

12-15-1987

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Recommended Citation

Anthony J. Mohr *Liability of Political Candidates and Their Staffs for Campaign Committee Obligations*, 15 Pepp. L. Rev. Iss. 1 (1987)

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Liability of Political Candidates and Their Staffs For Campaign Committee Obligations

Anthony J. Mohr*

I. INTRODUCTION

The California appellate courts have yet to decide issues involving the personal liability of political candidates and staff members for debts incurred by their campaign committees. Unreported trial court decisions demonstrate the unsettled nature of this issue.¹ To date, no decisions on this issue have been reported.²

Whether members of a political committee³ are liable for committee debts has been said to depend "on the factual circumstances" of each case.⁴ Perhaps the most relevant threshold question of fact is whether the candidate personally agreed to pay for the debt.⁵ However, the following issues are far more difficult to answer. Should a candidate be held liable for a campaign obligation simply because he is a member of the campaign committee? Should a candidate bear re-

* Practicing as an attorney in Beverly Hills, California, he has been admitted to both California and the District of Columbia Bars. B.A. Cum laude, Wesleyan University; J.D., Columbia University, 1972, Phi Beta Kappa. Assistant Editor, Columbia Journal of Transnational Law, 1971-72.

1. See, e.g., *infra* text accompanying notes 6 and 7.

2. This is probably because the amounts in controversy are generally relatively small or the parties have chosen to settle.

3. Most of the discussion in this article will concern the liability of a candidate as opposed to members of his staff. However, it is suggested that in determining whether personal liability should attach to campaign managers, treasurers, or other staff members, a court should employ similar reasoning.

4. Democratic County Central Committee—Brown Act—Liability for Contractual Obligations, 59 Op. Cal. Att'y. Gen. 162 (1976) [hereinafter Brown Act]. In this regard there is a strong analogy to the state action cases, where "[o]nly by sifting facts and weighing circumstances" can a court determine if state action is present. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

5. Again, for purposes of ease, the focus of inquiry is on the "candidate." One could just as easily ask, "Did the campaign manager or treasurer personally agree to pay the bill?"

sponsibility for an obligation incurred by another member of the committee? What should the answers to these three questions be if the obligation stems from a tort instead of a contract? Finally, there is the related public policy issue of whether a candidate and members of a candidate's campaign committee ought to be held liable for debts of the committee, and if so, under what circumstances? Analysis of these issues, along with some proposed answers, are set forth below.

A. Should Liability Attach to a Candidate Who Personally Agreed to Pay a Campaign Debt?

This question is the easiest to answer. If the candidate personally agreed to pay the campaign debt, he naturally will be held liable because, as a party to the agreement, he is in privity of contract with the creditor. By personally incurring the obligation, the candidate is stripped of any opportunity to claim he is nothing more than a member of an unincorporated association.

The decisions of two trial courts illustrate this result. In *Hoffenblum, Mollrich Communications, Inc., v. Ware*,⁶ the Alameda County Court Supervisor decided that the defendant, Ezell Ware, an unsuccessful candidate for the Oakland City Counsel, was personally liable to the plaintiff, Hoffenblum, Mollrich Communications, Inc. The court first pointed out that there was a written agreement between the plaintiff and the Ware for Council Committee. Furthermore, the court noted that Ware testified that he had skimmed the agreement and signed his name under the phrase "reviewed and approved." Ware signed on behalf of himself, not on behalf of the Ware for Council Committee. Finally, the court pointed out that Ware knew that the plaintiff was providing him with the services.

A different result was reached by a Sacramento superior court because there was no personal agreement by the candidate.⁷ In that case, one Mr. Dey, a political consultant and an agent of the Assembly Republican Political Action Committee (ARPAC), arranged for a meeting between Judge Tharp, an unsuccessful candidate for the California State Assembly, and Raymond McNally, a long time political associate of Dey. Judge Tharp met with Dey and McNally and he found McNally to be acceptable for his campaign. ARPAC agreed to pay and later did pay McNally's "creative fee" of \$5,000. However, no one explained to Judge Tharp the difference between the creative fee and the expenses of actually printing and producing copy. There were no discussions at that time about Judge Tharp or his committee

6. No. 554832-9 (Alameda County Super. Ct. Dec. 3, 1984) (Statement of Decision by Judge Joseph Karesh).

7. *McNally v. Tharp*, No. 296144 (Sacramento Super. Ct. March 8, 1985) (Tentative Decision).

paying any portion of the bill. The initial contract prepared by McNally called for the signature of ARPAC alone. Dey told McNally to revise the contract and provide a place for "Tharp for Assembly" to sign, which he did. Neither Judge Tharp nor any representative of his committee ever signed the contract prepared by McNally. Furthermore, at no time did Judge Tharp say he would personally pay for McNally's services. Based on these facts, the court held that Judge Tharp had not personally agreed to pay the bill and, therefore, was not responsible for the debt.

B. Should a Candidate Be Held Liable for a Campaign Obligation Simply Because He Is a Member of the Campaign Committee?

Until the early 1860's, a person injured by a member or members of an unincorporated association could bring suit against the other members of the association. Under this approach, clubs, committees, and other similar groups were treated very much like partnerships.⁸

Each member was considered a general agent of the others, and all were chargeable with harm caused by a member in the course of association business. By the end of the nineteenth century, however, many jurisdictions had drawn a sharp line between partnerships and nonprofit associations, and held association members liable only if they had actually authorized, ratified, or participated in the act. Moreover, authorization normally was not inferred from mere membership; . . . [A]s associations grew larger, made more contracts, and caused greater injury, the desire to find authority or ratification also increased. But this very growth in size made membership control unrealistic and membership liability seem unfair; courts expanding the liability of the members sometimes found themselves overruled by statute.⁹

The California statutory and common law schemes track this development. Traditionally, in the absence of a statute providing otherwise, the contract of an unincorporated association was regarded at common law as the contract of the particular members of the association who authorized or ratified the contract.¹⁰ For example, in *Security First National Bank v. Cooper*,¹¹ the plaintiffs sought to recover from an unincorporated association and its individual members for money due on a property lease. In holding the principals individually

8. See Comment, *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1088 (1963). See also FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS 51 (1959).

9. Comment, *supra* note 8 at 1088 (footnote omitted).

10. *Pacific Freight Lines v. Valley Motor Lines, Inc.*, 72 Cal. App. 2d 505, 507, 164 P.2d 901, 902 (1946).

11. *Security First Nat'l Bank v. Cooper*, 62 Cal. App. 2d 653, 145 P.2d 722 (1944).

liable, the court quoted Corpus Juris Secundum's description of the rule of membership liability as follows:

"Membership, as such, imposes no personal liability for the debts of the association; but to charge a member therewith it must be shown that he has *actually or constructively assented to or ratified the contract on which the liability is predicated*. If, however, a member, as such, directly incurs a debt, or *expressly or impliedly authorizes or ratifies the transaction* in which it is incurred, he is liable as a principal. *So a member is liable for any debt that is necessarily contracted to carry out the objects of the association.*"¹²

The court went on to note that the same substantive rule was stated in *Leake v. City of Venice*:¹³ "Where the parties unite in a voluntary unincorporated association, and for convenience contract under an associate name, the acts of the association, it not being a legally responsible body, are the acts of its members who instigate and sanction the same."¹⁴ The court of appeal then stated:

The meaning of the words "constructively assented" in the above quotation from Corpus Juris Secundum is illustrated by the statement of the court in *Richmond v. Judy* (1879), 6 Mo. App. 465, that "*Persons who organize as a campaign committee on the eve of an election may perhaps be supposed to know that their associates, in the name of the committee, will incur certain obvious expenses in giving notice of political meetings, and to sanction such outlay by the very fact of their organization.*"¹⁵

The California Legislature has modified to some extent the common law liability of members of nonprofit unincorporated California associations with respect to contracts.¹⁶ Section 21102 of the California Corporations Code provides: "No presumption or inference existed prior to September 15, 1945, or exists after that date, that a member of a nonprofit association has consented or agreed to the incurring of any obligation by the association, from the fact of joining or being a member of the association, or signing its by-laws."¹⁷

The Code Commission notes which accompany this statute state the following: "But, see *Security First National Bank v. Cooper* (1944), 62 C. A. 2d 653, and authorities cited therein as to the law prior to September 15, 1945, the effective date of this section."¹⁸ This language allows an element of uncertainty to linger, for it seems to contradict the assumption made by the statute regarding pre-1945 law. Perhaps for this reason, a 1976 opinion of the California Attor-

12. *Id.* at 667, 145 P.2d at 729-30 (quoting 7 C.J.S. *Associations* § 32) (emphasis added).

13. 50 Cal. App. 462, 195 P. 440 (1920).

14. *Cooper*, 62 Cal. App. 2d at 667, 145 P.2d at 729-30 (quoting *Leake*, 50 Cal. App. at 465, 195 P. at 441).

15. *Id.* See generally Comment, *Liability of Members and Officers of Nonprofit Unincorporated Associations for Contracts and Torts*, 42 CALIF. L. REV. 812, 820-25 (1954).

16. This section is part of a series of statutes intended to cut back expanding common law liability. CAL. CORP. CODE §§ 21000-21003 (West 1977).

17. *Id.* § 21102.

18. *Id.*

ney General quoted at length the opinion in *Cooper* to describe the common law liability of members of nonprofit unincorporated associations. The attorney general added that section 21102 of the Corporations Code only modified the common law "to some extent," which was a strong indication that section 21102 did not overrule or discredit the *Cooper* decision.¹⁹ In light of the foregoing, it is likely that all this statute accomplishes is the elimination of a presumption.

The next fundamental question is whether campaign committees are covered by the law of unincorporated associations. Since the mid-1970's, campaign organizations have increasingly become statutory creatures. State campaign organizations are usually organized under the Political Reform Act of 1974.²⁰ This Act contains no specific enactment regarding liability of members of these committees. Campaign committees involving federal offices find their legitimacy under Title 2, section 431 of the United States Code.²¹ However, none of these provisions contains any specific enactment regarding liability of committee members. Thus, the courts are left to decide whether campaign committees should be treated as nonprofit associations of natural persons.

The few reported cases addressing the issue have had no difficulty in treating campaign committees in this way.²² In *McCabe v. Goodfellow*,²³ a lawyer sued the Law and Order League of Kirkland (formed to help enforce certain excise and corporate laws) for compensation for professional services. In his complaint, he named the committee's treasurer, but was unsuccessful in securing a judgment against him. The court noted a distinction between associations formed for the purpose of pecuniary profit and those formed for other objectives.²⁴ Noting the transitory character of the organization, the court went on to conclude that members:

had no reason to suppose that the committee so employed the plaintiff upon their individual credit. On the contrary, it fairly appears that they expected that his compensation, as well as the other expenses incurred by the officers and committees, were to be met by the funds voluntarily contributed for that

19. Democratic County Central Committee—Brown Act—Liability For Contractual Obligations, *supra* note 4 at 165.

20. CAL. GOV'T CODE §§ 81000-81016 (West 1987).

21. 2 U.S.C. §§ 431-455 (1982).

22. *Security First Nat'l Bank v. Cooper*, 62 Cal. App. 2d 653, 667, 145 P.2d 722, 729 (1944); *McCabe v. Goodfellow*, 133 N.Y. 89, 96-97, 30 N.E. 728, 730 (1892); *Richmond Advertising/Remhold Assocs., Inc. v. Del Giudice*, 66 A.D.2d 701, 702, 411 N.Y.S.2d 251, 252 (1978); *Bloom v. Vauclain*, 329 Pa. 460, 463-64, 198 A. 78, 79 (1938).

23. 133 N.Y. 89, 30 N.E. 728 (1892).

24. *Id.* at 94, 30 N.E. at 729.

purpose, and placed at the disposal of the committees. . . .²⁵

No court has held a candidate liable for a campaign debt simply by virtue of the candidate's membership in a campaign committee. By the same token, no member of a candidate's committee has been found liable for committee debts simply by virtue of his status as a member. Notwithstanding this relatively decisive case law, more certainty is definitely desirable in this area of the law.

C. *Should a Candidate Bear Responsibility for a Contractual Obligation Incurred by Another Member of the Campaign Committee?*

In order for liability to attach to a committee member, that member must actually or constructively assent to or ratify the contract on which liability is predicated.²⁶ If he directly incurs the debt or either expressly or impliedly authorizes or ratifies the transaction from which the debt arises, he will become liable as a principal.²⁷

In light of this interpretation, it is not surprising that section 21102 of the California Corporations Code has been read as restricting accountability to those members of an unincorporated association who are actors and "who, expressly or impliedly authorize, ratify, or consent to the action taken."²⁸ . . . Thus, the establishment of liability of an individual member will hinge upon a finding of individual participation. . . ."²⁹ Moreover, subsequent ratification by a candidate or a member of the staff may also form a basis for personal liability.³⁰

Implied ratification may be found from the candidate's mere act of acknowledging the benefits of a contract which he did not originally authorize, or even by passively doing nothing. In either case, the law will infer ratification since the candidate has recognized the action taken by the creditor as valid.³¹ This is an area where the facts become crucial. There are no reported decisions in California. The only appellate decisions on point come from other jurisdictions.

In *Perry v. Merideth*,³² the defendant ran for attorney general of Alabama. His campaign experienced financial difficulties and he told members of his committee as well as his office workers not to incur any debts on his behalf. The defendant later met with the plaintiff at

25. *Id.* at 96, 30 N.E. at 730.

26. *Cooper*, 62 Cal. App. 2d at 667, 145 P.2d at 729.

27. *Id.*

28. Comment, *supra* note 12, at 817 (footnote omitted).

29. *Id.* at 817.

30. CAL. CIV. CODE § 2307 (West 1985). See *DeMille v. American Fed'n of Radio Artists*, 31 Cal. 2d 139, 147, 187 P.2d 769, 774 (1947) (holding that subsequent ratification is equivalent to prior authorization), *cert. denied*, 333 U.S. 876 (1948).

31. CAL. CIV. CODE § 2310 (West 1985). See *Johnson v. California I.M.T. Assoc.*, 24 Cal. App. 2d 322, 336, 74 P.2d 1073, 1080 (1938).

32. 381 So. 2d 649 (Ala. Civ. App. 1980).

a social occasion. What occurred at the meeting was disputed, but it was agreed that the plaintiff indicated his willingness to do printing work for the defendant's campaign.³³ Thereafter, an unidentified member of the candidate's office staff contacted the plaintiff and placed an order for certain printed campaign materials. The order was filled and the goods were delivered and accepted. More orders followed and they too were filled and the goods accepted. The defendant's campaign headquarters were allegedly billed after each delivery and acceptance.³⁴

The court was impressed with evidence indicating that the plaintiff and defendant had discussed the proposed transactions, that thereafter a member of the defendant's staff ordered and accepted materials, and the items were put to use in furthering the defendant's unsuccessful campaign. The record failed to reveal that the plaintiff was notified of any limitation on the campaign staff's authority to place and accept delivery of such orders.³⁵ Under these facts, the court found that the campaign staff possessed apparent authority to bind the candidate for campaign materials which were ordered, accepted, and used by the candidate's staff.³⁶

A 1978 New York decision insulated various campaign staff members of mayoral candidate Albert Blumenthal from personal liability for campaign debts.³⁷ A man described as Blumenthal's assistant campaign coordinator employed the plaintiff to place television and radio advertising for Blumenthal's campaign. The plaintiff claimed that the defendant's staff members "agreed to pay the plaintiff in advance for each broadcast."³⁸ The plaintiff sued the assistant treasurer, the treasurer, and the campaign manager. Each defendant denied having entered any agreement to pay any campaign obligations individually or to assume any personal liability whatsoever. Significantly, the plaintiff did not contradict these denials. In exonerating the defendants, the court remarked:

It seems quite clear that those who became associated with the Blumenthal mayoral campaign did not thereby intend or implicitly agree to become personally liable for whatever obligations were incurred during the course of the campaign, and that plaintiff could not reasonably have so understood. Since it

33. *Id.* at 650.

34. *Id.*

35. *Id.* at 650-51.

36. *Id.* The court also relied heavily on an analysis of the law of agency. *See infra* 52 through 58 and accompanying text.

37. *Richmond Advertising/Remhold Assocs., Inc. v. Del Giudice*, 66 A.D.2d 701, 411 N.Y.S.2d 251 (1978).

38. *Id.* at 701, 411 N.Y.S.2d at 252.

is undisputed in this record that the appellants never agreed to become personally liable for any of the obligations in question, no factual issue is presented, and summary judgment dismissing the complaint against them should be granted.³⁹

The effect of apparent authority is brought into sharp focus by *Hunt v. Davis*,⁴⁰ in which Republican gubernatorial candidate, Guy Hunt, was held personally liable for campaign debts. In *Hunt*, a fund-raising plan consisting of two mass-mailings of campaign literature was employed to request contributions for the campaign. Hunt initially rejected the plan because it required over \$20,000 to get underway. Hunt's campaign manager and consultant, together with a public relations specialist, offered a solution whereby they would solicit "loans" to obtain the necessary money. Hunt authorized this plan, pursuant to which his staffers were to raise \$15,000 to fund the mass-mailing. The contributions received as a result of the mailing would in turn be used to repay the loans. The remaining amount was to be used in the media campaign. Eventually, the necessary money was raised.

The Hunt campaign opened a checking account in the name of "Guy Hunt Campaign Committee Special Account." The campaign manager was listed as the only person authorized to sign checks. The manager sent his ideas to a firm which designed brochures for mailing. The expenses incurred in having this material designed were paid with campaign funds. Hunt testified that he read and approved proofs of the brochures. The brochures contained the following: "Pd. Pol. Adv. by Guy Hunt Campaign, Cullman, Al Carl Woodward, Chmn. printed by O. Davis Enterprises, Huntsville, Al."⁴¹

The publicist and campaign manager then contacted the plaintiff and they told him that the manager represented the Guy Hunt campaign. The plaintiff had previously done printing for the campaign. He prepared copies of different brochures and the materials were mass-printed and mailed to approximately 60,000 individuals. Unfortunately, the plan was unsuccessful in raising the expected contributions. It raised only a few thousand dollars. During this time, some money was paid to the plaintiff by a check signed by the campaign manager and drawn on the "special account."

Following the election, approximately \$1,400 remained in the special account. After it was redeposited into Hunt's regular campaign account, the money was used to reimburse one of the individuals whose contribution initiated the fund-raising plan.⁴²

The court held that the campaign manager "had at least apparent

39. *Id.* at 701, 411 N.Y.S.2d at 253.

40. 387 So. 2d 209 (Ala. Civ. App.), *writ denied*, 387 So. 2d 213 (1980).

41. *Id.* at 211.

42. *Id.*

authority to bind Hunt,"⁴³ noting that the candidate "allowed it to appear to plaintiff that he personally authorized the project. . . . This being so, if Hunt desired to avoid liability, he should have made this clear to plaintiff."⁴⁴ The court emphasized that third persons who are ignorant of the restricted extent of an agent's authority may rely on his apparent authority as long as this reliance is reposed in good faith. The court noted that the plaintiff had printed other materials for the campaign, and that there had been a plan to use the plaintiff in an advertisement as a representative black businessman who supported Hunt's candidacy. Moreover, the brochures, which the candidate approved, indicated that they were paid for by the Hunt campaign and named the plaintiff as the printer.⁴⁵

There are no reported California decisions on these issues. In *McNally v. Tharp*,⁴⁶ a California superior court case, the trial judge found the candidate to be personally liable since Judge Tharp met with McNally knowing his anticipated role, and "approved" of him. Furthermore, the court found significant the fact that Judge Tharp had knowledge of each piece of literature which McNally produced, although another person did the actual ordering. Tharp reviewed the copy of the proposed literature, and used and benefited from McNally's products in his campaign. In addition, the court noted that Tharp had approved of the overall schedule of the campaign material and never expressly disclaimed personal responsibility.⁴⁷

In *Hoffenblum, Mollrich Communications*,⁴⁸ a campaign consultant and eight vendors sued an unsuccessful candidate for the Oakland City Council. The campaign consultant and the candidate entered into a written letter agreement which the candidate signed under the phrase "reviewed and approved." Although the agreement recited that the campaign consultant was contracting with the Ware

43. *Id.* at 212. The court quoted *Pearson v. Agricultural Ins. Co.*, 247 Ala. 485, 25 So. 2d 164 (1946), "[a]s between the principal and third persons, mutual rights and liabilities are governed by the apparent scope of the agent's authority which the principal has held out the agent as possessing, or which he has permitted the agent to represent that he possesses. . . ." *Id.* at 488, 25 So. 2d at 167 (emphasis added).

44. *Davis*, 387 So. 2d at 212. See also *Hafenbraedl v. LeTendre* for Congress Comm., 61 Wis. 2d 665, 213 N.W.2d 353 (1974) (suggesting that candidates "can limit their liability if they wish by inserting appropriate provisions in the contracts which the committee makes with third parties.") *Id.* at 667, 213 N.W.2d at 354.

45. *Davis*, 387 So. 2d at 212.

46. No. 296144 (Sacramento County Super. Ct. March 8, 1985) (Tentative Decision). See *supra* note 7 and accompanying text.

47. *Id.*

48. *Hoffenblum, Mollrich Communications, Inc. v. Ware*, No. 554832-9 (Alameda County Super. Ct. Dec. 3, 1984) (Statement of Decision by Judge Joseph Karesh).

for Council Committee, Ware signed individually, and not on behalf of the committee. Thereafter, the consultant engaged the services of the other plaintiffs. They performed their services and billed the Ware for Council Committee in care of the campaign consultant. It was undisputed that the candidate used brochures prepared by the other plaintiffs, was aware of campaign activity, and even taped a portion of a radio spot which one of the plaintiffs produced. Consolidated campaign statements filed after the election and signed by the candidate and his treasurer acknowledged unpaid bills to most of the vendors. The court entered a judgment in favor of the campaign consultant and against Ezell Ware. However, the remaining plaintiffs did not recover.⁴⁹

The only other source of guidance in this area is a 1976 opinion of the Attorney General involving the Democratic County Central Committee which concluded that “[i]ndividual members who actually or constructively ratified a committee contract may be liable for the obligation.”⁵⁰ In support of that conclusion, the opinion relied on sections 21000-21103 of the California Corporations Code and the *Cooper* opinion.⁵¹

Although there are no cases which have so indicated, the statutory classification of a campaign committee could play a vital role in determining candidate liability. Depending on the manner in which the committee is organized, a candidate may be estopped to deny that he authorized or ratified an obligation. For example, the vast majority of California campaign committees are “controlled committees.” A controlled committee is precisely defined in section 82016 of the California Government Code:

“Controlled committee” means a committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.⁵²

A candidate who exercises “significant influence” on committee actions and decisions, will be hard put to deny he authorized a particular debt incurred by his committee members. Perhaps the only way he could escape liability on such a delinquent debt would be to claim that the agent who entered into the agreement exercises significant

49. It is difficult to determine why from the memorandum opinion.

50. Brown Act, *supra* note 4, at 166.

51. *Cooper*, 62 Cal. App. 2d 653, 145 P.2d 722 (1944).

52. CAL. GOV'T CODE § 82016 (West 1987). Determining if a committee is “controlled” is an easy task. Statements of organization filed with the Secretary of State contain a box which must be checked if a committee is a controlled committee. Campaign expense reports contain questions asking whether the committee is a controlled committee. All of this information is a part of the public record.

influence on committee actions. If the candidate can prove he was ignorant of the obligation, he may not be found liable.

The equivalent federal statute is not as strongly worded.⁵³ Federal campaign committees can be broken down into "principal campaign committees," "authorized committees," and "connected organizations." None of these statutory definitions contains a requirement that a candidate have a significant influence on committee activities.⁵⁴

D. Liability Under the Law of Agency

Sections 21000-21103 of the California Corporations Code do not codify the entire sphere of membership liability.⁵⁵ Agency law fills in some of the holes left by the statutory scheme pertaining to individual liability of committee members. If the liability of officers or agents acting on behalf of an unincorporated association is considered with respect to the law of agency, then several other theories can be advanced in favor of individual liability.⁵⁶

"There is a strong inference that where an agent purports to act for a nonexistent principal, the parties intend that the agent shall be individually liable on the contract."⁵⁷ An unincorporated association is not a legal entity. Therefore, it could conceivably be argued that such an association is tantamount to a nonexistent principal. As a result, an agent appearing to act for the association may incur individual liability on a contract made on behalf of the association. "It is immaterial that the agent misunderstood the law or did not intend to bind himself."⁵⁸ Although support for this proposition appears in cases and at least one law review article, the idea runs counter to a small number of out-of-state decisions and cuts sharply into a 1976 opinion of the Attorney General. Moreover, none of the decisions

53. 2 U.S.C. §§ 431-455 (1984).

54. The closest definition is a "principal campaign committee" which means a "political committee designated and authorized by a candidate under § 432(e)(1) of this title." 2 U.S.C. § 431(5)-(7).

55. See Comment, *supra* note 15, at 823.

56. *Id.* at 824 (citing treatises on the law of agency).

57. *Id.* at 825 (footnote omitted); See *Leake v. City of Venice*, 50 Cal. App. 462, 195 P. 440 (1920). "In the employing of plaintiffs to perform labor and purchasing materials required in holding the races, they [defendants] acted by persons designated as officers of the association, and the fact that the transaction out of which the indebtedness arose were [sic] had between plaintiffs and such purported officers selected and appointed by defendants makes them nonetheless liable." *Id.* at 466, 195 P. at 441.

58. Comment, *supra* note 15, at 825 (citations omitted).

supporting the proposition involved a political campaign.⁵⁹ Accordingly, it is unlikely that this approach would be applied in the context of political committees.

It is apparent that the only time a pure agency analysis would be proper in the political committee context would be when questions arise as to the authority of a campaigner to contract on behalf of the campaign committee. If a staffer receives credit personally—not on behalf of the campaign—or if he binds a campaign knowing full well he lacks authority to do so, then he will be personally liable.⁶⁰

Under California agency law, an agent also incurs personal liability “when his acts are wrongful in their nature.”⁶¹ Courts have interpreted this to mean that an agent who commits a tort, such as negligence, stands individually liable for the act.⁶² Usually, of course, the doctrine of respondeat superior operates to impose liability on the principal. However, it is unclear whether a political campaign committee will be held responsible for torts committed by its members.

E. Tort Liability of Campaign Committee Members

In an era of expanding tort liability and increasing willingness by the general public to engage in tort litigation, the extent to which a candidate and members of campaign staffs are subject to tort liability may become an increasingly important issue. At present, very little law exists in this regard. The leading decision in this area comes from the Alabama Supreme Court.⁶³ In *Pittman v. Martin*,⁶⁴ Jim Martin was Alabama’s Republican candidate for the United States Senate in 1978. Martin borrowed an aircraft owned by his co-defendant for use in his election campaign. On October 30, 1978, while the aircraft was being used to transport passengers from Montgomery to Huntsville for Martin’s campaign, it crashed, taking the lives of plain-

59. See generally, *supra* notes 11 and 12.

60. Section 2343 of the California Civil Code provides in pertinent part:

One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so. . . .

CAL. CIV. CODE § 2343 (West 1985). See also *Borton v. Barnes*, 48 Cal. App. 589, 594, 192 P. 307, 309 (1920).

61. CAL. CIV. CODE § 2343(3) (West 1985). The statute provides that the agent will be liable to third parties when he assumes personal liability in a transaction; enters a contract on behalf of another without a good faith belief that he has the authority to do so; and when he commits “wrongful acts.” *Id.*

62. See, e.g., *Mayer v. Sturdy Northern Sales, Inc.*, 91 Cal. App. 3d 69, 78, 154 Cal. Rptr. 43, 49 (1979).

63. *Pittman v. Martin*, 429 So. 2d 976 (Ala. 1983).

64. *Id.*

tiffs' decedents. The plaintiffs sued the candidate for negligence based upon the acts of the pilot as the candidate's agent, servant, or employee; for negligent entrustment of the aircraft to the pilot; for causing or authorizing the pilot to operate the aircraft; and for liability as a co-joint venturer for the purpose of transporting the plaintiffs' decedents.

Martin obtained a summary judgment in his favor and the executrix appealed. The Alabama Supreme Court reversed, holding that "there is a scintilla of evidence, enough to allow submission to the jury of the claim that [the candidate] did actually ratify or authorize the type of action which caused the death of plaintiffs' intestates."⁶⁵

In dicta, however, the supreme court announced that it was "loath" to extend the rationale of cases imposing contractual liability into the area of tort law where a political campaign is involved.⁶⁶ The court distinguished political campaigns from business ventures in which the principal and agent have established a more permanent business relationship. The court noted that: "[p]olitical commentators have aptly described political campaigns as organized confusion."⁶⁷

A political campaign . . . is of relatively short duration, usually not more than a few months, and is characterized by intensive activity and decision-making. By the force of his personality and precepts, the candidate hopes to draw to his cause diverse groups and individuals, many of whom he may never know worked for him. It is also not like a joint venture because it is not for a business purpose and the campaign is so organized that different individuals have definite duties and responsibilities, such as campaign manager, media representative, scheduler, finance chairman, etc. Yet, in the political campaign, Americans are allowed to exercise two of their fundamental constitutional rights: the right to vote and the right to freedom of expression. We believe that to apply agency principles in the political arena where tort liability is invoked would have a chilling effect on these important constitutional rights.⁶⁸

Therefore, the court decided that the "better rule" would be that a "political candidate can only be individually liable where he has personally authorized an individual to perform the type of act which caused plaintiff's injuries or death, or has subsequently ratified such actions."⁶⁹

One justice, however, stated that

65. *Id.* at 979.

66. *Id.* at 978. This assertion was specifically set forth in the case of *Perry v. Meredith*, 381 So. 2d 649 (Ala. Civ. App. 1980), and *Hunt v. Davis*, 387 So. 2d 209 (Ala. Civ. App. 1980).

67. *Pittman*, 429 So. 2d at 978. See generally, J. BROWN & P. SEIB, *THE ART OF POLITICS* (1976); J. MCGINNIS, *THE SELLING OF THE PRESIDENT 1968* (1969).

68. *Pittman*, 429 So. 2d at 978-79.

69. *Id.* at 979. See *American Artworks, Inc. v. Republican State Comm.*, 177 Okla. 420, 421, 60 P.2d 786, 787 (1936).

whether a candidate can be held responsible on a theory of vicarious liability for the tortious acts of his agent, employee, or servant is one of first impression before this court and as far as I can find, one of first impression before any appellate court in the United States.⁷⁰

He went on to declare that he found no reason why the doctrines applied in cases decided in a contractual context should not be applied in a tort law context.⁷¹

The result in *Pittman* might have been different had the case involved a California controlled campaign committee. Since the candidate was running for the United States Senate, his organization had been formed pursuant to federal law. The candidate himself was not a member of the committee, nor was he in charge of the campaign's day-to-day activities.⁷² Since no statutory definition of a federal campaign committee involves the element of control,⁷³ the Alabama court was able, based on the facts of the case, to carve an exception to traditional agency law.⁷⁴ In an action against a controlled committee, on the other hand, the plaintiff would have less difficulty establishing candidate control. Once this were accomplished, liability would be established regardless of whether the Alabama rule was followed in California. In summary, while candidates for federal office may not automatically be liable for their torts, an opposite result may be the case with respect to controlled committees formed under the California Government Code.⁷⁵

F. Constitutional and Public Policy Questions

No appellate court has considered constitutional and public policy questions in this area except to note briefly that political campaigns involve the right to vote and the right to freedom of expression.⁷⁶

The little commentary that does exist tends to insulate candidates from liability. The Alabama Supreme Court commented that expanding tort liability against candidates would create a "chilling effect" on the important constitutional rights of freedom of expression and voting.⁷⁷

Additionally, the 1985 California State Bar Conference of Delegates voted down a resolution imposing liability on a candidate for

70. *Pittman*, 429 So. 2d at 980-81 (Embry, J., concurring and dissenting).

71. *Id.* at 981 (Embry, J., concurring and dissenting).

72. *Id.* at 977.

73. See *supra* text accompanying note 52.

74. *Pittman*, 429 So. 2d at 979 (Embry, J., concurring and dissenting). The Justice pointed to portions of the record indicating that the candidate did, indeed, possess the ultimate power to control the campaign. He disagreed with the court decision which basically carved out an exception which protects political candidates. *Id.*

75. See *supra* note 50 and accompanying text.

76. *Pittman*, 429 So. 2d at 979.

77. See generally J. BROWN & P. SEIB, *THE ART OF POLITICS* (1976); J. MCGINNIS, *THE SELLING OF THE PRESIDENT 1968* (1969).

the breach of a written agreement personally signed by the candidate in connection with his campaign.⁷⁸ In a written opposition statement, the State Bar's Committee on Human Rights opined that such a statute would create a chilling effect on those wishing to run for public office.⁷⁹

Seductive as this argument may sound, it invites a number of disturbing questions. Should there be occasions in which a person is relieved from paying his debts in order to avoid violating his constitutional rights? If an exception is recognized for political candidates, should it not also apply to their campaign managers and staffs? Are there other philanthropic or public spirited activities to which such a constitutional or policy protection would extend? Answering these questions is difficult, and perhaps it is no accident that the law in this area has remained murky.

An argument can be made to the effect that constitutional rights would be "chilled" if candidates were *freed* from their obligations. The merit of this contention becomes apparent when one considers the ramifications of a rule insulating candidates from financial responsibilities. Vendors and campaign managers would undoubtedly insist on substantial "up front" money deposits before agreeing to render their services to a campaign. This would effectively devastate candidates' efforts because they would be forced to make their largest cash outlays early—which is precisely when committees can least afford to make major disbursements. Most campaigns raise the largest portion of their funds during their last few weeks.

Creditors such as the telephone company and other utilities would be unbending. It is uncertain what a utility company's charges will be until after its services are provided. With the candidate immune from liability, and in light of the heavy telephoning that occurs the week before an election, Pacific Bell and others would be justified in

78. State Bar Conference of Delegates, *1985 Conference*, Res. 2-9-85, at 2-9a-85. The resolution, drafted by the author, reads as follows:

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add Section 21101.1 to the Corporations Code as follows:

Section 21101.1

(a) Notwithstanding the provisions of section 21102, a candidate for public office who has signed a written agreement as an individual or on behalf of a controlled committee (as that term is defined in section 82016 of the Government Code) is personally liable for any obligations incurred by the controlled committee under the written agreement.

(b) The provisions of the above subsection are not exclusive and are in addition to any other procedures or remedies provided for by law.

Id.

79. *Id.*

demanding a large deposit from a campaign during its vulnerable initial stage.

It is very common for a candidate to have "X" dollars at a time when he needs four times that amount to pay a vendor. However, the candidate may know that ten days later he will have sufficient funds in his treasury. In such instances, the vendor or the campaign manager will usually advance credit, especially in the common situation where the campaign already has paid many times that amount in earlier bills. A decision insulating the candidate would discourage the vendor and the manager from continuing these practices, since they would have no legal rights against the candidate or anyone else on his committee.

If a rule of law were to be adopted shielding candidates from obligation for their debts, vendors understandably would adopt these practices, and wealthy candidates would consequently enjoy an undeserved advantage over those of modest means. Without considerable personal wealth, a candidate would not have access to needed funds, and promises that such funds are forthcoming would mean nothing to a creditor who knows he has no legal recourse except against a campaign committee that will cease to exist with the passage of election day. The wealthy candidate, on the other hand, would be capable of advancing needed funds at the outset of the campaign and wait to be repaid later from contributions.

The effects of such a ruling might range beyond contractual situations. Politicians may claim that section 2343 of the California Civil Code does not apply to them.⁸⁰ Does this mean that a candidate is immune from legal proceedings if one of his campaign brochures contains defamatory statements about an opponent? What about the publicist who wrote the brochure? Does a person shield himself from all debts, all blame, and all responsibility the moment he seeks public office?

II. CONCLUSION

More than once, litigants have made policy decisions to let the law remain unsettled out of fear of the consequences of a definitive ruling. During the 1970's, for example, some civil rights organizations decided not to appeal cases to the United States Supreme Court for fear of producing an opinion that would emaciate earlier Warren Court decisions. Perhaps similar considerations have been in operation regarding campaign debt liability.⁸¹

80. *See supra* note 60.

81. Neither *Hoffenblum, Mollrich Communications Inc. v. Ware*, No. 554832-9 (Alameda County Super. Ct. Dec. 3, 1984), nor *McNally v. Tharp*, No. 296144 (Sacramento County Super. Ct. March 8, 1985) have been appealed. While the cost of litigation un-

Regardless of an election's outcome, most individuals who run for office feel a personal obligation either to pay campaign debts or make arrangements for them to be satisfied at the end of a campaign. This is as it should be. The pitfalls in this area of the law are not generally known. Consider the possible ramifications if they were suddenly to become clarified by some widely publicized court decision. Would vendors and public relations agencies bow out? Would financially irresponsible people start running for public office? These disturbing questions suggest that any court decision, whichever way it goes, might generate bad law.

doubtedly played a role in these decisions, the parties must have been aware of the consequences of a published opinion establishing a definitive ruling on this issue.

