, at 160.

8 As used in this article, “fictitious business name statute” includes any fictitious or assumed business name statute.

9 Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 38, 116(3).
vinces and territories, in each of the eight Australian states and territories. Although their provisions vary, these statutes generally require that individual proprietors and certain business entities file statements containing specified information if the name under which the business is operated does not adequately inform the public as to the ownership of the business. The information required usually includes the name under which the business is operated and the name and address of each of the owners. The statement is filed with a central state agency, or in the city or county where the business is operated, or in both places. California and nine other states also require that the statement be published in a newspaper. A variety of sanctions is imposed in an effort to obtain compliance with the statutory requirements.

The purpose of the California statute is to prevent fraud and deceit in business practices by providing a public source of information as to the identity and addresses of the owners of a business operated under a fictitious name.


10 ALTA. REV. STAT. c. 230, §§ 68-72 (1955); B.C. REV. STAT. c. 277, §§ 67-81 (1960); MAN. REV. STAT. c. 196, §§ 48-60 (1954); N.B. REV. STAT. c. 168 (1952); N.S. REV. STAT. c. 213 (1954); ONT. REV. STAT. c. 289 (1960); QUE. REV. STAT. c. 272 (1964); SASK. REV. STAT. c. 387, §§ 47-64 (1965); YUKON TER. REV. ORD. c. 84, §§ 47-58 (1958).


useful to potential creditors of such a business. For example, many commercial credit agencies in California use the information in ascertaining the solvency of those behind a particular firm before extending credit or submitting a credit report. The information also is useful in determining the persons who may be liable on claims against the business entity and in effecting service of process on those persons. Although the same information might be obtained through "Doe pleading" and discovery, its availability in the public files saves considerable time and expense. Finally, the business name information may be used for collection purposes.

In most states, compliance or noncompliance with the fictitious business name statute is unrelated to the protection of trade names. Compliance usually confers no priority in the right to use a particular name and, of itself, does not protect against use of the same name by another person. Similarly, failure to comply with the statute does not bar the common law right to enjoin use of the same name as


To implement this purpose, the Washington statute made failure to file a required fictitious name certificate presumptive evidence of fraud in procuring credit. WASH. REV. CODE § 19.80.040 (1958).


15 One Washington case states that the primary purpose of the statute is to prevent partners from concealing the partnership relationship in an attempt to avoid liability for partnership debts. Bowman v. Harrison, 59 Wash. 56, 109 P. 192 (1910); accord, Bacon v. Gardner, 38 Wash. 2d 299, 229 P.2d 523 (1951). See also Rerick v. Ireland, 76 Ind. App. 139, 131 N.E. 527 (1921); Canonica v. St. George, 64 Mont. 200, 208 P. 607 (1922).

At least one court has stated that this is the primary policy in enacting fictitious name legislation. Cor-Gal Builders, Inc. v. Southard, 136 So. 2d 244 (Fla. Ct. App. 1962). See also Rowland v. Canuso, 329 Pa. 72, 196 A. 823 (1933); Leckie v. Seal, 161 Va. 215, 170 S.E. 844 (1933).

unfair competition. In several states, however, fictitious business name filings are at least partially coordinated with trademark and trade name protection systems. The provisions of these statutes vary according to purpose. Some, such as the Australian Uniform Act, provide only that the registrar may refuse to register "undesirable" names. Other states, such as Oregon, provide a comprehensive system of registration of assumed names and authorize cancellation or suspension for similarity or misuse. Thus, in such states the filings may also provide a means of obtaining exclusive use of a particular name.

Although there seems to be some misconception in the minds of businessmen about the effect of the California statute, it is clear that it does not provide a means for obtaining exclusive use of a business name. Related California statutes provide for trademark protection and for the registration and protection of specific types of names such as farm names. However, there are no general provisions for registering and obtaining exclusive use of trade names. The person who first adopts and uses a trade name, whether within or beyond the limits of the state, is its original owner. He is offered a measure of protection by common law doctrines relating to protection of trade names and by various theories of unfair competition. A showing that one has complied with the fictitious business name statute might be some evidence of first adoption and use of a particular name, but there appears to be no California appellate decision in which such evidence influenced the court in reaching its

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19 Other statutes require the application to contain a brief description of the kind of business to be conducted. COLA. REV. STAT. ANN. § 141-2-1 (1963); GA. CODE ANN. § 106-301 (1956); NEB. REV. STAT. § 87-202 (1966); N.H. REV. STAT. ANN. § 349:5 (1966); OR. REV. STAT. § 648.050 (1963); Uniform Business Names Act § 9 (Victoria 1962). This information is only useful in connection with unfair business practices.
21 OR. REV. STAT. §§ 648.005-.990 (1965).
22 See OR. REV. STAT. § 648.050 (1963); Potter v. Osgood, 69 Pitts. 856 (Pa. 1921).
23 See Benioff v. Benioff, 64 Cal. App. 745, 749-50, 222 P. 835, 837-38 (1923). The California Law Revision Commission has received several letters expressing a fear that a revised statute would "no longer" protect the use of a trade name by prior filing.
24 Tomsky v. Clark, 73 Cal. App. 412, 238 P. 950 (1925) (filing of copartnership certificate to operate business in family name of another did not give exclusive right to the name).
25 CAL. BUS. & PROF. CODE §§ 14200-325.
26 CAL. BUS. & PROF. CODE §§ 14460-65.
27 CAL. BUS. & PROF. CODE § 14400.
Some persons believe that fictitious business name legislation is ineffective because many of the statutes fail to include important types of business organizations and because the sanctions often are not sufficient to obtain compliance. Nevertheless, the enactment of such legislation by the great majority of states and by many foreign jurisdictions indicates that the statutes provide a useful source of information. Federal, state, and local agencies, as well as commercial enterprises, use the fictitious business name information filed under the California statute. In Los Angeles County, 77,417 index searches, including both fictitious and corporate names, were made during 1965.

The difficulty with the California statute is not its lack of a useful purpose but rather its inadequacy in relation to modern business conditions. This article compares the California statute with the statutes of other jurisdictions and suggests changes that would make the statute more useful and effective and, at the same time, minimize the burden imposed upon those required to comply.

Persons and Firms Affected

In General

The California statute applies to "every person transacting business in this State under a fictitious name and every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business." A corporation is a "person" under the

29 In Lutz v. Western Iron & Metal Co., 190 Cal. 554, 213 P. 962 (1923), the court alluded to the certificate that was filed but did not seem to give any particular weight to it in reaching its decision. Cf. People v. Pinkus, 256 A.C.A. Supp. 175, 63 Cal. Rptr. 680 (1967) (fictitious name certificate evidence against defendant in criminal case to show ownership of store selling obscene films); Katschinski v. Keller, 49 Cal. App. 406, 193 P. 587 (1920) (fictitious name certificate filed by defendant introduced by plaintiff in unfair competition case as evidence of use of name by defendant).

30 The County Clerk of Los Angeles County reports that both the United States Post Office and the United States Treasury Department use this information. Letter from William G. Sharp, Los Angeles County Clerk, to Cal. Law Revision Comm'n, March 17, 1966.


32 Letter from William G. Sharp, supra note 30.

33 Id.

34 Id. Los Angeles County had 345,000 separate business names on file in 1965. Id.

35 CAL. CIV. CODE § 2466.
statute and must comply if it transacts business under a name other
than the one stated in its articles.\textsuperscript{36} Commercial or banking partnerships established and transacting business in a foreign country are specifically excepted,\textsuperscript{37} and it has been held that persons not maintaining a place of business in California are not included.\textsuperscript{38}

The statutes in six other states emulate the California provision
and apply to firms transacting business under a "fictitious name" or
"a designation not showing the names of the persons interested as
partners in the business."\textsuperscript{39} In 12 states, the statute applies to firms conducting or transacting business under an "assumed name" or under "any designation, name, style, corporate or otherwise, other than the real name of the individual conducting or transacting such business."\textsuperscript{40} Most of the remaining states require registration by any firm doing business under a name or title "other than the real name or names of the person or persons conducting or transacting such business."\textsuperscript{41}

\textsuperscript{37} CAL. CIV. CODE § 2467.
\textsuperscript{38} Moon v. Martin, 185 Cal. 361, 197 P. 77 (1921).
\textsuperscript{39} ARIZ. REV. STAT. ANN. § 29-102 (Supp. 1967); MONT. REV. CODES ANN. § 63-601 (1962); NEV. REV. STAT. § 602.010 (1957); N.D. CENT. CODE § 45-11-01 (1960); OHIO REV. CODE ANN. § 1777.02 (Page 1964); OKLA. STAT. tit. 54, § 81 (1961). See also DEL. CODE ANN. tit. 6, § 3101 (1953) ("trade name or title which does not disclose the Christian and surname of such person"); GA. CODE ANN. § 106-301 (1956) ("which does not disclose the individual ownership of the trade, business, or profession"); MICH. REV. STAT. ANN. § 19.821 (1964), as amended No. 138 [1967] Mich. Pub. Acts; LA. REV. ANN. § 547.1 (1966) ("under any assumed name, or under any designation other than the real name or names"); MONT. REV. STAT. §§ 648.005 (1965); and W. VA. CODE § 333.01 (1965) ("designation, name, or style, which does not set forth the full individual name of every person interested in such business").
\textsuperscript{40} ARK. STAT. ANN. § 70-401 (1947); CONN. GEN. STAT. REV. § 35-1 (1960), as amended No. 84 [1967] Conn. Pub. Acts 112; IDAHO CODE ANN. § 58-501 (1957); ILL. REV. STAT. ch. 96, § 4 (1965); KY. REV. STAT. § 365.010 (1962); LA. REV. STAT. § 51:281 (1950); MICH. STAT. ANN. § 19.821 (1964), as amended No. 138 [1967] Mich. Pub. Acts; N.J. REV. STAT. ANN. § 56:1-2 (1954); R.I. GEN. LAWS ANN. § 6-1-1 (1966); TEX. PEN. CODE art. 1067 (1948), TEX. REV. CIV. STAT. art. 5924 (1948); WASH. REV. CODE § 19.80.010 (1961); W. VA. CODE § 47-8-2 (1966). See also ALA. CODE tit. 14, § 230 (1958) ("under any assumed name, or under any designation other than the real name or names"); IOWA CODE § 547.1 (1966) ("under any trade name, or any assumed name of any character other than the true surname of each person or persons owning or having an interest in such business"); MO. REV. STAT. § 417.210 (1959) ("fictitious name or under any name other than the true name of such person"); N.C. GEN. STAT. § 66-68 (1963) ("under any assumed name or under any designation, name or style other than the real name of the owner or owners thereof"); OREG. REV. STAT. § 648.005 (1963) ("under any assumed name or under any designation, name or style, other than the real and true name of each person conducting the business or having an interest therein").
\textsuperscript{41} IND. ANN. STAT. § 50-201 (Supp. 1967). Similar wording is used in the following statutes: COLO. REV. STAT. ANN. § 141-2-1 (1963) ("under any other name than the personal name or names of his or its constituent members"); FLA. STAT. § 865.00 (1965) ("other than the proper name or known called names of those persons engaged in such business"); MD. REV. STAT. ANN. tit. 31, § 2 (1984) ("other than his own name exclusively"); Md. ANN. CODE art.
The generality of the language used in the statutes to describe the persons and firms covered leaves important questions of interpretation to the courts. For example, decisions vary on the effect of inclusion in a firm name of “Co.” “& Co.” “Bros.” “& Son.” or similar words or symbols. The Oregon statute is unique in that it deals with this particular problem by requiring compliance if the name suggests the existence of additional owners. It further provides that, “Words which suggest the existence of additional owners . . . include such words as ‘Company,’ ‘& Company,’ ‘& Son,’ ‘& Associates’ and the like.”

In addition, the question whether a particular type of business is covered by a given statute is often litigated. Although most of the statutes use similar language in describing the firm names that must be registered, the actual types of entities covered differ because of specific statutory inclusions and exceptions and because of court construction of the statute. Fictitious business name statutes generally are strictly construed; they are said to be in derogation of the common law or to be penal in nature. As a result, few courts


42 Ore. Rev. Stat. § 648.010(1) (1963): “No person or persons shall carry on, conduct or transact business in this state under any assumed name or under any designation, name or style, other than the real and true name of each person conducting the business or having an interest therein, standing alone or coupled with words which merely describe the business carried on and do not suggest the existence of additional owners, unless the person or all the persons conducting the business or having an interest therein sign and cause to have filed a verified application for registration with the Corporation Commissioner. Words which suggest the existence of additional owners within the meaning of this section include such words as ‘Company,’ ‘& Company,’ ‘& Sons,’ ‘& Associates,’ and the like.” (emphasis added)

43 Humphrey v. City Nat'l Bank, 190 Ind. 293, 130 N.E. 273 (1921); Lipman v. Thomas, 143 Me. 270, 61 A.2d 130 (1948).

have been willing to extend their coverage by construction.\textsuperscript{45} However, this rule has not been followed in California. Its statute, for example, has been expansively interpreted to include a corporation operating under a name other than its actual corporate name.\textsuperscript{46}

**Individual Proprietors**

The California statute specifically includes individuals. Only four states—those that limit application of their fictitious business name statute to partnerships—do not include individuals.\textsuperscript{47} The only significant problem in applying the statutes to individuals lies in determining when a firm name is such that it requires registration.

As a general rule, registration is not required if a sole proprietor's surname appears in the designation accompanied by words descriptive of the business. For example, a California court has held that the firm name "Kohler Steam Laundry" need not be registered.\textsuperscript{48} However, where the word "company" is used, the courts differ from jurisdiction to jurisdiction. The California Supreme Court has ruled that an individual trading under the name "W.S. Wetenhall Company" does not have to register.\textsuperscript{49} This construction appears to be based on a view that the single object of the legislation is to require disclosure of the proprietorship of the business and that the sole proprietor who uses his personal name in the business designation is not withholding from customers any information regarding the person with whom they are dealing.\textsuperscript{50} However, this view is not universally shared. Pennsylvania, for example, has held that the name "Hagerling Motor Car Company" as used by an individual is fictitious because the word "company" implies that there are other owners of the business.\textsuperscript{51} In addition,

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\textsuperscript{45} The Pennsylvania statute was held inapplicable to an unincorporated association because it purported to cover only "individuals" carrying on business under a fictitious name. Chester Progressive Club v. Rossin, 75 Pa. D. & C. 413 (C.P. Delaware Cty. 1950). See also Talbot v. Ephrata Nest No. 1805, Order of Owls, 40 Lanc. L. Rev. 105 (Pa. C.P. 1926).


\textsuperscript{50} Wetenhall v. Chas. S. Mabrey Constr. Co., 209 Cal. 590, 276 P. 1015 (1930).

\textsuperscript{51} Hagerling Motor Car Co. v. Palmer, 3 Pa. D. & C. 650 (C.P. Dauphin
it is fairly clear in California and most other jurisdictions that use of such terms as "& Co." and "& Company" by an individual proprietor necessitates filing.\(^6^2\) Such addenda imply additional owners and thus make the name fictitious as well as misleading.\(^5^3\)

This uncertainty should be eliminated by adding a provision similar to the previously mentioned section of the Oregon statute.\(^5^4\) Adoption of the provision in California would expand coverage of the existing statute only to the extent of including sole proprietors who use the terms "Co." and "Company." In other words, the provision would eliminate the distinction now drawn between "Jones Company" and "Jones & Company." As a practical matter, few businessmen probably are aware of this technical distinction. Further, individual proprietorships could still be conducted under a name such as "Kohler Steam Laundry." Only those persons insisting upon the use of the word "company" or a variant of that term would be required to file.

**Partnerships**

The California statute specifically covers "partnerships" that transact businesses under a "fictitious name" or a "designation not showing the names of the persons interested as partners in such business."\(^5^5\) This provision has been construed to include unincorporated

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\(^6^3\) In Wetenhall v. Chas. S. Mabrey Constr. Co., 209 Cal. 293, 295, 286 P. 1015, 1016-17 (1930), the court said: "We have been unable to discover any case in which a single individual who was doing business under a name not his own, but one which was not fictitious, was required to comply with said section 2466 . . ." (emphasis added). A name such as John Doe & Co.—as opposed to John Doe Co.—should be held to be a fictitious name rather than a designation showing the owner's name because there is an implication of additional owners, and therefore should not come within the Wetenhall reasoning. See Doob & Bro. v. Lovell Mfg. Co., 3 Ohio N.P. 169, 4 Ohio Dec. 186 (C.P. Hamilton Cty.), aff'd 12 Ohio C. Dec. 722 (1839) ("Doob & Bro." is fictitious because there are three—as opposed to two—brothers in the partnership); see also Birdwell v. Watson, 268 App. Div. 642, 53 N.Y.S.2d 77 (Sup. Ct. 1945) (clerk properly refused to register "Russell Birdwell and Associates" because it is misleading to public where Birdwell had no associates); accord, Proctor v. Watson, 2 Misc. 2d 881, 149 N.Y.S.2d 100 (Sup. Ct. 1956). But see Willey v. Crocker-Woolworth Nat'l Bank, 141 Cal. 508, 513, 75 P. 106, 108 (1904) (no presumption of additional owners from use of "& Company" in estoppel case).

\(^5^4\) ORE. REV. STAT. § 648.010(1) (1965).

\(^5^5\) CAL. CIV. CODE § 2466.
cooperative associations, \(^{56}\) joint stock companies, \(^{57}\) and business trusts. \(^{58}\) It does not include unincorporated fraternal benefit societies \(^{59}\) or trustees transacting business as a finance company. \(^{60}\) Although the statute is not entirely clear in this respect, a partnership must file if its firm name includes the surnames of some, but not all, of the partners. \(^{61}\)

The statutes in 25 other states specifically apply to partnerships. \(^{62}\) Ten of these states preclude a construction that would exclude unincorporated business associations, such as joint ventures, by referring to a partnership or association, \(^{63}\) a firm or partnership, \(^{64}\) or a firm or association. \(^{65}\) Thirteen states provide only that “persons” or “individuals” must comply, \(^{66}\) and three additional states include only individuals and corporations. \(^{67}\) However, most of these

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\(^{56}\) Kadota Fig Ass’n of Producers v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946).


\(^{58}\) Kadota Fig Ass’n of Producers v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946).


\(^{60}\) Wright v. Schaad, 111 Cal. App. 87, 295 P. 373 (1931).

\(^{61}\) See Flora v. Hankins, 204 Cal. 351, 268 P. 331 (1938); Pendleton v. Cline, 85 Cal. 142, 24 P. 659 (1890).


statutes are construed to include partnerships. In only two states are partnerships either expressly or impliedly exempted.

Seven states specifically require registration of a partnership name that does not include the surnames of all of the partners. This appears to be the rule in states without such an express provision, and it is the statutory rule in the United Kingdom and the Australian states. A second group, consisting of five states, requires registration unless the surname of at least one partner appears in the firm name. An additional provision in some states requires compliance if the business uses the terms "& Co." or "and Company." As a variation, the Arizona statute provides that use of these terms without displaying a sign indicating the names of the owners subjects the business assets to full liability for the debts of the person ostensibly conducting the business.

The exception as to partnership names should be limited to those firm names that include the surnames of all the partners. Any broader exception tends to defeat the purpose of the legislation generally and is inconsistent with the objective of preventing concealment of the names of responsible partners. There is no assurance that a named partner has assets or a substantial interest in the business. Further, until the litigation stage is reached, there is no feasible means of requiring the named partner to divulge the identity of his copartners. Even in litigation, the plaintiff must resort to discovery to determine the names of the other partners. This runs counter to the view, stated by some courts, that the

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68 See, e.g., Arnold Barber & Beauty Supply Co. v. Provance, 221 Ark. 385, 253 S.W.2d 367 (1952); Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930); 1962 Minn. Op's Att'y Gen. 920-D.


71 See, e.g., Cruse v. Wilson, 92 So. 2d 270 (Fla. Sup. Ct. 1957).


77 See note 15 supra.
statute is meant to require disclosure of the name of the real party in interest.\textsuperscript{78} The problem could be particularly acute when the named partner has died, a certificate has not been filed to show that the name is now fictitious, and the name of the firm has not been changed. To avoid such problems, the California statute should codify the existing rule that a filing must be made if the name of the firm does not contain the surnames of all of the partners.

\textbf{Problems of Statutory Construction}

California follows the general rule that use of the word "and" or the use of an ampersand between the surnames of all of the partners does not make the name fictitious.\textsuperscript{79} It is clear that use of the term "& Co." subjects a partnership to the requirements of the statute. The California Supreme Court held in an early decision that the firm name "J.D. Byers & Co." did not show the names of all of the persons interested in the business.\textsuperscript{80} In addition, it would appear that any partnership using the term "Company" as a part of its firm name must comply with the California statute since the reasoning of the \textit{Wetenhall}\textsuperscript{81} case does not apply where there is more than one owner.\textsuperscript{82} The California Supreme Court has also held that the business names "Abrams Bros."\textsuperscript{83} and "P.H. Murphy & Son"\textsuperscript{84} do not show the persons interested as partners and therefore must be registered.

Authority from other states provides no uniform rule as to when

\textsuperscript{78} See note 16 supra.
\textsuperscript{80} Byers v. Bourret, 64 Cal. 73, 23 P. 61 (1883); accord, Nicholson & Co. v. Auburn Gold Mining & Milling Co., 6 Cal. App. 547, 32 P. 651 (1907).
\textsuperscript{81} 209 Cal. 293, 286 P. 1015 (1930).
\textsuperscript{83} North v. Moore, 135 Cal. 621, 67 P. 1037 (1902).
\textsuperscript{84} Swartz & Gottlieb, Inc. v. Marcuse, 175 Cal. 401, 165 P. 1015 (1917).
a partnership name must be registered. For example, the Supreme Judicial Court of Maine held that three men named Lipman doing business as "Lipman Poultry Co." were required to register the firm name, but the Florida Attorney General has ruled that the name "Jones & Co." need not be registered where both partners are named Jones. The partnership designation "Cohick's Meat Market" was held by a Pennsylvania court not to be fictitious because all of the partners were named Cohick although it appears that the opposite result would have been reached if the word "Company" had appeared in the name. The Michigan courts have gone so far as to hold the name "David S. Zemon & Co." need not be registered despite the fact that Zemon's partner had a different surname.

The general rule in states other than California is that the use of "Bros." following the partners' surname does not make the firm name fictitious because the name affords a reasonable and sufficient guide to correct knowledge about the owners of the business. The reasoning of these cases is equally applicable where "& Son" is used. Most courts hold that use of such a name does not render the designation fictitious.

Any uncertainty in the California statute would be eliminated by a provision similar to the Oregon statute noted above. Adoption of that language would not change existing law. As indicated above, California law differs from the majority rule where the term "Bros." or "& Son" is used and already requires the firm to file a fictitious business name certificate.

86 Lipman v. Thomas, 143 Me. 270, 61 A.2d 130 (1948).
87 1946 FLA. ATT'Y GEN. BIENNIAL REP. 735.
93 OR. REV. STAT. § 648.010 (1) (1965).
Partnerships Established and Transacting Business in a Foreign Country

California Civil Code section 2467 provides:

A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate or making the publication prescribed in the last section, use in this State the partnership name used by it there, although it be fictitious, or do not show the names of the persons interested as partners in such business.

This exception was included in the 1872 Civil Code and has remained, with only a minor modification in 1873. The exception was taken from the New York act of 1833, as amended in 1849—the first fictitious business name statute enacted in the United States. Six other states also adopted this exception. Three of these states copied the California statute, including this exception, when they first enacted their fictitious business name statutes. One of the six states, South Dakota, has since eliminated it, as has New York, its original source.

Civil Code section 2467, the California exception for commercial and banking partnerships established and transacting business in a foreign country, should be repealed. The reference to banking partnerships is now obsolete since only a corporation may carry on the business of banking in California. Foreign commercial partnerships should be required to comply with the statute. Persons in California have greater difficulty in obtaining information concerning such partnerships than in obtaining information concerning local partnerships. Since both foreign and domestic partnerships would be treated equally, there would be no discrimination against foreign...
commerce. Information concerning the partnerships covered by section 2467 will be especially useful because such partnerships are the only foreign partnerships not covered by Corporations Code section 15700 which requires foreign partnerships doing business in California to designate an agent for service of process if the partnership does not have a regular place of business in this state. Whatever the reason for including it in the 1872 statute, the exception is no longer justifiable. This conclusion is strengthened by the fact that the exception has been eliminated in the state where it originated, New York, and by the failure of most of the recent fictitious business name statutes to include it.

Law or Other Professional Partnerships

California has no special provision in its fictitious business name statute regarding law partnerships or other professional partnerships. Some states have made special provisions for professional firms. The Georgia statute\textsuperscript{104} excepts all professional partnerships, and the New York\textsuperscript{105} and Arizona\textsuperscript{106} acts specifically exempt law partnerships. A similar result has been reached in Minnesota where a law partnership is not considered a commercial enterprise within the meaning of the statute.\textsuperscript{107}

There are many provisions in the California Business and Professions Code regarding the use of fictitious names by licensed persons.\textsuperscript{108} The most significant of these is section 2393, which requires

\textsuperscript{103} No reason is perceived for this exception to \textsc{Cal. Corp. Code} § 15700 except that it conformed that section to \textsc{Cal. Civ. Code} § 2467. The exception should be eliminated. Section 15700 is based on former Civil Code § 2472, Cal. Stats. 1909, ch. 696, § 1, at 1065, which described the partnerships not required to designate an agent for service of process by reference to \textsc{Cal. Civ. Code} § 2467, when the service of process provisions were part of the chapter on fictitious names.

\textsuperscript{104} \textsc{Ga. Code Ann.} § 106-304 (1956).

\textsuperscript{105} \textsc{N.Y. Gen. Bus. Law} § 130 (McKinney Supp. 1967).


\textsuperscript{107} 1948 \textsc{Minn. Ops. Att'y Gen.} 920-D; cf. \textsc{Southwestern Bell Tel. Co. v. Texas State Optical}, 253 S.W.2d 877 (Tex. Civ. App. 1952).

\textsuperscript{108} \textsc{Cal. Bus. & Prof. Code} § 1000-10 (no chiropractor shall practice under an assumed or misleading name); § 1680 (use of any false, assumed or fictitious name by a dentist other than licensed name is unprofessional conduct); § 2393 (requires physicians to obtain permit to operate under fictitious name); § 3125 (no optometrist may practice under a false or assumed name); §§ 5072-74 (require fictitious name information when accountancy partnership registers); § 5668 (use of assumed or fictitious or corporate name by landscape architect is grounds for disciplinary action); § 6875 (collection agencies must furnish fictitious name information to get license, and license may be refused for similarity); § 7067 (registration of contractors' partnership contains same information as fictitious name statement); § 7540 (private detective must have fictitious name certificate to get a license); § 7629 (mortician may not use misleading name); § 8936.1 (yacht or ship builder cannot use a fictitious name unless licensed under that name); § 9330 (electronic repair dealer cannot carry on business under fictitious name unless stated on ap-
physicians to obtain a permit from the Board of Medical Examiners before opening a clinic or similar establishment under a fictitious name. Only certain specified names may be used and violation of the section is punishable both as unprofessional conduct and as a misdemeanor. Such permits must be renewed either every year or every 2 years depending upon the particular type of medicine practiced by the partnership. These fictitious-name permits apparently must be filed with the county clerk and indexed by him under provisions requiring every person authorized to practice medicine in this state to file a certificate in the office of the county clerk in every county in which he is practicing.

The provisions concerning use of fictitious names by physicians are adequate to protect the public from fraud and deceit and to give the creditors of the partnership sufficient information about the particular firm. There is no significant reason to include physicians within the terms of the general fictitious name statute and therefore a special exception should be made for medical partnerships that come within the provisions of section 2393. To assure that the information will be available to the public, section 2340 should be amended to require expressly the filing of fictitious name permits issued by the Medical Examiner's Board with the county clerk, and section 2341 should be amended to require the county clerk to maintain an alphabetical index of the information.

Law partnerships should also be excepted from the business name legislation. Canon 33 of the American Bar Association Canons of Professional Ethics provides in part that "in the selection of a firm name, no false, misleading, assumed or trade name should be used." Thus, the use of "& Co.," "Associates," "and Co.,” "Northern

plication for permit); § 10159.5 (real estate broker must prove compliance with the fictitious name statute before license will issue in fictitious name). See also Cal. Ins. Code § 1724.5 (all fictitious names must be listed and Commissioner may screen for similarity and misleading names); Cal. Fin. Code § 12300.2 (check seller or cashier must conduct business under true name unless he has complied with the fictitious name statute).

Cal. Bus. & Prof. Code § 2393(c) provides that the name must include at least one of the following designations: "Medical Group," "Medical Clinic," "Podiatrists' Group," or "Podiatrists' Clinic."


Cal. Bus. & Prof. Code § 2340 requires filing by the physician. Section 2341 requires the county clerk to keep an alphabetical register of the certificates.


ABA Comm. on Professional Ethics, Opinion No. 219, in H. Drinker, Legal Ethics, app. A, nos. 373, 374 (1953).

Law Clinic," "McCarrus Claim Service," "Veterans' Legal Service," "Legal Bureau," and "Legal Writing Associates" has been held improper.

Attorneys practicing in California are registered with the State Bar although no record of members of partnerships is required to be kept. Firm nameplates and letterheads customarily include the names of all interested partners, and the names of the members of law firms are listed in the various unofficial legal registers, such as Martindale-Hubbell. In addition, partnerships between lawyers and members of other professions or nonprofessional persons are generally not allowed where any part of the partnership's activities consists of the practice of law. It seems clear therefore that the purpose of the fictitious name statute will be fully achieved without requiring law partnerships to file statements.

Limited Partnerships

At present, California has no exception for limited partnerships. A substantial overlap in filing requirements results from the registration provisions of the Uniform Limited Partnership Act which was enacted in 1929 and is now codified as Corporations Code sections 15501 to 15531.

Corporations Code section 15502 requires persons forming a limited partnership to sign and acknowledge a certificate setting forth the name of the partnership, the character of the business, the location of the principal place of business, the name and place of residence of each member, the term of the partnership, the capital contribution of each limited partner, and other information. The certificate must be filed in the office of the recorder of the county in which the principal place of business is located as well as in the recorder's office in each county where the partnership has a place of business or holds title to real property.

Section 15505 provides that the surname of a limited partner cannot appear in the firm name unless it is also the surname of a

118 Id. no. 376.
119 Id. no. 375.
120 N.Y. CITY BAR COMM. OP. b-7 (1945), in OPINIONS ON PROFESSIONAL ETHICS No. 684 (Cromwell Foundation ed. 1956).
121 N.Y. CITY BAR, COMM. OP. 53 (1926-1927), in OPINIONS ON PROFESSIONAL ETHICS No. 48 (Cromwell Foundation ed. 1956).
123 There are, however, decisions which hold that use of the term "Brothers" or "& Son" is proper. H. DRIINGER, LEGAL ETICS, app. A, nos. 370, 371 (1953).
124 MARTINDALE-HUBBELL, LAW DIRECTIONARY (100th ed. 1968).
125 ABA, CANONS OF PROFESSIONAL ETHICS No. 33 (1937).
126 Cal. Stats. 1929, ch. 865, § 1, at 1912.
127 CAL. CORP. CODE § 15502.
general partner or unless, prior to the time that the limited partner
became such, the business was carried on in a name including his
surname. Sections 15524 and 15525 set forth the procedure for amending
or canceling the certificate and prescribe when such an amendment
or cancellation must be made.\textsuperscript{128}

New York,\textsuperscript{129} North Carolina,\textsuperscript{130} and Washington\textsuperscript{131} have recog-
nized the overlap and have excepted limited partnerships from their
fictitious business name statutes. West Virginia does not require
either general or limited partnerships to file a fictitious name
statement,\textsuperscript{132} apparently because those organizations must file under
more comprehensive partnership acts. Michigan recently enacted a
unique provision which requires all partnerships which file a fictitious
name statement to include a reference to the place and date of
filing with any governmental authority of any documents required to
be filed in order to complete the organization of the business and
entitle it to transact business in the state.\textsuperscript{133}

When fictitious name files are maintained only at the county
level—the present California practice—there is no substantial reason
for requiring a limited partnership to file both a limited partnership
statement and a fictitious business name statement. However, under
a central filing system,\textsuperscript{134} the purpose of which is to make as much
information as possible available at a single location, the filing of
both certificates serves a useful purpose. In addition, the fictitious
name certificate maintained under a central filing system should
indicate the place or places where the limited partnership certificate
has been filed so that an interested party may find that information.

Corporations

The California statute does not expressly include corporations.
However, the court of appeal held in \textit{Berg Metals Corp. v. Wil-

\textsuperscript{128} Section 15524 provides that the certificate shall be cancelled when the
partnership is dissolved or all limited partners cease to be such. Other perti-
nent subdivisions provide that a certificate must be amended if there is a
change in the name of the partnership, or if new limited or general partners
are admitted to the firm, or if a general partner ceases to be interested in the
business.

The pertinent provisions of section 15525 provide that a writing to amend
a certificate must be signed and acknowledged by all members of the firm
and that a person desiring the cancellation or amendment of a certificate may
petition the superior court to direct a cancellation or amendment of the cer-
tificate if any person who must execute the writing refuses to do so.

\textsuperscript{129} N.Y. GEN. BUS. LAW § 130(7) (McKinney Supp. 1967).

\textsuperscript{130} N.C. GEN. STAT. §§ 66-68, 66-70 (Supp. 1967).

\textsuperscript{131} WASH. REV. CODE § 19.80.020 (1961).

\textsuperscript{132} W. VA. CODE ANN. § 47-8-4 (1966).


\textsuperscript{134} See text accompanying notes 160-86 infra.
son\textsuperscript{135} that the term “person” in the California statute includes corporations. As a result, a corporation must file a certificate when it is doing business under a name other than its corporate name. For example, if “California Mill Supply Corporation” is the corporate name and the business is transacted in that name, there is no need to file a certificate. However, if the same corporation transacts business as “Berg Metals Company,” it is transacting business in a fictitious name and must file a certificate.

The New York fictitious name statute of 1833,\textsuperscript{136} as amended in 1854,\textsuperscript{137} provided an exception for both domestic and foreign corporations. At the present time, statutes in 15 states specifically exempt corporations.\textsuperscript{138} In addition, 16 other states limit coverage to “persons” or “individuals” or individuals and partnerships but do not specifically exempt corporations.\textsuperscript{139} However, 12 states\textsuperscript{140} and the United Kingdom,\textsuperscript{141} which originally had either an express or implied exception for corporations, now expressly include corporations within their statutes. The Australian acts also expressly include corporations.\textsuperscript{142} In addition, at least two states include corporations within the statute by judicial decision,\textsuperscript{143} and the Florida Attorney General

\textsuperscript{136} Ch. 281, [1833] N.Y. Laws 96.
\textsuperscript{137} Ch. 400, § 2, [1854] N.Y. Laws 1084.
\textsuperscript{141} Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116 (3).
\textsuperscript{142} Uniform Business Names Act § 5(2b) (Victoria 1962).
has expressed the view that the corporate exception in the Florida statute applies only to use of the actual corporate name. This marked trend toward inclusion of corporations is noteworthy in view of the significant number of corporations presently doing business in the United States under assumed names. There is no substantial reason for excluding a corporation from coverage unless the particular state prohibits a corporation from engaging in business under a name other than its corporate name.

To meet the problem created by including corporations within the terms of a fictitious business name statute, seven states, the United Kingdom, and the Australian states now provide by statute that a corporation need not file a certificate if it is doing business in its actual corporate name. This provision precludes a construction of the statute that would require a filing with the agency in charge of corporations in the particular state as well as with the office designated to receive fictitious name statements. This is a sensible rule because the corporate name should not be considered "fictitious"; it is the formally adopted name of a "legal person." However, when a corporation does business under a name different from that under which it is incorporated, it should be required to file in the same manner and in the same place as any other person using a fictitious business name. Such a rule allows an interested person to trace down a particular name by searching the files in a single location. It would also fill a gap in the California corporate registration provisions since a California corporation is not otherwise required to file a certificate when it does business in a name other than its corporate name. The California statute should be revised to codify the decision in Berg Metals to include expressly corporations doing business under a fictitious name.

Foreign Corporations Qualified to Transact Business in California

California Corporations Code sections 6403-08 prohibit a foreign corporation from transacting intrastate business in California without having first obtained a certificate of qualification from the secretary of state. To obtain a certificate of qualification, the corporation must file a statement containing information specified in the stat-
The use of misleading or deceptive corporate names is prohibited; the secretary of state is authorized, however, to permit a foreign corporation to substitute a fictitious name, if the corporate name is the same as or deceptively similar to the name of a domestic or another foreign corporation authorized to transact business in California, or if its use would be likely to mislead the public.\textsuperscript{151}

These California provisions relating to foreign corporations are generally satisfactory. At the present time, foreign corporations file only with the secretary of state.\textsuperscript{152} The fictitious name statements, which are now filed only at the county level, contain no reference to the fact that the firm is not a domestic corporation. The statement should indicate the fact that the business is a foreign corporation so that the other information on file with the secretary of state will be readily accessible to interested persons. If central filing of fictitious business name statements is adopted,\textsuperscript{153} the statement should still contain an indication that the business is a foreign corporation so the persons using the local file will be aware of that fact and will have a ready cross-reference to other files.

**Persons Not Regularly Transacting Business in California**

The California statute has been held not to cover a person who does not maintain a place of business in California.\textsuperscript{154} The need for California residents to be able to discover the identity of persons who do not have an established place of business in California seems at least as great as the need to be able to discover the identity of persons doing business from a fixed location within the state. Most foreign partnerships doing business in California are required to designate an agent for service of process if they do not maintain a place of business in this state,\textsuperscript{155} and the extension of the fictitious business name statute to cover such partnerships would not impose a substantial additional burden on them, especially if filing under the fictitious business name statute were in the same office as the filing of the designation of an agent for service of process. Foreign corporations are also required to file to qualify to do business in

\textsuperscript{150} \textit{CAL. CORP. CODE} § 6403.
\textsuperscript{151} \textit{CAL. CORP. CODE} § 6404.
\textsuperscript{152} \textit{CAL. CORP. CODE} § 6401, Cal. Stats. 1947, ch. 1038, § 6401, at 2405, required a foreign corporation also to file a copy of its articles with the county clerk of the county in which its principal place of business in this state was located and with the county clerk of any other county in this state in which it owns real property. This section was repealed in 1959.
\textsuperscript{153} See text accompanying notes 160-86 infra.
\textsuperscript{154} Moon v. Martin, 185 Cal. 361, 197 P. 77 (1921).
\textsuperscript{155} \textit{CAL. CORP. CODE} § 24003.
this state and the requirement that they file under a fictitious name statute would impose no substantial additional burden.

Some jurisdictions such as Michigan and the Australian states specifically provide that certain transactions will not be considered "doing business" within the meaning of the statute. A better method would be to require only businesses "regularly" transacting business in this state to file. Reliance may be placed upon the normal judicial construction of the term "doing business" in cases involving fictitious names. Inclusion of the term "regularly" will make it clear that the statute does not apply to a person who engages in only isolated transactions in California.

Recommendation

The problems of what business entities are covered by a particular statute and what firm names must be registered have caused a great deal of litigation. A carefully drafted, comprehensive statute could eliminate most of these problems. Two appropriate sections of a definitional nature would be as follows:

(a) As used in this chapter, "fictitious business name" means:
   (1) In the case of an individual, a name that does not include the surname of the individual or a name that suggests the

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156 CAL. CORP. CODE § 6403.
157 MICH. STAT. ANN. § 19.821 (Supp. 1968), provides, "that the selling of goods by sample or through traveling agents or traveling salesmen or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this act as conducting or transacting business so as to require the filing of said certificate."

North Carolina and West Virginia have similar provisions. N.C. GEN. STAT. § 66-68(d) (1963); W. VA. CODE ANN. § 47-8-2 (1966).
158 Uniform Business Names Act § 4(2) (Victoria 1962) provides:
"For the purposes of this Act a person shall not be regarded as carrying on business within this State for the reason only that within the State he—
(a) is or becomes a party to any action or suit or any administrative or arbitration proceeding, or effects settlement of an action, suit or proceeding of any claim or dispute;
(b) maintains any bank account;
(c) effects any sale through an independent contractor;
(d) creates evidence of any debt or creates a charge on real or personal property;
(e) secures or collects any of his debts or enforces his rights in regard to any securities relating to such debts;
(f) conducts an isolated transaction that is completed within a period of thirty-one days, but not being one of a number of similar transactions repeated from time to time; or
(g) invests any of his funds or holds any property."
existence of additional owners.

(2) In the case of a partnership or other association of persons, a name that does not include the surname of each general partner or a name that suggests the existence of additional owners.

(3) In the case of a corporation, any name other than the corporate name stated in its articles of incorporation.

(b) A name that suggests the existence of additional owners within the meaning of subdivision (a) is one which includes such words as “Company,” “& Company,” “& Sons,” “& Associates,” “Brothers,” and the like, but not words that merely describe the business being conducted.

(c) As used in paragraph (2) of subdivision (a), “general partner” means:

(1) In the case of a partnership, a general partner.

(2) In the case of an unincorporated association other than a partnership, a person interested in such business whose liability with respect to the business is substantially the same as that of a general partner.

As used in this chapter, “person” includes individuals, partnerships or other associations, and corporations.

To exclude nonprofit associations and corporations, the section that requires filing should provide that “every person who is regularly transacting business in this state for a profit under a fictitious name” must file in the manner prescribed by the statute.

Place of Filing

California Civil Code section 2466 requires only that the fictitious business name certificate be filed with the clerk of the county in which the firm has its principal place of business. A number of other states have adopted a similar rule and require that the certificate be filed in the county or town of the firm's principal place of business.160 In addition, eight states require filing in the county or town “where the business is to be conducted.”161 Although it is not entirely clear what interpretation is to be given this filing requirement, these eight statutes probably mean that the filing is to be made in the county or town of the principal place of business. The requirement in most other states, however, is that the fictitious name


certificate be filed in each county in which business is to be conducted.162

Still other states require central filing, either alone or in addition to local filing. Missouri,163 Nebraska,164 New Hampshire,165 and Utah166 require filing only with the secretary of state. The United Kingdom statute provides for central filing in the particular country in which business is done,167 and the Australian statutes require registration with the registrar of companies for the state in which business is to be transacted.168 New Jersey,169 Pennsylvania,170 and Vermont171 require filing at both the state and local levels. Indiana,172 Colorado,173 and Virginia174 follow a similar rule with respect to corporations but not as to individuals and partnerships. Michigan requires partnerships and corporations, but not individuals, to file a certificate in the counties in which business is transacted as well as with the treasurer of the state.175 Oregon has a unique provision which requires filing with the corporations commissioner who then sends a copy of the certificate to the county clerk of each county in which the registrant has indicated an intention to do business.176

Many of the states in this latter group at least partially coordinate the fictitious business name filings with their trade name protection system.177 Where this is done, the entire system can consolidate the business name filings of sole proprietorships, unincorporated associations, and corporations, other trade name filings, corporate organization papers, and secured transaction information. Such a scheme lends itself to a central filing system that makes all information


167 Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).
168 Uniform Business Names Act §§ 4-7 (Victoria 1962).
177 See statutes cited notes 19-22 supra and accompanying text.
about a particular business available at a single location. However, the cost of instituting and maintaining such a comprehensive system in California might outweigh its value, especially since trade names are not now screened for similarity or other elements of possible unfair competition.

Nevertheless, centralized filing of fictitious business name certificates without trade name protection provisions would be a marked improvement in California practice. When the first fictitious name statutes were enacted, unincorporated associations and sole proprietors rarely did business in more than a localized area. Filing in the county or counties of operation was the least expensive and most efficient system. However, modern business has spread beyond these limits and has been accompanied by a substantial increase in credit transactions. Today, many businesses operate in several counties of the same state or in several states. It is therefore necessary that all information be obtainable in a single location. In California, where filing is now required only in the county of the principal place of business, an interested person often must search the records of several counties before the principal place of business is found. To find all similarly named businesses in this state, he must search the files in each of the 58 counties. Furthermore, the present filing system does not permit the gathering, at one location, of data about different businesses from different parts of the state.

Corporation organization documents must be filed with the secretary of state in California, and California requires central filing for financing statements under section 9401 of the Commercial Code. Corporations Code sections 24003-06, enacted in 1967, require the secretary of state to process and index information concerning the principal offices in this state of unincorporated associations and their agents for service of process. A state that is able to accommodate such filings at the state level should have no problem adding a file for fictitious business name statements, especially where data processing equipment is available, as it is in California. The California secretary of state indicates that his office would be able to handle the additional workload with its data processing equipment. Since the filings of information relating to domestic and foreign corporations, foreign partnerships, unincorporated as-

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178 CAL. CORP. CODE § 308.
182 See CAL. CORP. CODE § 308.
183 CAL. CORP. CODE § 15700.
and financing statements are now made with the secretary of state, the fictitious name statements also should be filed with him.

Central filing, combined with the use of data processing equipment, would make it considerably easier for persons outside California and persons in counties other than the county of a firm's principal place of business to obtain the information contained in the fictitious business name statements. The use of data processing equipment also would make it possible to run fictitious business name searches more quickly and accurately than is possible under existing law. For example, searches could easily be made to determine whether a statement is on file for: (1) a business at a specific address that uses a specific fictitious business name, (2) every business having its principal place of business in a given county and using a specific fictitious business name, (3) all businesses within the state using a specific fictitious business name, and (4) all businesses within the state owned in whole or in part by a named individual. In addition to these advantages, the data processing equipment would automatically "print out" the results of a search, thus minimizing the possibility of human error.

However, in addition to central filing, retention of a local file would be highly desirable. There is substantial use of fictitious name information at the county level in California and a local file would allow a businessman to check easily the files in his county when that is all that is required. Thus, the Oregon system—a central filing with a state officer who is directed to send copies of the certificate to each of the interested counties—should serve as a guide for the new California statute. A less expensive system which meets most of the requirements is recommended. It would require the California secretary of state to send a copy only to the county of the principal place of business. In addition, the latter plan would coordinate more easily with the present system in California which requires filing only in the county of the principal place of business.

**Information Required in Certificates**

The information required in a fictitious business name statement depends upon the purpose of the statute in the particular jurisdiction. In California, the fictitious business name filings are not integrated with other business name filings. As a result, the statute requires only that the certificate state "the name in full and the place of residence of such person [transacting business under the fict-

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184 CAL. CORP. CODE § 24003.
185 CAL. CORP. CODE § 9401.
188 See note 34 supra and accompanying text.
tititious name] and . . . the names in full of all the members of such partnership [transacting business under the fictitious name] and their places of residence. Nineteen of these states, like California, require no additional information.

Ten states, the United Kingdom, and the Australian states require fictitious name statements to set forth the name of the business, its location, the name and addresses of the owners and a description of the kind of business to be conducted. These provisions are necessary in these states because they have adopted fictitious business name statutes that implement trade name protection systems or protect the public against misleading names.

Four states require the location of the firm's principal place of business to be listed in the certificate and this requirement generally coincides with a requirement that the statement be filed in the county in which the firm's principal place of business is located. Five states require that the location of the business be included in the certificate. In these states, the statement must be filed in the county in which the firm's principal place of business is located.

187 CAL. CIV. CODE § 2466.


191 Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).


county in which the business is located. Thus, this provision serves the same purpose as one requiring the firm to list its principal place of business. Oregon requires that every county in which the name will be used be listed in the certificate.\textsuperscript{195} This information enables the commissioner of corporations to send each interested county clerk a copy of the certificate as required by the Oregon statute.\textsuperscript{196} If the California statute is amended, as it should be, to provide for filing with the secretary of state, it should include a provision requiring the person filing to list his principal place of business so that a certificate may be sent to the proper county clerk.

The New York statute includes a requirement that the ages of any infant partners be set forth.\textsuperscript{197} At the time that the statute was enacted, the New York law prescribed a special limited liability for infant partners which has been described as follows:

The law does not deny an infant the right to enter a partnership. As between the infant and his co-partners, the contract of partnership is subject to the infant's privilege of avoidance, though binding upon the adult partners; upon such avoidance, the minor may recover from his co-partners his contribution to capital, less the amounts he received from the business. The infant may avoid personal liability on partnership obligations but as respects his contribution to capital, the infant's right of restitution is subordinate to the right of creditors to apply the firm assets to the payment of their claims.\textsuperscript{198}

A later statute changed this rule with respect to infants over the age of 18 years where the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made.\textsuperscript{199} The requirement remains in the statute to protect persons dealing with a firm that has an infant partner under the age of 18 as well as those over 18 when a contract is such that it might be considered "improvident."

In California, a minor is any person under 21 years of age, except that a married person over 18 years of age is considered an adult for the purposes of property or contract transactions.\textsuperscript{200} The limits on the contractual capacity of minors are set forth in detail in California Civil Code sections 33 to 37. Section 33 provides in part that, "[A] minor cannot give a delegation of power."\textsuperscript{201} This section codi-

\textsuperscript{195} ORE. REV. STAT. § 648.010 (1965).
\textsuperscript{196} ORE. REV. STAT. § 648.045 (1965).
\textsuperscript{197} N.Y. GEN. BUS. LAW § 130 (McKinney Supp. 1967). Comparable provisions are found in ALA. CODE tit. 14, § 230 (1958); Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 3; Uniform Business Names Act § 7(2) (Victoria 1962).
\textsuperscript{198} 1938 N.Y. LAW REVISION COMM'N REPORTS 106-07 (footnotes omitted; emphasis in original).
\textsuperscript{199} N.Y. GEN. OBLIGATIONS LAW § 3-101(1) (McKinney 1964).
\textsuperscript{200} CAL. CIV. CODE § 25.
\textsuperscript{201} A minor may also disaffirm any contract made under the age of 18 without restoring the consideration received. Where a contract is made when
fies the common law rule, that, except as expressly permitted by statute, any delegation of power by a minor is void.\textsuperscript{202} As a result, it is not even necessary for a minor to disaffirm such a contract after he attains his majority.\textsuperscript{203} The minor's misrepresentation of age or his failure to reveal his incapacity to the other contracting party does not estop him from asserting his lack of capacity.\textsuperscript{204} Thus, it would seem that in California, since no minor can delegate authority and since any such attempted delegation is void, a minor cannot be a partner. Hence, there would appear to be no need for a provision similar to the New York requirement.

Michigan recently enacted a statute which gives an interested person a ready cross-reference to other public documents filed by a firm using a fictitious name:

The [fictitious name] certificate . . . , in the case of any person named therein other than an individual, Shall state the nature of the entity; the statutory law, if any, pursuant to which it was organized; the place and the date of filing with any governmental authority, identifying it, of any documents, describing them, required to be filed in order to accomplish or complete the organization of the entity and to entitle it to operate or transact business under the laws of this state and, if organized elsewhere, of the state or county where organized but such certificate need not list the names and addresses of stockholders of corporations . . . .\textsuperscript{205}

A similar provision should be added to the California statute because it provides a means of coordinating the various business filings in the state. However, the Michigan provision is much more comprehensive than that needed in California. All that is needed is a statement of the type of "person" running the business; the certificate should state whether the business is (1) an individual proprietorship, (2) a domestic partnership or other domestic unincorporated association, (3) a foreign partnership or other foreign unincorporated association, (4) a domestic corporation, or (5) a foreign corporation. With this information, a person could easily obtain the other documents since almost all business filings in California are made with the secretary of state or the county clerk of the firm's principal place of business and the principal place of business will also be listed on the certificate.

**Indexing Requirements**

Section 2470 of the California Civil Code provides:

Every county clerk must keep a register of the names of firms and

the minor is over 18 years old, he may disaffirm upon restoring the consideration received or paying its equivalent. \textsuperscript{202} CAL. CIV. CODE § 35.


\textsuperscript{203} See Lee v. Hibernia Sav. & Loan Soc'y, 177 Cal. 656, 171 P. 677 (1918); Hakes Inv. Co. v. Lyons, 166 Cal. 557, 137 P. 911 (1913).

\textsuperscript{204} Lee v. Hibernia Sav. & Loan Soc'y, 177 Cal. 656, 171 P. 677 (1918); Hakes Inv. Co. v. Lyons, 166 Cal. 557, 137 P. 911 (1913).

\textsuperscript{205} MICH. STAT. ANN. § 19.821 (Supp. 1968).
persons mentioned in the certificates filed with him pursuant to this article, entering in alphabetical order the name of every such person who does business under a fictitious name, and the fictitious name, and the name of every such partnership, and of each partner therein.

Twelve other states also require that an alphabetical index or register be maintained for both the name of the business and the names of the owners.206

Eleven states have only a provision for indexing the names of the persons filing.207 Although this may be considered a cumbersome procedure—in some instances of large partnerships 50 or more names may have to be indexed—it is a necessary index for tracing the business assets of a particular person. This index alone, however, is not sufficient. Most persons using the fictitious name files know the name of the business rather than that of the owner. For this reason, two states require only that the assumed name be indexed.208 This is, of course, usually the most essential index. Collection agencies, persons checking credit references, and persons with claims against a firm using a fictitious name normally will use this index.

In some states, the usefulness of the fictitious name filings is frustrated because of nonexistent or faulty indexing requirements. Sixteen states have either no provision for indexing209 or merely have a provision that the statements are to be "recorded,"210 "filed,"211 "indexed,"212 or "registered."213 These statutes provide no guidelines to the type of index to be maintained or its accessibility to interested persons. Although these states may have provided for


an adequate system by administrative mandate, the statute should provide for the types of indices to be maintained to assure that the information will be available in useful form. The California type of index is recommended because it is the most comprehensive and useful. It allows an interested person to determine all of the available information about a business if he knows the name of either the business or the owner. To reduce expenses, it might be advisable to provide for a comprehensive index at the state level and only an index of fictitious business names at the county level since most persons using the county file will know the name of the business rather than the name of the owner.

**Updating the Files**

The fictitious business name statute in California, Civil Code section 2469, requires that a new certificate be filed "on every change in the members of a partnership transacting business in this State under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business . . . ." The person or partnership filing and publishing a certificate may, upon ceasing to use that name, file a "certificate of abandonment." Upon such abandonment, the county clerk must enter that fact in the register. In addition, Corporations Code section 15035.5 provides that, whenever a partnership is dissolved, an affidavit of publication of the notice of dissolution must be filed with the county clerk.

Nine states have no express provision indicating when a new certificate must be filed. Twenty states, like California, require a new filing whenever there is any change in the ownership of the business although nine of these states also specify other occur-

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215 In 1967, the County Clerks Association of California sponsored S.B. 1429 to repeal Cal. Civ. Code § 2470 and thereby eliminate the alphabetical indexing requirements. The bill died in the Senate Judiciary Committee.


218 Alabama, Connecticut, Florida, Kentucky, Louisiana, Maryland, North Carolina, Rhode Island, West Virginia.

rences, such as a change in the registered name,\textsuperscript{221} that require a new certificate. Illinois\textsuperscript{222} and Massachusetts\textsuperscript{223} require a new filing whenever an owner's residence address is changed. Four states require a new filing whenever there is a dissolution or termination of the business.\textsuperscript{224} Four states expressly require that a withdrawing owner must file a statement to avoid liability for debts contracted after his withdrawal.\textsuperscript{225} New York requires a new filing on any change in the facts shown in the statement;\textsuperscript{226} this statute is broad enough to include even immaterial facts. The Illinois\textsuperscript{227} and Australian\textsuperscript{228} acts list a number of events that necessitate a new filing.

The wide variation in these statutes seems unnecessary. Each statute should require a new filing whenever there is a change in a material fact. In California, such material facts include the name of the business, the principal address of the business, if listed, and the name or names of the owner or owners of the business. A change in the residence address of an owner should not be considered such a material fact. To require a new filing in this case would impose an undue burden on businessmen. The address of a registrant, if changed, can be traced from the recent address found in the certificate.

Many states either require or permit a withdrawing partner to file a certificate of withdrawal so that his interests will not be prejudiced by failure of the remaining partners to file.\textsuperscript{229} This is not

\textsuperscript{221} \textit{IIL. REV. STAT.} ch. 96, \S 4 (1965).
\textsuperscript{222} \textit{MISS. GEN. LAWS ANN.} ch. 110, \S 5 (Supp. 1967).
\textsuperscript{223} \textit{IND. ANN. STAT.} \S 50-201 (Supp. 1967); \textit{MICH. STAT. ANN.} \S 19.824 (Supp. 1968); \textit{N.J. REV. STAT. ANN.} \S 55:1-6 (Supp. 1966); \textit{VT. STAT. ANN. tit. 11, \S 1628 (Supp. 1967).}
\textsuperscript{224} Uniform Business Names Act \S 12 (Victoria 1962) (change occurs which renders description of nature of business insufficient to disclose true nature of business; place or places where business done changed; change in name of resident agent; change in Christian or surname or place of residence of any person; change in the corporate name; dissolution of business; addition of owners).
presently allowed by the California statute, although the partnership is required to file when there has been a change in its membership. Such a provision does not appear to be necessary in California. Corporations Code section 15035.5 requires a notice of dissolution of partnership to be published and an affidavit to be filed with the county clerk. A “dissolution” is defined as the “change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.” The publication of this notice and the filing of the affidavit should rebut the presumption, under Civil Code section 2471, that the facts contained in a fictitious name statement are true, and thereby effectively protect the withdrawing partner.

Purging the Files

Expiration

The California statute, Civil Code section 2469.2, provides:

Every certificate of fictitious name filed under the authority of this chapter shall expire and be of no further force and effect at the end of five years following the first day of January next after the filing of a certificate of fictitious name with the county clerk in accordance with Section 2466, unless at any time within 12 months immediately preceding said date of expiration a renewal certificate containing all information required in the original certificate and subscribed and acknowledged as required by that section is filed with the county clerk with whom said original is on file.

Only six other states and the Australian Uniform Act provide for expiration of the certificate after a given length of time. The Australian act specifies that the certificate remains in force for 3 years and requires the registrar to send notice to the owner when it is time for renewal. Michigan and Oregon provide that the certificate is effective for 5 years and is renewable, and that notice shall be mailed to the registrant. Utah prescribes an 8-year period with provision for renewal and notice. Nebraska, New Hampshire, and Texas use 10-year periods, with provision for renewal, but neither Nebraska nor Texas requires that any notice be given to the owner at the time of expiration.


These provisions attempt to prevent overloading the business name files with the names of firms that have ceased to carry on business in the particular jurisdiction under a registered name. The United Kingdom statute attempted to solve this problem by requiring the owner of a business to inform the registrar that he had ceased to do business, or be subject to a fine. However, this provision was found to be ineffective because many persons ceased to do business without reporting that fact. For this reason, the Australian Uniform Act provides for expiration of the registration in addition to requiring that an owner report when he had ceased doing business.

California should retain its expiration provision because it is the only practical way of providing an up-to-date, unencumbered file. However, the statute should also require that notice of the impending expiration be sent to the owner of the business to minimize the possibility of the registrant's being unaware of the expiration and the need for renewal. A similar procedure is provided by Corporations Code section 24006 with respect to statements filed by unincorporated associations to designate a principal place of business for venue purposes.

Destruction of Outdated Certificates

Civil Code section 2469.3 permits the county clerk to destroy a fictitious name certificate if it has expired or if a certificate of abandonment has been filed. However, the section also requires that mi-

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238 Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, as amended Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).

239 P. Higgins, The Law of Partnership in Australia and New Zealand 308-09 (1963). In a letter of December 18, 1967, to the California Law Revision Commission, Mr. R.B. James, Clerk of San Diego County, indicated that his office had conducted a survey showing that many businesses in California do not file certificates when they cease to do business. Thirty-eight numbers were picked in the age group of filings 10 years old and 38 in the age group of filings 5 years old. In the groups selected, every 25th number was listed. An envelope was addressed to the name and address exactly as it was contained in the San Diego County files. Printed postcards were included asking whether or not the business still existed. The results are as follows:

**FILLINGS—10 years old**

Inquiries sent - 38

- Returned undelivered 17
- Returned advising same business 8
- Returned advising change 5
- No reply 8

**FILLINGS—5 years old**

Inquiries sent - 38

- Returned undelivered 15
- Returned advising same business 7
- Returned advising change 2
- No reply 14

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240 P. Higgins, supra note 239, at 308-09.
crofilm copies of the certificate be made and filed. This section is comparable to provisions in the Pennsylvania\textsuperscript{241} and Utah\textsuperscript{242} statutes. A better practice obtains in Michigan\textsuperscript{243} and New Hampshire\textsuperscript{244} where the certificates may be destroyed without retaining a copy after a given number of years. The time period selected must be sufficient to assure that substantially all actions against the firm have been barred by an applicable period of limitation and, at the same time, must allow for a worthwhile updating of the files. In California, the statute of limitations runs on oral contracts in 2 years,\textsuperscript{245} on written contracts in 4 years,\textsuperscript{246} and on torts in either 1 year\textsuperscript{247} or 3 years\textsuperscript{248} depending upon the nature of the wrong. Since almost all actions against business firms sound in contract or tort, it appears that a 4-year period for the retention of certificates after abandonment of the name or expiration would be sufficient. There may be a few instances where an action is initiated after the destruction of the certificate, but the number of such claims is insignificant in comparison with the importance of updating the files and the expense of microfilming material that has little, if any, permanent value.

The Publication Requirement

California Civil Code section 2466 provides that a fictitious business name certificate

must be published . . . pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate . . . shall be filed with the county clerk within 30 days after the completion of such publication.

Government Code section 6064 requires publication once a week for 4 successive weeks. The certificate filed on a change of members of a partnership,\textsuperscript{249} and the certificate of abandonment of a fictitious name\textsuperscript{250} must be published in the same manner. However, a certificate of renewal need not be published if the information required in the original certificate has not changed.\textsuperscript{251} In addition, section 15035.5 of the Corporations Code requires that notice of the dissolution of a

\textsuperscript{241} PA. STAT. ANN. tit. 54, § 28.10 (Supp. 1967) (records kept one year after microfilming).
\textsuperscript{242} UTAH CODE ANN. § 42-2-8 (Supp. 1967) (permanent inactive file).
\textsuperscript{243} MICH. STAT. ANN. § 19.821(1) (1964) (6 years after expiration).
\textsuperscript{244} N.H. REV. STAT. ANN. § 349.8 (1966) (all registrations 10 years old and not renewed).
\textsuperscript{245} CAL. CODE CIV. PROC. § 339.
\textsuperscript{246} CAL. CODE CIV. PROC. § 337.
\textsuperscript{247} CAL. CODE CIV. PROC. § 340.
\textsuperscript{248} CAL. CODE CIV. PROC. § 338.
\textsuperscript{249} CAL. CIV. Code § 2469.
\textsuperscript{250} CAL. CIV. Code § 2469.1.
\textsuperscript{251} CAL. CIV. Code § 2469.2.
partnership be published at least once and that an affidavit of publication be filed with the county clerk.

The first statute to require publication of fictitious business name certificates was the New York enactment of 1833.252 When that statute was revised and relocated, the publication requirement was deleted.253 Meanwhile, California included a very similar provision in its Civil Code of 1872.254 Subsequently, Montana,255 Nevada,256 North Dakota,257 Ohio,258 Oklahoma,259 and South Dakota260 enacted fictitious business name statutes that contained publication requirements based upon the California provision. Three of these states, plus New York, have since deleted the publication requirement: Ohio, which adopted its statute in 1894, deleted publication in 1896;261 Nevada deleted publication in 1923;262 and South Dakota eliminated the publication requirement in 1933.263 In 1959, North Dakota, which had required publication in a newspaper of general circulation for 4 successive weeks—the existing California practice—reduced its requirement to one publication.264 A few more recent statutes have included publication requirements.265

Of the 10 states that now require publication, only California,266 Florida,267 Montana,268 and Oklahoma269 require publication for 4 successive weeks. Two of these states, Montana and Oklahoma, adopted the California statute almost verbatim over 70 years ago. Illinois270 requires three publications. Georgia,271 Minnesota,272 and Penn-

254 CALIFORNIA CIVIL CODE ANNOTATED § 2469, at 109 (Haymond & Burch ed. 1872).
256 Ch. XL, § 1, [1887] Stat. of Nev. 46.
262 Ch. 156, [1923] Stat. of Nev. 271.
265 FLA. STAT. § 865.09(3) (1965); GA. CODE ANN. § 106-301 (1956); ILL. REV. STAT. ch. 96, § 4 (1965); MINN. STAT. § 333.01 (1965); NEB. REV. STAT. § 87-205 (1966); PA. STAT. ANN. tit. 54, § 26.3 (Supp. 1967).
266 CAL. CIV. CODE § 2466; CAL. GOV'T CODE § 6064.
267 FLA. STAT. § 865.09 (1965).
269 OKLA. STAT. tit. 54, § 81 (1961).
270 ILL. REV. STAT. ch. 96, § 4 (1965).
271 GA. CODE ANN. § 106-301 (1956).
272 MINN. STAT. § 333.01 (1965).
sylviana require two publications, and Nebraska and North Dakota require only one.

New York, South Carolina, and the Australian states use posting as a substitute for publication. The New York and Australian statutes require that a copy of the most recent statement filed by the business be conspicuously posted on the premises. South Carolina requires that a sign be posted at the place of business indicating the names of the owners. The United Kingdom statute is more extensive. To assure that interested persons have knowledge of the fact that a business is trading under an assumed name, the statute requires that no business letter or advertisement be issued or sent unless the name or names of the owner or owners appear thereon in legible characters.

Newspaper publication of fictitious business name statements was useful and perhaps necessary in the horse-and-buggy days when there were very few newspapers in any one city or county, and unincorporated businesses normally did not operate in more than one locality. Since then, business has expanded to the point where many "small" enterprises operate in several counties or even in several states. Each area now has many newspapers including legal newspapers which the public normally does not consult. As a result, it has become almost impossible to assemble all of the filings for a large urban area merely by clipping the published newspaper notices.

Assembly of the published fictitious name data in an area such as Los Angeles County is almost impossible without a large staff. In 1966, the letterhead of the Los Angeles Newspaper Service Bureau, a "legal advertising clearing house," listed in an incomplete roster the names of 107 newspapers in Los Angeles County. The cost of having employees read the legal notices from all these newspapers plus those from adjoining counties, and maintaining an up-to-date, useful file of the information, is almost prohibitive. The Los Angeles county clerk indicates that approximately 21,000 fictitious name certificates were filed in that county alone last year. There are approxi-

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279 Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 18, as amended, Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5(3), 11(3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116(3).
280 In 1966 California had approximately 670 weekly, and 156 daily newspapers. California Information Almanac 348 (San Jose News-Mecury ed. 1967).
mately 345,000 business names (including corporations) now on file in that office. A businessman could hardly be expected to maintain a comprehensive file of the information. Where there are adequate public files, properly indexed, the overwhelming majority of users of fictitious business name information are forced to use those files. It seems clear, therefore, that publication of fictitious business name certificates no longer serves a useful purpose. This conclusion has been reached by almost all of the California businessmen who have made their views known to the California Law Revision Commission. A similar view is taken by various public officials in Cal-

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**Total** 37,838

282 Letter from William G. Sharp, note 281 supra.

ifornica whose agencies frequently use the fictitious name information for purposes of investigation.\(^{284}\)

The experience in California has been that the newspaper industry strenuously opposes any attempt to eliminate publication requirements and normally is successful in its efforts.\(^{285}\) For this reason and because it is difficult to effect changes in long-established practices, it may not be possible to eliminate the publication requirement altogether. However, marked improvements in the mode of publication should be made, as follows:

(1) The duty of publishing the fictitious business name information should be imposed upon the secretary of state, rather than on the person doing business under a fictitious name. This change will reduce the cost of publication because the secretary of state can consolidate all the information for a particular county, thereby eliminating the present cost of processing and publishing many individual certificates. The fee imposed for filing a fictitious business name statement should be increased to an amount adequate to cover the cost of publication in this manner.

(2) For each fiscal year, one paper of general circulation in each county should be selected for the publication of all fictitious business name information required to be published in that county. This will permit interested persons to obtain all the fictitious name information for the entire county by consulting that paper. Selection of one newspaper to publish the information for a fiscal year should result in economy of publication. This procedure is now prescribed by Government Code section 37907 which requires that publication of all city legal notices during a fiscal year be in one newspaper if there are several newspapers of general circulation in the city.

(3) The fictitious business name information should be published in a more useful form, and useless material should be deleted. The information to be published should include the fictitious business name, the address of the principal place of business in this state, the name of the individual or corporation or the names of the partners doing business under the fictitious name, the index number assigned by the secretary of state to the statement, and the date the statement was filed. Although the statute need not so specify, the secretary of


state should arrange for publication of the fictitious name information according to the city in which the principal place of business is located with the information for each city published in alphabetical order by the fictitious business name. The use of data processing equipment will make it possible to prepare the information for publication in this form. Although a business operating under a fictitious name frequently will not confine its operations to the city where it is located and may, in fact, operate throughout the county or even the state, classification of the information according to the city in which the principal place of business is located will present the information in a form that will be most useful to interested persons.

The residence addresses of the individual or partners should not be included in the published information. The slight value this information might have does not justify the cost of publication. The addresses can easily be obtained, using the index number contained in the published information, by reference to the fictitious business name statement filed in the office of the county clerk and the office of the secretary of state.

(4) In view of the improvements thus effected in the form of publication, the number of publications should be reduced from four publications to two. Since all publications in a particular county will be in the same newspaper, the likelihood that an interested person will fail to notice the publication of information relating to a particular business is minimized. Although some newspapers now indicate material that is published for the first time, many do not. Thus, the reduction in the number of publications will substantially reduce the volume of material that must be examined by persons who use or assemble the published information.

Sanctions

An oft-expressed view of businessmen and others interested in the California statute is that widespread noncompliance with it makes it largely ineffective. It is, of course, essential that any statute in this field include sanctions adequate to compel compliance with the law. Otherwise, the policy of the statute will be circumvented by those to whom its requirements are addressed.

The sole penalty for failure to comply with the California legislation is provided by Civil Code section 2468:

No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain

286 In California, information concerning financing statements filed under the Commercial Code is now provided in this form by the secretary of state pursuant to CAL. COMM. CODE § 9407(2).
any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required.

California never followed the early rule formulated in other states that a contract made during noncompliance was illegal and void.\textsuperscript{287} Rather, section 2468 was originally construed to mean that the filing of a complaint was an incident to "maintaining an action," and therefore the certificate had to be filed prior to the filing of the complaint in any action involving a contract or transaction made under a fictitious name.\textsuperscript{288} Numerous later cases have relaxed this strict interpretation;\textsuperscript{289} modern California cases indicate that noncompliance merely abates the action until compliance is had.\textsuperscript{290} The certificate may be filed and publication made at any time before the trial,\textsuperscript{291} and even if judgment is rendered for the defendant on the grounds of noncompliance by the plaintiff, the judgment is not res judicata.\textsuperscript{292} Further, the rule is applied only to contract cases and does not bar a suit in tort,\textsuperscript{293} or to recover property,\textsuperscript{294} unless the cause of action is a direct result of the failure to file. Moreover, an individual proprietor who generally uses a fictitious business designation is not within the scope of the legislation where he either consummates all of his business transactions under his own name\textsuperscript{295} or did so with respect to the particular transaction.\textsuperscript{296}

California experience has resulted in at least two informal sanctions being applied. It is reported that banks in Los Angeles will not open a commercial account for a business until compliance with the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{287} See generally 1 J. BARRETT & E. SEAGO, PARTNERS AND PARTNERSHIPS 161 & n.26 (1956); Annot., 45 A.L.R. 198, 208-12 (1926); Annot., 42 A.L.R.2d 516 (1955).
\item \textsuperscript{288} Byers v. Bourret, 64 Cal. 73, 28 P. 61 (1883).
\item \textsuperscript{289} E.g., Nicholson v. Auburn Gold Mining & Milling Co., 6 Cal. App. 547, 92 P. 651 (1907).
\item \textsuperscript{290} Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946); accord, Croft v. Bain, 49 Mont. 484, 143 P. 960 (1914); Walsh v. J.R. Thomas' Sons, 91 Ohio St. 210, 110 N.E. 454 (1915); Peterson v. Morris, 119 Wash. 335, 205 P. 408 (1922).
\item \textsuperscript{291} Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946).
\item \textsuperscript{292} Folden v. Lobrovich, 153 Cal. App. 2d 32, 314 P.2d 58 (1957).
\item \textsuperscript{294} Wallbrecht v. Blush, 43 Colo. 329, 95 P. 927 (1908); Lowenstine v. Citro, 74 Ind. App. 516, 129 N.E. 280 (1920).
\item \textsuperscript{295} Messick v. Houx Bros., 105 Cal. App. 637, 288 P. 434 (1930).
\item \textsuperscript{296} Dennis v. Overholtzer, 178 Cal. App. 2d 766, 3 Cal. Rptr. 193 (1960).
\end{itemize}
\end{footnotesize}
statute has been shown.\footnote{297} In San Francisco, a firm conducting business in a fictitious name is not allowed to file an action in the small claims court unless the firm has complied with the statute.\footnote{298} This procedure has been adopted despite the fact that the defense of failure to register normally may be waived by the opposing party.\footnote{299}

Several states force compliance with their fictitious business name legislation by providing that no license shall be issued to certain enterprises until the fictitious business name has been filed in the proper office.\footnote{300} California has several special provisions which require proof of filing a fictitious business name certificate before a permit or license will issue. Real estate brokers,\footnote{301} mineral, oil and gas brokers,\footnote{302} yacht or ship brokers,\footnote{303} private detectives,\footnote{304} and check sellers and cashers\footnote{305} must show such compliance.

The statutes in seven states, like California, provide only that no action may be maintained on a contract without compliance with the filing requirement.\footnote{306} An additional eight states combine a “no action” provision with a provision making violation of the statute a misdemeanor.\footnote{307} In most such states, violations of the statute are punishable by fine or imprisonment. The United Kingdom statute is similar but contains a unique provision.\footnote{308} It imposes a criminal sanction and offers an alternative to the “no action” provision. It provides that no action may be maintained on a contract made during noncompliance, but this is subject to the discretion of the trial court to allow or disallow suit. Thus, the court may allow an “innocent” noncompliant to maintain an action, but may preclude a party from enforcing a contract if enforcement would not be in the public interest.

\footnote{297}{Address by Telford Work to Annual Convention of Nevada Press Association, May 21, 1966.}
\footnote{298}{Letter from Martin Mongan, San Francisco County Clerk, to Cal. Law Revision Comm’n, March 15, 1987.}
\footnote{299}{Kadota Fig Ass’n v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (1946).}
\footnote{300}{See LA. REV. STAT. § 51:281 (1950); VA. CODE ANN. § 50-76 (1967).}
\footnote{301}{CAL. BUS. & PROF. CODE § 10159.5.}
\footnote{302}{CAL. BUS. & PROF. CODE § 10522.5.}
\footnote{303}{CAL. BUS. & PROF. CODE § 8936.1.}
\footnote{304}{CAL. BUS. & PROF. CODE § 7540.}
\footnote{305}{CAL. FIN. CODE § 12300.2.}
\footnote{306}{ARIZ. REV. STAT. ANN. § 29-102B (Supp. 1967); MONT. REV. CODES ANN. § 63-602 (1962); N.D. CENT. CODE § 45-11-04 (1960); OHIO REV. CODE ANN. § 1777.04 (Page 1964); OKLA. STAT. tit. 54, § 83 (1961); S.D. CODE § 49.0802 (1939); WASH. REV. CODE § 19.80.040 (1958).}
\footnote{307}{COLO. REV. STAT. ANN. § 141-2-2 (1963); FLA. STAT. § 865.09 (1965); IDAHO CODE ANN. § 53-506 (1957); MICH. STAT. ANN. § 19.827 (Supp. 1968); ORE. REV. STAT. §§ 648.090, 648.990 (1965); PA. STAT. ANN. tit. 54, §§ 28.4, 28.13 (Supp. 1967); UTAH CODE ANN. § 42-2-10 (Supp. 1967); VA. CODE ANN. §§ 50-77, 50-78 (1967).}
\footnote{308}{Registration of Business Names Act of 1916, 6 & 7 Geo. 5, c. 58, § 7, as amended, Fees (Increase) Act of 1923, 13 & 14 Geo. 5, c. 4, §§ 5 (3), 11 (3), and Companies Act of 1947, 10 & 11 Geo. 6, c. 47, §§ 58, 116 (3).}
Nineteen states impose only a criminal sanction. These statutes vary a great deal. For example, the Maine statute prescribes a fine of $5.00 for each day of violation whereas the Alabama statute prescribes a penalty of not more than $500 and 6 months at hard labor. In addition to a criminal penalty, North Carolina and Delaware provide that anyone who sues an unincorporated association that is in violation of the statute may recover $50 to $500, respectively. The Australian statutes have a unique feature designed to enforce compliance by a corporation whose officers may feel that compliance is too much trouble. The statute makes any director, manager, secretary, or other officer of the corporation, who was knowingly a party to the offense, also guilty of the violation.

A civil penalty is the most desirable form of sanction. Since compliance is the result sought, a civil penalty large enough to compel compliance is necessary. The conviction of a misdemeanor is a harsh penalty in some instances, especially if the party fails to file because of inadvertence, ignorance, or mistake of law. Where a party is engaged in some illegal or fraudulent activity, other criminal charges are available against him. Thus, a civil penalty of substantial proportions, recoverable by a state or county officer, seems most appropriate. In addition, the statute should either provide that the civil penalty is the sole penalty or that all contracts executed when one is not in compliance with the statute are valid and enforceable. This precludes a construction of the statute that would impose the civil penalty in addition to the presently existing "no action" penalty.


314 A similar statute in Manitoba requires the person suing to divide the $100.00 penalty with the government. Man. Rev. Stat. c. 196, § 57 (Can. 1954).


Evidentiary Effect

Civil Code section 2471 provides that a certified copy of the certificate or an affidavit of publication is presumptive evidence of the facts stated therein. Most fictitious business name statutes in other jurisdictions provide that the certificate will be prima facie or presumptive evidence in any court in the state where one of the facts stated therein is in issue. Fourteen states have no provision on the matter. Seventeen states provide that the statement shall be presumptive evidence of all of the facts stated therein, and five states and the Australian Uniform Act provide that it shall be prima facie proof of such facts. One state provides only that the certificate is admissible evidence, and Maine makes it a conclusive presumption of the contents. The latter is too harsh a rule. The Washington rule—that the failure to file is presumptive evidence of fraud in procuring credit—is also too harsh. However, a rebuttable presumption of the truth of the facts stated in the certificate does impose a sanction of sorts. Although a party can overcome the presumption, he may be more likely to complete the form correctly if he knows that anything he states therein can be used against him in a court of law.

Conclusion

Forty-two states have fictitious business name filing requirements. The purpose and plan of most of these statutes is similar. Yet, the statutes vary from jurisdiction to jurisdiction as to the types of businesses that are required to file, the information to be included in the statement, the place of filing, the accessibility and maintenance of the information, and the sanctions imposed. The California statute

317 Alabama, Arizona, Delaware, Georgia, Indiana, Iowa, Maryland, Massachusetts, Missouri, Nebraska, South Carolina, Vermont, Virginia, and Washington.
serves a useful purpose but is largely ineffective because of out-
moded provisions, especially in the areas of publication, local filing,
and sanctions. The statutory comparisons made in this article indi-
cate that the California statute can be modernized and modified to
serve its purpose better. It is particularly important that all busi-
nesses doing business in the state under an assumed name be re-
quired to register, that registration be in a state agency, that publi-
cation be eliminated or modified, and that sanctions be imposed
which will elicit substantial compliance with the law.