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Doctoring the Law of Nonprofit Associations with a Band-aid or a Body Cast: A Look at the 1996 and 2008 Uniform Unincorporated Nonprofit Association Acts

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**DOCTORING THE LAW OF NONPROFIT
ASSOCIATIONS WITH A BAND-AID OR A BODY CAST: A
LOOK AT THE 1996 AND 2008 UNIFORM
UNINCORPORATED NONPROFIT ASSOCIATION ACTS**

Elizabeth S. Miller[†]

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I. INTRODUCTION

Unincorporated nonprofit associations are enigmatic creatures that have long been problematic for the law.¹ In most states, nonprofit associations² are governed by “a hodgepodge of common law principles and statutes governing some of their legal aspects.”³ In 1992, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Unincorporated Nonprofit Association Act.⁴ This Act was amended in minor respects in 1996 and continued to be designated the Uniform Unincorporated Nonprofit Association Act.⁵ The Uniform Unincorporated Nonprofit Association Act (UUNAA) addresses a very limited number of issues. UUNAA has been adopted in thirteen jurisdictions.⁶ In 2005, NCCUSL determined that UUNAA

1. *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 n.3 (Tex. 1992) (“Unincorporated associations long have been a problem for the law. They are analogous to partnerships, and yet not partnerships; analogous to corporations, and yet not corporations; analogous to joint tenancies, and yet not joint tenancies; analogous to mutual agencies, and yet not mutual agencies.”).

2. In Parts I and II of this article, the terms “unincorporated nonprofit association” and “nonprofit association” are used in a generic sense to refer to a nonprofit organization that is not incorporated and is not a charitable trust or limited liability company. *See infra* Parts I, II. “Nonprofit association” and “unincorporated nonprofit association” are defined terms used in the Uniform Unincorporated Nonprofit Association Act and Revised Uniform Unincorporated Nonprofit Association Act, respectively. When those terms are used in this article in the context of the application of those statutes, they are used as defined in the applicable statute. *See infra* Parts I, II.

3. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT Prefatory Note, 6B U.L.A. 142 (Supp. 2011).

4. *See* UNIF. UNINCORPORATED NONPROFIT ASS’N ACT, 6A U.L.A. 509–38 (1995) (current version at 6B U.L.A.709–51 (2008)).

5. *See* UNIF. UNINCORPORATED NONPROFIT ASS’N ACT (amended 1996), 6B U.L.A. 709–51 (2008). Section 15 of the 1996 version states: “This [Act] may be cited as the Uniform Unincorporated Nonprofit Association Act (1996).” *Id.* § 15 at 745.

6. UUNAA has been adopted in Alabama, Arkansas, Colorado, Delaware,

should be updated and made more comprehensive, and the result was the Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA), which was approved by NCCUSL in 2008.⁷ RUUNAA has been adopted in four jurisdictions.⁸ The goal of RUUNAA is to provide a more modern and integrated basic legal framework governing nonprofit associations than is provided under the common law and statutes of most states.⁹ It addresses some significant issues not addressed by UUNAA, such as internal governance, dissolution, winding up, and merger. Thus, RUUNAA provides rules on numerous issues where there is a dearth of statutory or common law in most jurisdictions. Supplanting the vagaries of and filling the gaps in the law of nonprofit associations with specific statutory provisions holds obvious appeal, but it is worth noting that legislative adoption of a more comprehensive set of rules such as RUUNAA limits the flexibility of courts to fashion common-law rules that are tailored to particular types of nonprofit associations or particular circumstances. In addition, close examination of some of the provisions of RUUNAA raises some questions that suggest states should carefully consider how legislative pronouncements in this area are articulated, what issues are suited to legislative pronouncements applicable to nonprofit associations in general, and what issues are better left to the judiciary in particular cases or to statutes addressing specific types of nonprofit associations.

the District of Columbia, Hawaii, Idaho, Louisiana, North Carolina, Texas, West Virginia, Wisconsin, and Wyoming. *Id.* Table of Jurisdictions Wherein Act Has Been Adopted at 709, 175 (2008 & Supp. 2011). Arkansas and the District of Columbia subsequently adopted the Revised Uniform Unincorporated Nonprofit Association Act. *See infra* note 8.

7. *See* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT Prefatory Note at 142. The Revised Uniform Unincorporated Nonprofit Association Act (2008) (with prefatory note and comments) is also available online. *See* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT, available at <http://www.law.upenn.edu/bll/archives/ulc/hunaa/2008final.pdf>.

8. RUUNAA has been adopted in Arkansas, the District of Columbia, Iowa, and Nevada. *Legislative Fact Sheet - Unincorporated Nonprofit Association Act (2008)*, UNIF. L. COMM'N, [http://www.nccusl.org/LegislativeFactSheet.aspx?title=Unincorporated Nonprofit Association Act \(2008\)](http://www.nccusl.org/LegislativeFactSheet.aspx?title=Unincorporated%20Nonprofit%20Association%20Act%20(2008)) (last visited Oct. 7, 2011).

9. *See* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT Prefatory Note at 142.

II. HISTORICAL BACKGROUND OF NONPROFIT ASSOCIATIONS

A nonprofit organization may take the form of a nonprofit corporation, charitable trust, or nonprofit association.¹⁰ In some states, a limited liability company may be formed for a nonprofit purpose.¹¹ State nonprofit corporation statutes provide definite and comprehensive rules regarding the formation and operation of a nonprofit corporation.¹² Limited liability company statutes likewise provide a comprehensive set of rules for the formation and operation of a limited liability company, but the default statutory provisions generally contemplate owners who have invested in a for-profit business, and special challenges are thus presented in drafting the governing documents of a nonprofit limited liability company.¹³ Specific statutory provisions regarding charitable trusts are limited, but private trust law provides many of the rules for charitable trusts.¹⁴ The charitable trust is not a suitable form of organization for conducting a business or other active operations but can be an appropriate vehicle for foundations that simply collect, hold, and disperse property for charitable purposes.¹⁵ Nonprofit organizations that are not formed as a nonprofit corporation, nonprofit limited liability company, or charitable trust are nonprofit associations. Nonprofit associations take many shapes and sizes, and the law that applies to them has traditionally consisted of a vague combination of statutes and common-law principles that create a number of problems for nonprofit associations.

Though there are some large, highly structured nonprofit associations,¹⁶ many nonprofit associations are quite small and

10. 1 MARILYN E. PHELAN, *NONPROFIT ORGANIZATIONS: LAW AND TAXATION* § 1:3 (2011).

11. See 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, *RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES* § 4.10 (2011).

12. See 1 PHELAN, *supra* note 10, § 1:10.

13. See 1 RIBSTEIN & KEATINGE, *supra* note 11, § 4.10.

14. 1 PHELAN, *supra* note 10, § 1:4.

15. See *id.*

16. See UNIF. UNINCORPORATED NONPROFIT ASS'N ACT Prefatory Note (amended 1996), 6B U.L.A. 711 (2008) (pointing out that NCCUSL is an unincorporated association and that the Association of American Law Schools and the American Bar Association were not incorporated until 1972 and 1992, respectively). NCCUSL (now also known as the Uniform Law Commission) continues to be organized as an unincorporated nonprofit association. *About the ULC*, UNIF. L. COMM'N, [http://www.nccusl.org/Narrative.aspx?title=About the ULC](http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC) (last visited Oct. 2, 2011) (stating that the Uniform Law Commission is “a

informal. Nonprofit associations include charitable organizations, churches and other religious organizations, political groups, social clubs, and trade associations. Some have detailed written constitutions; many function quite informally with little in the way of written governing documents. Because no formal action such as a filing is required to create a nonprofit association, it is essentially the default form of nonprofit organization, much like the general partnership is the default form of business in the for-profit sector. A somewhat typical definition of an unincorporated association is “a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective.”¹⁷ The affairs of an unincorporated association are regulated by any written articles, constitution, or bylaws adopted by its members; in the absence of such governing documents, “the government of unincorporated associations will be determined by common parliamentary rules, their powers may be ascertained by usage acquiesced in by the members thereof, and they may adopt any lawful means to accomplish their purposes.”¹⁸

Historically, unincorporated associations, including nonprofit associations, have not been considered separate legal entities and have had no legal existence apart from their members.¹⁹ The lack of entity status creates a number of problems for a nonprofit association and its members. For example, under the common law, the association itself cannot hold title to property, thus necessitating that title to property be held through trustees.²⁰ Additionally, the common law did not recognize an association’s

non-profit unincorporated association”).

17. *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) (citing BLACK’S LAW DICTIONARY 1531–32 (6th ed. 1990)). Courts generally look for some degree of organization in order to characterize a group as an unincorporated association. *See, e.g., Juhl v. Airington*, 936 S.W.2d 640, 641, 643 n.2 (Tex. 1996) (commenting that it was doubtful that a group of anti-abortion protestors, who met together the night before a demonstration and reconvened the next morning for the demonstration, could be considered an unincorporated association where the demonstration was organized by an individual who operated his anti-abortion activities as a sole proprietorship and the protestors had no newsletter, no charter, no membership, no formal organization, and no regular meetings).

18. *Johnson v. S. Blue Hill Cemetery Ass’n*, 221 A.2d 280, 283 (Me. 1966).

19. *Cox*, 836 S.W.2d at 169.

20. *Id.*; *see also Johnson*, 221 A.2d at 284 (noting unincorporated associations “have no such legal existence as will permit them to acquire and hold property in the associate name,” but they may acquire and hold property through trustees).

capacity to sue or be sued.²¹ This principle has been altered in many states by procedural rules or statutes permitting suit in the name of an unincorporated association, but these procedural modifications do not generally alter substantive rights.²² Thus, even though a judgment may be entered against a nonprofit association in its name, the aggregate nature of the association for other purposes still presents difficulties for the members.

Liabilities incurred on behalf of a nonprofit association or in the course of its activities are a matter of serious concern to the members as a result of a nonprofit association's lack of legal identity under the common law. Although the liability of members of a nonprofit association at common law is not necessarily coextensive with partner-type vicarious liability, significant risks nevertheless loom by virtue of member status. With regard to contracts, a member incurring a debt on behalf of the association or assenting to its creation is personally liable.²³ Broadly applied, this rule does not require knowledge of the specific contract and leads to liability for any debt "necessarily contracted to carry out the objects of the association."²⁴ With regard to tort liabilities, some courts have adopted a rule of partner-type liability whereby a member's status as member is alone sufficient to impose liability for tortious acts or omissions of another acting for the association.²⁵ Other courts have concluded that mere membership in the association is an insufficient basis to impose liability for another member's tortious conduct and that liability of a member must be analyzed based on the specific actions undertaken, authorized, or

21. *Cox*, 836 S.W.2d at 169.

22. *See, e.g.*, TEX. R. CIV. P. 28 (permitting suit by or against an unincorporated association doing business under an assumed name); *see also* *Fast v. Kahan*, 481 P.2d 958, 963 (Kan. 1971) ("Even in those states where statutes have been enacted permitting unincorporated associations to be sued *eo nomine*, it has generally been held not to preclude a plaintiff from pursuing any remedy available to him at law or in equity against the individual members."); *Cox*, 836 S.W.2d at 171 (discussing Rule 28 of the Texas Rules of Civil Procedure).

23. *Cox*, 836 S.W.2d at 170.

24. *Sec. First Nat'l Bank of L.A. v. Cooper*, 145 P.2d 722, 729 (Cal. Dist. Ct. App. 1944).

25. *See, e.g., Fast*, 481 P.2d at 963 (holding that defendant was severally liable as a member of the association); *see also* David J. Oliveiri, Annotation, *Liability of Member of Unincorporated Association for Tortious Acts of Association's Nonmember Agent or Employee*, 62 A.L.R.3d 1165 (1975) (discussing various courts' treatment of the liability of a member of an unincorporated association for the tortious acts of the association's nonmember agent or employee).

ratified by the member.²⁶

Yet another problem arising from the aggregate nature of the nonprofit association at common law is the situation in which a member suffers an injury due to the tortious conduct of another member or agent of the association. Historically, an unincorporated association has not been liable to a member for damages caused by the wrongful act of another member or agent of the association.²⁷ The conceptual underpinning of this rule is that the injured member and the association are co-principals, and the wrongful conduct is thus imputed to the plaintiff for purposes of the plaintiff's suit.²⁸ In essence, the plaintiff would be suing herself.²⁹ Courts in a number of jurisdictions have abrogated this doctrine.³⁰

III. OVERVIEW OF UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (1996)

The purpose of UUNAA is to improve upon the common law with respect to a limited number of legal problems.³¹ UUNAA is thus a skeletal statute. It reforms the common law in three significant areas: (1) the capacity of a nonprofit association to acquire, hold, and transfer property;³² (2) the capacity of a nonprofit association to sue and be sued as an entity;³³ and (3) the contract and tort liability of a nonprofit association, its members, and persons who participate in management of the association.³⁴ The approach of UUNAA is that a nonprofit association is a legal

26. See, e.g., *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996) (rejecting the lower court's holding that "the existence of such an association might alone form the basis for imposing tort liability on all members for the acts of some"); see also *Oliveiri*, *supra* note 25 (discussing various courts' treatment of the liability of a member of an unincorporated association for the tortious acts of the association's nonmember agent or employee).

27. *Cox*, 836 S.W.2d at 170.

28. *Id.*

29. *Id.*

30. *Id.* at 172-73 (citing *White v. Cox*, 95 Cal. Rptr. 259, 261 (Cal. Ct. App. 1971); *Furek v. Univ. of Del.*, 594 A.2d 506, 513 (Del. 1991); *Buteas v. Raritan Lodge*, 591 A.2d 623, 628 (N.J. Super. Ct. App. Div. 1991); *Tanner v. Columbus Lodge No. 11*, 337 N.E.2d 625, 627 (Ohio 1975); *Crocker v. Barr*, 409 S.E.2d 368, 372 (S.C. 1991)).

31. See UNIF. UNINCORPORATED NONPROFIT ASS'N ACT Prefatory Note (amended 1996), 6B U.L.A. 710-11 (2008).

32. See *id.* § 4 at 720.

33. See *id.* § 7 at 732.

34. See *id.* § 6 at 728.

entity for the purposes of these three areas; UUNAA does not make nonprofit associations legal entities for all purposes.³⁵

The provisions of UUNAA revolve around the three basic areas mentioned above.³⁶ UUNAA does not address questions of membership, governance, or other issues addressed in modern nonprofit corporation statutes.³⁷ Efforts to develop default internal governance rules demonstrated the complexity and difficulty of devising rules that reasonably would fit the wide variety of nonprofit associations encompassed by UUNAA,³⁸ and the drafters thus concluded that the area was best left to a jurisdiction's common law or other statutes on the subject.³⁹

A. *Definition of Nonprofit Association*

UUNAA defines a “nonprofit association” as “an unincorporated organization, other than one created by a trust, consisting of [two] or more members joined by mutual consent for a common, nonprofit purpose.”⁴⁰ The statute does not define “nonprofit purpose.” The definition does not require that the nonprofit association be tax-exempt for federal or state tax purposes, but an unincorporated association organized for a tax-exempt purpose would certainly fall within the scope of the term

35. *Id.* Prefatory Note at 712. Though UUNAA does not explicitly provide that a nonprofit association is an entity for any purpose other than the issues addressed in UUNAA, a court might conclude by analogy that entity treatment makes sense in contexts not specifically addressed by the statute.

36. Sections 4, 5, 9, and 19 of UUNAA relate to holding, acquiring, and disposing of property. Sections 7, 8, 10, 11, 12, and 13 relate to suits by and against a nonprofit association. Sections 6 and 8 relate to liability of a member or person authorized to participate in management of a nonprofit association. *See generally id.* §§ 4–13, 19 at 709–51.

37. *Id.* Prefatory Note at 712.

38. UUNAA applies to all types of nonprofit associations, i.e., public benefit, mutual benefit, and religious associations. *Id.* Thus, UUNAA applies to “unincorporated philanthropic, educational, scientific, and literary clubs, unions, trade associations, political organizations, cooperatives, churches, hospitals, condominium associations, neighborhood associations, and all other unincorporated types of nonprofit associations.” *Id.* UUNAA was drafted with “small informal associations in mind,” although there are notable instances of large nonprofit organizations operating as unincorporated associations. *Id.*

39. *Id.* § 2 cmt. 3 at 719.

40. *Id.* § 1(2) at 715–16. The definition goes on to state that “joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.” *Id.* at 716.

“nonprofit association.”⁴¹ The comments to UUNAA state that “nonprofit” is used in a broad sense and goes beyond the commonly used definition of the term as an association whose net gains do not inure to the benefit of its members and which makes no distribution before dissolution to its members.⁴² Thus, a consumer cooperative that is not organized under a specific state or federal statute would be a nonprofit association under UUNAA even though it makes distributions to its members.⁴³ A Colorado court determined that UUNAA applied to a political candidate’s campaign committee.⁴⁴ A Texas court opined that the pooling of money by investors for their common defense in tax litigation with the Internal Revenue Service appeared to fall within the definition of a nonprofit association under UUNAA.⁴⁵

For an association to fall within the definition of a nonprofit association under UUNAA, it must have at least two members.⁴⁶ A “member” is defined as “a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.”⁴⁷ UUNAA is concerned only with whether a person is a “member” for purposes of external relations, such as liabilities to third parties.⁴⁸ The comments to UUNAA point out that a person is not a member for purposes of the statute simply because the association calls a person a member.⁴⁹ For example, a supporter or donor who is not authorized to participate in the development of policy or in the selection of persons who manage the affairs of the

41. See I.R.C. § 501(c) (West 2011).

42. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1 cmt. 9 at 718.

43. *Id.*

44. *Mohr v. Kelly*, 8 P.3d 543, 545–46 (Colo. App. 2000).

45. *Izen v. Sjostrom*, No. 14-06-00142-CV, 2007 WL 968841, at *3 (Tex. App. Apr. 3, 2007).

46. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1(2) at 715–16. UUNAA recommends to the states that the definition require two or more members, but the number is enclosed in brackets to suggest that the states consider whether the number should be one or two or an even larger number. *Id.* § 1 cmt. 8 at 717. Some states have required a larger number. See, e.g., TEX. BUS. ORGS. CODE ANN. § 252.001(2) (West 2010) (specifying a minimum of three members).

47. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1(1) at 715. The statute defines “person” to include artificial persons, such as corporations and partnerships, as well as individuals. *Id.* § 1(3) at 716.

48. *Id.* § 1 cmt. 1 at 716.

49. *Id.* § 1 cmt. 2.

nonprofit association is not a “member” as defined by UUNAA.⁵⁰ On the other hand, the definition of a “member” is broad enough that the association need not designate or refer to members in order to have members within the meaning of the statute. Some nonprofit organizations have self-perpetuating boards and may not refer at all to “members” in their organizational structures. It appears that persons serving on the governing board would constitute “members” in such cases.⁵¹

The definition of a nonprofit association is sufficiently broad to encompass formal and informal associations. No filing or writing is required to create a nonprofit association, and much as a general partnership may arise inadvertently, a nonprofit association may be created without a realization on the part of its members that such an association has been created. In the case of an informal or inadvertent partnership, the partnership provisions of state partnership statutes contain a somewhat comprehensive set of rules that govern the relationship of the partners in the absence of an agreement.⁵² UUNAA leaves the rules that govern the operation of a nonprofit association’s affairs and the rights and duties of the members *inter se* and with respect to the association to the governing documents or agreements adopted by the members or the common law.⁵³ The answers to legal issues that may arise in the unincorporated association context often are not clear, and UUNAA has been criticized for its skeletal approach.⁵⁴

50. *Id.*

51. This is so because the persons on a self-perpetuating board select the persons authorized to manage the affairs of the nonprofit association, and the definition includes as a “member” a person entitled to participate in the selection of persons authorized to manage the affairs of the association. Indeed, if an association has a governing board that determines organizational policies, as is typically the case in a board structure, a board member would fall within the definition of a “member” of the association regardless of whether the board selects the persons authorized to manage the association’s affairs because the definition includes as a “member” a person who may participate in the development of policy of the association. *See id.* § 1(2) at 715–16.

52. *See* UNIF. P’SHIP ACT (amended 1997), 6 Pt. I U.L.A. 1-274 (2001).

53. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2 at 719 (“Principles of law and equity supplement this [Act] unless displaced by a particular provision of it.”). *See also id.* § 18(c) at 746 (“This [Act] replaces existing law with respect to matters covered by this [Act] but does not affect other law respecting nonprofit associations.”).

54. *See Memorandum 2000-44, Uniform Unincorporated Nonprofit Association Act*, CAL. L. REVISION COMM’N (July 7, 2000), <http://www.clrc.ca.gov/pub/2000/MM00-44.pdf>. The California Law Revision Commission was charged with determining whether UUNAA should be adopted in California in whole or in part.

B. Capacity of Nonprofit Association to Hold Property

Under UUNAA, “[a] nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.”⁵⁵ A nonprofit association under UUNAA may acquire, hold, encumber, or transfer property in its name and may be a beneficiary of a trust, contract, or will.⁵⁶ Thus, UUNAA resolves a major problem for nonprofit associations under the common law.⁵⁷

UUNAA provides for an optional filing of a statement of authority as to real property.⁵⁸ If a nonprofit association desires, it may execute and record a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association, and the authority of a person named in a recorded statement of authority is conclusive in favor of a person who gives value without notice that the person lacks authority.⁵⁹

UUNAA contains a provision for the disposition of personal property of a nonprofit association that has become inactive.⁶⁰ There are numerous questions that may arise under this provision, such as the meaning of “inactive”⁶¹ and the duties of the transferee of property. The provision only applies to personal property and is intended to relieve a person in possession of the property of responsibility for the property.⁶² The provision authorizes a person in possession or control of personal property of a nonprofit association to transfer custody of the property if the nonprofit association has been inactive for three years or longer.⁶³ A

The Commission ultimately recommended improvement and reorganization of existing unincorporated association statutes in California rather than adoption of UUNAA. Extensive materials relating to the Commission’s study can be found at [http://www.clrc.ca.gov/B501.html#Staff Memoranda](http://www.clrc.ca.gov/B501.html#Staff%20Memoranda).

55. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 4(a) at 720.

56. *Id.* § 4(b)–(c).

57. *See supra* note 20 and accompanying text.

58. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 5 at 722–23.

59. *Id.*

60. *Id.* § 9 at 735.

61. The statute does not define “inactive.” *Id.* § 9 cmt. 2. The comments to UUNAA provide the following examples of an inactive association: (1) “[a] nonprofit association that has accomplished its purpose, such as seeking approval in a school bond election”; and (2) “[a] nonprofit association that has stopped pursuing its purposes, collecting dues, holding elections of officers and board members, and conducting meetings, and [that] has no employees.” *Id.*

62. *Id.* § 9 cmt. 1 (pointing out that the provision is not a dissolution provision).

63. *Id.* § 9.

document of a nonprofit association may specify a longer or shorter period of inactivity.⁶⁴ The property may be transferred to a person specified in a document of a nonprofit association or, if no person is specified, “to a nonprofit association or nonprofit corporation pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.”⁶⁵

UUNAA offers two alternative provisions facilitating the effectuation of a purported transfer of property to a nonprofit association before the effective date of UUNAA.⁶⁶ One provision would be appropriate for adoption in a state having the initial common-law rule that a purported transfer of property to a nonprofit association totally failed, and the other provision would be appropriate in a state that had adopted the rule that an estate or interest in property purportedly transferred to a nonprofit association vested in a fiduciary.⁶⁷ Depending upon what rules a state has adopted with respect to transfers of property to nonprofit associations, adoption of one, both, or neither alternative may be appropriate.⁶⁸

C. *Capacity of Nonprofit Association to Sue and Be Sued*

UUNAA broadly recognizes the right of a nonprofit association to participate as an entity in judicial, administrative, or governmental proceedings and in arbitration or mediation.⁶⁹ The comments to UUNAA note that many states have enacted provisions granting unincorporated associations the right to sue and be sued but have rejected the argument that these provisions make the association a separate entity for other purposes.⁷⁰ UUNAA specifies that a nonprofit association is an entity for purposes of enforcing rights, duties, and liabilities in contract and tort,⁷¹ but the failure to provide entity status for all purposes leaves in question the extent to which a nonprofit association under UUNAA enjoys rights or may be bound by obligations that do not arise under contract or tort law, i.e., rights or obligations

64. *Id.*

65. *Id.*

66. *Id.* § 19 at 747.

67. *See id.* § 19 cmt. 1 at 748.

68. *See id.*

69. *Id.* §§ 6(a), 7(a) at 732.

70. *Id.* § 7 cmt. 1.

71. *Id.* § 6(a) at 728.

emanating from a constitution, statute, or regulation.⁷²

Consistent with its entity approach to proceedings against a nonprofit association, UUNAA provides that a claim against a nonprofit association does not abate merely because of a change in its members or managing persons,⁷³ and a judgment against a nonprofit association is not by itself a judgment against a member or managing person.⁷⁴ UUNAA rejects the common-law notion of an association and its members as co-principals by providing that a member of a nonprofit association may assert a claim against the nonprofit association and vice versa.⁷⁵ UUNAA permits, but does not require, a nonprofit association to file an appointment of agent to receive service of process.⁷⁶

UUNAA describes a nonprofit association's standing to represent the interests of its members in a proceeding.⁷⁷ Under this provision, "a nonprofit association may assert a claim in its name on behalf of its members if: [1] one or more members of the nonprofit association have standing to assert a claim in their own right, [2] the interests the nonprofit association seeks to protect are germane to its purposes, and [3] neither the claim asserted nor the relief requested requires the participation of a member."⁷⁸ The comments note that this is the federal rule of standing and that a nonprofit association must meet the three requirements of this provision only if it seeks to represent the interests of its members; if the suit concerns only the nonprofit association's interests, these requirements do not apply.⁷⁹

72. See, e.g., *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006) (holding that an unincorporated anti-abortion association is not a "person" under 42 U.S.C. § 1983 and thus could not sue a city under § 1983 for violating the association's First Amendment rights when the city denied the association a parade permit). UUNAA did not enter into the court's analysis, and it is not clear that entity status conferred by a state statute for some or all purposes would have altered the result, but the court recognized that corporations, nonprofit corporations, and unions are "persons" for purposes of § 1983 and distinguished unions from unincorporated associations on the basis of the similarity between unions and corporations. *Id.* at 1213–15.

73. UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 11 at 742.

74. *Id.* § 8 at 733.

75. See *id.* § 6(e) at 728.

76. *Id.* § 10 at 738.

77. *Id.* § 7(b) at 732.

78. *Id.*

79. *Id.* § 7 cmt. 3.

D. Liability in Tort and Contract

UUNAA provides that a nonprofit association is a “legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and tort.”⁸⁰ This statement clearly establishes that a nonprofit association may be bound as an entity on contracts entered into on its behalf and held liable for tortious acts imputable to it as an entity.⁸¹ The statute goes on to expressly provide that a person is not liable for the breach of contract or tortious act or omission of a nonprofit association merely because the person is a member, a person authorized to participate in management of the nonprofit association, or a person considered to be a member by the association.⁸² It might be argued that these provisions do not literally alter the common-law liability of members or managing persons in jurisdictions in which a person’s contractual liability is based on the person’s authorization of or assent to the contract and a person’s liability in tort hinges on the person’s participation or ratification of the tortious conduct.⁸³ The comments make clear, however, that the intent of the provisions is to preserve only the type of direct liability that a person has under other law, such as liability on a contract that the person has personally guaranteed or

80. *Id.* § 6(a) at 728. Consistent with this principle, a judgment or order against a nonprofit association is not by itself a judgment or order against a member or a person considered to be a member by the nonprofit association. *Id.* § 8 at 733.

81. The articulation of the principles set out in section 6 of UUNAA in terms of “contract” and “tort” may literally describe the intended scope in terms that are too narrow. *See id.* § 6 at 728. Presumably, the drafters intended an association to have the benefits conferred and obligations imposed by statutory and regulatory schemes such as employment laws as well as to shelter members and managing members from liabilities arising from such laws.

82. *Id.* § 6(b)–(c). Phrasing the liability protection in terms of “contract” and “tort” raises the question of whether other types of liabilities, such as liabilities under statutory and regulatory provisions, are encompassed. The commentary reflects the assumption that the liability protection is similar to corporate liability protection (alluding to the possibility of application of corporate veil-piercing principles) and gives no indication that the “contract” and “tort” characterization was intended to leave members exposed to vicarious liability for other types of liabilities that might not literally fall within the scope of common-law contract and tort liabilities. *See id.* § 6 cmt. 6 at 729.

83. *See Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996); *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 170 (Tex. 1992); *see also Oliveiri, supra* note 25 (collecting cases that discuss the liability of a member of an unincorporated association for the tortious acts of the association’s nonmember agent or employee).

entered into on behalf of an undisclosed or partially disclosed principal, or liability for a tort with respect to which the person is actually a tortfeasor.⁸⁴ The case law interpreting these provisions to date, albeit sparse, reflects the understanding that UUNAA provides corporate-type liability protection.⁸⁵ The comments point out that courts have applied veil-piercing principles to nonprofit corporations and suggest that the entity status of a nonprofit association under UUNAA might also be disregarded under similar principles.⁸⁶

IV. OVERVIEW OF REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008)

Like UUNAA, RUUNAA is intended to improve upon the common law with respect to a limited number of legal problems, but RUUNAA reflects NCCUSL's decision that an updated and more comprehensive statute was needed.⁸⁷ In contrast to the approach of UUNAA, which only addresses the status of a nonprofit association as an entity in the context of the specific areas addressed in UUNAA,⁸⁸ RUUNAA states that a nonprofit association is a legal entity separate and distinct from its members and managers as a general principle rather than tying entity

84. UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 6 cmts. 2–10, 15 at 729–30.

85. See *Mohr v. Kelly*, 8 P.3d 543, 546 (Colo. App. 2000) (holding that a candidate was not liable for obligations of his campaign committee, a nonprofit association, to pay the committee's former employees, even if the candidate was a member of the committee, had management responsibilities within the committee, or negotiated the employment contracts on behalf of the committee); *Izen v. Sjostrom*, No. 14-06-00142-CV, 2007 WL 968841, at *5 (Tex. App. Apr. 3, 2007) (rejecting attorney's argument that a member of a legal defense fund, which the court stated appeared to fit the definition of a nonprofit association under UUNAA, had personal liability for attorney's fees owed by the fund to the attorney because UUNAA provides that a person is not liable for a nonprofit association's contract merely because the person is a member or authorized to participate in management of the association's affairs).

86. UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 6 cmt. 6 at 729.

87. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT Prefatory Note, 6B U.L.A. 142 (Supp. 2011).

88. UNIF. UNINCORPORATED NONPROFIT ASS'N ACT Prefatory Note at 712. Though UUNAA does not explicitly provide that a nonprofit association is an entity for any purpose other than the issues addressed in UUNAA, a court might well be persuaded that entity treatment makes sense in contexts not specifically addressed by the statute, and a court should not be precluded by UUNAA from concluding that a nonprofit association is an entity for other purposes.

treatment to particular areas.⁸⁹ RUUNAA refines and expands upon the three basic areas addressed by UUNAA (i.e., capacity of a nonprofit association to acquire, hold, and transfer property; capacity of a nonprofit association to sue and be sued as an entity; and contract and tort liability of a nonprofit association, its members, and persons who participate in management of the association) and addresses numerous other issues, such as internal governance (including quorum and voting rules, duties of members and managers, information rights, and limitations on distributions), dissolution and winding up, and merger.⁹⁰ Though it significantly expands the skeletal coverage of UUNAA, RUUNAA is not nearly as comprehensive as the typical state nonprofit corporation statute and is not intended to provide a substitute for organizing a nonprofit organization as a nonprofit corporation.⁹¹

A. *Definition of Unincorporated Nonprofit Association*

RUUNAA defines an “unincorporated nonprofit association” as “an unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes.”⁹² This definition is similar to the definition of a “nonprofit association” under UUNAA, with the concept of “mutual consent” in UUNAA articulated in RUUNAA as “an agreement that is oral, in a record, or implied from conduct.”⁹³

89. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 5(a) at 149.

90. *See generally id.* §§ 1–36 at 140–74.

91. *Id.* Prefatory Note at 142.

92. *Id.* § 2(8) at 145.

93. *See* UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1(2) at 715–16; REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2(8) at 145. The creation of a nonprofit association governed by either of these statutes hinges on mutual consent or agreement, but it is certainly possible for persons to associate together for a nonprofit purpose in a manner that creates such an association without any particular understanding of the type of organization they have created or the statute that governs it, just as persons may associate together to engage in a business for profit in a manner that constitutes a general partnership without the realization that they have created a partnership. *See* UNIF. P’SHP ACT § 202(a) (amended 1997), 6 Pt. I U.L.A. 92 (2001). Indeed, UUNAA and RUUNAA were drafted with small informal associations (of the type that are likely to have failed to consider legal and organizational questions) in mind. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT Prefatory Note at 711; REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT Prefatory Note at 142. However, persons may expressly agree that they have not formed an unincorporated nonprofit association governed by RUUNAA even though their association would otherwise fall within

RUUNAA, like UUNAA, excludes a trust and various types of co-ownership of property from the definition, but RUUNAA specifies the following additional exclusions: a marriage and various other types of domestic relationships, an organization formed under another statute that governs the organization or operation of unincorporated associations, and a relationship under an agreement that expressly provides that the relationship does not create an unincorporated nonprofit association.⁹⁴ Like UUNAA, RUUNAA does not define “nonprofit purpose” and does not require that the nonprofit association be tax-exempt for federal or state tax purposes.⁹⁵ The comments to RUUNAA state that the nonprofit corporation act of an enacting jurisdiction is probably the best reference point for what constitutes a nonprofit purpose and that each enacting jurisdiction should determine whether these limitations should be expressly set forth in the statute.⁹⁶

As is the case for a nonprofit association under UUNAA, an unincorporated nonprofit association under RUUNAA must have at least two members.⁹⁷ The comments to RUUNAA distinguish

the definition of an unincorporated nonprofit association under RUUNAA, whereas the subjective intent or label chosen by the parties will not preclude characterization of their arrangement as a general partnership if it otherwise falls within the definition of a partnership. *Compare* REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2(8)(E) at 145 *with* UNIF. P’SHP ACT § 202 cmt. 1 at 93. UUNAA is silent on this issue.

94. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2(8) at 145.

95. RUUNAA contains a provision specifying that an unincorporated nonprofit association may engage in profit-making activities so long as the profits from such activities are used or set aside for the association’s nonprofit purposes. *Id.* § 5(d) at 150.

96. *Id.* § 2 cmt. 8 at 147. The comments to RUUNAA further note that the statute applies to all unincorporated nonprofit associations, whether religious, public benefit, or mutual benefit, and thus “will cover unincorporated philanthropic, educational, scientific, social and literary clubs, unions, trade associations, political organizations, . . . churches, hospitals, neighborhood and property owner associations, and sports organizations . . .” *Id.*

97. As in UUNAA, the number two is bracketed to signify that a state might choose to vary this requirement. *Id.* § 2(8) at 145; UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1(2) at 715–16. The comments to UUNAA take a negative tone toward a definition providing for a minimum of one member but nevertheless “raise the question” and appear to acknowledge that a state might choose to so provide. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1 cmt. 8 at 717. The comments to RUUNAA take the position that the requirement of two members is “quite minimal” and is necessary in order to have an agreement; there is no suggestion that the possibility of a definition allowing for only one member should be entertained. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2 cmt. 8 at 147.

RUUNAA from state nonprofit corporation statutes, in that nonprofit corporation statutes typically permit a nonprofit corporation to have a self-perpetuating board and no members, while RUUNAA requires that an unincorporated nonprofit association have a minimum of two members.⁹⁸ This distinction may be less significant than the comments suggest, however. The definition of a member for purposes of RUUNAA would include the persons functioning as “directors” of an unincorporated nonprofit association since a member is “a person that may participate in the selection of persons authorized to manage the affairs” of the association or in the “development of the policies and activities of the association.”⁹⁹ Thus, a nonprofit association with a self-perpetuating board consisting of at least two persons would satisfy the minimum two-member requirement even though the association may have no participants referred to as “members” by the association itself.

Whereas UUNAA provides for entity treatment of a nonprofit association for specified purposes, RUUNAA sets forth the general principle that an unincorporated nonprofit association is a separate legal entity.¹⁰⁰ RUUNAA also provides a default rule of perpetual duration for unincorporated nonprofit associations and includes the standard general powers provision included in uniform unincorporated entity laws.¹⁰¹

RUUNAA expands upon UUNAA’s provisions dealing with the relationship of the statute to other laws¹⁰² by expressly providing that inconsistent provisions of other statutes governing specific types of unincorporated nonprofit associations prevail over provisions of RUUNAA.¹⁰³ RUUNAA further states that RUUNAA

98. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2 cmt. 8 at 147.

99. *Id.* § 2(4) at 144. The definition is essentially the same under UUNAA. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1(1) at 715. Both statutes define “person” to include legal and commercial entities as well as individuals. REVISED UNIF. UNINCORPORATED ASS’N ACT § 2(5) at 144; UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 1(3) at 716.

100. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 5(a) at 149.

101. *Id.* § 5(b)–(c), cmt. 3.

102. UUNAA provides that “[p]rinciples of law and equity supplement this [Act] unless displaced by a particular provision of it.” UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2 at 719. This provision is typically included in NCCUSL uniform acts, and it is set forth in RUUNAA as well. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 3(a), cmt. 1 at 148.

103. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 3(b) at 148. The comments to RUUNAA note that many jurisdictions have statutes governing particular types of unincorporated nonprofit associations, e.g., churches. *Id.* § 3

“supplements the law of this state that applies to nonprofit associations operating in this state” and that “[i]f a conflict exists, that law applies.”¹⁰⁴ The precise application of this provision is somewhat unclear.¹⁰⁵ A legislative note suggests that a thorough review of other laws should be conducted to determine whether they need to be amended to continue to apply to unincorporated nonprofit associations after RUUNAA becomes effective.¹⁰⁶ RUUNAA also includes a provision that specifies the law governing the internal affairs of an unincorporated nonprofit association and the law governing matters other than its internal affairs.¹⁰⁷

B. Capacity of Unincorporated Nonprofit Association to Hold Property

RUUNAA includes provisions similar to the provisions of UUNAA with regard to the ownership and transfer of real property and the optional filing of a statement of authority.¹⁰⁸ RUUNAA does not include a provision like that in UUNAA providing for disposition of personal property of a nonprofit association that has become inactive.¹⁰⁹

cmt. 2.

104. *Id.* § 3(c).

105. While subsection (b) of section 3 refers to “a statute,” subsection (c) refers to “the law of this state.” *Id.* § 3(b)–(c). Literally, subsection (c) might be read to allow inconsistent common-law principles to prevail over provisions of RUUNAA, but such a result would run counter to the assertion in the Prefatory Note that RUNNAA “provides better answers than the common law” in the areas addressed by RUUNAA. *Id.* Prefatory Note at 142. It would also be inconsistent with the notion that “principles of law and equity” may be “displaced” by a provision of RUUNAA. *See id.* § 3(a) at 148. The comments simply refer to the existence of statutory provisions regarding supervisory powers of a state’s attorney general and requirements regarding registrations, notice, filings, and the like. *Id.* § 3 cmt. 3. These matters would appear to be supplementary rather than conflicting, so they do not appear to shed light on the rationale for providing that other law of the state applicable to nonprofit associations operating in the state applies if a conflict exists.

106. *Id.* § 3 Legislative Note.

107. *Id.* § 4. The provision specifies that the law of the jurisdiction in which an unincorporated nonprofit association has its “main place of activities” governs its internal affairs. *Id.* § 4(b). As to matters other than internal affairs, the enacting jurisdiction’s laws govern the operation, within that jurisdiction, of a nonprofit unincorporated association formed or operating in the jurisdiction. *Id.* § 4(a).

108. *See id.* §§ 6–7, 31 at 150–51, 171.

109. *See supra* text accompanying notes 60–65.

C. Capacity of Unincorporated Nonprofit Association to Sue and Be Sued

RUUNAA includes provisions similar to those in UUNAA regarding the assertion of claims by and against an unincorporated nonprofit association.¹¹⁰ Unlike UUNAA, RUUNAA does not address standing of an unincorporated nonprofit association to sue on behalf of its members; that matter is left to other statutes and procedural rules.¹¹¹

D. Liability in Contract, Tort, or Otherwise

As noted above, RUUNAA sets forth the general principle that an unincorporated nonprofit association is a separate legal entity;¹¹² therefore, it follows that it is an entity for purposes of determining and enforcing rights, duties, and liabilities in contract and tort as is specifically provided by UUNAA.¹¹³ RUUNAA also implicitly recognizes the principle that the association itself may enter into contracts and incur other liabilities by providing that a liability of an unincorporated nonprofit association is solely the liability of the association.¹¹⁴

RUUNAA provides for limited liability of members and managers in a broader and more succinct fashion than UUNAA, eliminating the potential gap under UUNAA for liabilities that may not literally be characterized as arising in contract or tort.¹¹⁵ RUUNAA provides members and managers liability protection for

110. See REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 9 at 155 (providing that an unincorporated nonprofit association may sue and be sued in its own name, and that a member or manager may assert a claim against the association and vice versa); *id.* § 10 at 156 (providing that a judgment or order against an unincorporated nonprofit association is not itself a judgment or order against a member or manager); *id.* § 11 (providing for optional filing of appointment of agent to receive service of process); *id.* § 13 at 158 (providing that “[a]n action or proceeding against an unincorporated nonprofit association does not abate merely because of a change in its members or managers”).

111. See *id.* § 9 cmt. 3 at 155.

112. *Id.* § 5(a) at 149.

113. See UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 6(a) (amended 1996), 6B U.L.A. 728 (2008) (“A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and tort.”).

114. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 8(a)(1) at 153.

115. Compare *id.* § 8(a) with UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 6(b)–(d) at 728. For a discussion of whether other types of liabilities are encompassed when the statute refers only to “contract” and “tort,” see *supra* note 82.

debts, obligations, and liabilities of an unincorporated nonprofit association “whether arising in contract, tort, or otherwise.”¹¹⁶ Such debts, liabilities, or obligations do not become the liabilities of a member or manager solely because the member or manager acts in such capacity, but RUUNAA makes clear that status as a member or manager does not prevent a person from being liable under other law.¹¹⁷ Thus, as is the case under UUNAA, a member or manager may be liable as a tortfeasor or party to a contract even though the association is also subject to liability.¹¹⁸ Furthermore, the comments to RUUNAA, like those to UUNAA, suggest that veil-piercing principles may be a basis for imposing personal liability on members and managers.¹¹⁹ The comments state that “[t]he same criteria that are applied to pierce the veil of nonprofit corporations should be applied in [unincorporated nonprofit association] veil piercing cases.”¹²⁰

In one respect, the provisions of RUUNAA limiting liability for the debts and obligations of an unincorporated nonprofit association do not expressly extend as far as those in UUNAA inasmuch as the provisions of UUNAA refer to “a person considered as a member by the nonprofit association.”¹²¹ The comments to UUNAA reflect the view that it is only a remote possibility that a person who is not a “member” or “manager” as defined in UUNAA would be found vicariously liable under the common law.¹²² Thus, the general pronouncement in RUUNAA that a liability of an unincorporated nonprofit association is solely the liability of the association is presumably sufficient to protect a person who is referred to as a “member” by the association but does not fall within the definitions of a “member” or “manager” under RUUNAA (e.g., a contributor with no other role in the association).

116. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 8(a) at 153.

117. *Id.*

118. *See id.* § 8 cmts. 1, 3 at 153–54.

119. *Id.* § 8 cmt. 1; UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 6 cmt. 6 at 729.

120. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 8 cmt. 1 at 153–54.

121. UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 6(b)–(e) at 728.

122. *Id.* § 6 cmt. 15 at 731.

E. Power and Authority to Bind Unincorporated Nonprofit Association

UUNAA does not address agency issues in the nonprofit association context other than providing that a nonprofit association may authorize an agent to convey real property in a statement of authority (which itself must be signed by an authorized person),¹²³ may appoint an agent for service of process (in an appointment that must be signed by an authorized person),¹²⁴ and may be bound by a contract or liable for a tort based upon acts of its agents.¹²⁵ Who is an agent and the extent of the agent's actual and apparent authority are issues left to the common law of agency under UUNAA. RUUNAA, on the other hand, includes a number of additional provisions impacting agency issues.

RUUNAA specifies that “[a] member is not an agent of the association solely by reason of being a member.”¹²⁶ This statement does not appear to represent a significant departure from the common-law approach to unincorporated nonprofit associations, but it does make clear that courts should not be tempted to analogize to the partnership context in this regard¹²⁷ and seems a sensible rule. RUUNAA's general rule negating agency status based merely on member status may be somewhat misleading if viewed in isolation, however. As a default rule, RUUNAA provides that all members are managers if a manager for an unincorporated

123. *See id.* § 5 at 722–23.

124. *See id.* § 10 at 738.

125. *See id.* § 6 at 728.

126. *See* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 15, 6B U.L.A. 158–59 (Supp. 2011). RUUNAA generally employs the defined term “unincorporated nonprofit association” and sometimes uses the shorthand term “association” when the longer defined term has appeared earlier in the same sentence. Occasionally, the undefined shorthand term “association” is used in a section of RUUNAA without an antecedent reference to an “unincorporated nonprofit association.” *See id.* §§ 15, 22 at 158–59, 162–63. These provisions are intended to apply to unincorporated nonprofit associations, and use of the defined terms “member” or “manager” in these provisions appears to confine the understanding of the term “association” to an unincorporated nonprofit association. Thus, the inconsistency does not appear to create any literal problem.

127. “Each partner is an agent of the partnership for the purpose of its business.” UNIF. P'SHIP ACT § 301(1) (amended 1997), 6 Pt. I U.L.A. 101 (2001); *see also* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 15 cmt. 1 at 159 (stating that the purpose of this section is to make clear that a person's status as a member does not itself make the person an agent of the unincorporated nonprofit association, in contrast to partnership law, under which general partners are deemed to be general agents of the partnership).

nonprofit association is not selected.¹²⁸ RUUNAA also provides as a default rule that each manager has equal rights in the management and conduct of the association's activities,¹²⁹ and the comments indicate that the managers of an unincorporated nonprofit association would generally be considered agents of the association with apparent authority to bind the association in the ordinary course of business.¹³⁰ Thus, the ultimate default management structure of an unincorporated nonprofit association under RUUNAA essentially follows the general partnership model, i.e., one in which all members are managers and thereby agents of the association.

As noted above, the comments to RUUNAA posit that the managers of an unincorporated nonprofit association would ordinarily have apparent authority to bind the association for acts in the ordinary course of business.¹³¹ This conclusion is presumably based on the default provisions of RUUNAA regarding management rights of managers, which borrow from the partnership model of management rather than the corporate board model.¹³² "Manager" is defined in RUUNAA as "a person that is responsible, alone or in concert with others, for the management of an unincorporated nonprofit association."¹³³ This definition would encompass persons comprising a board of directors in a traditional type of corporate management structure

128. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 22(3) at 162.

129. *Id.* § 22(4).

130. *Id.* § 15 cmt. 1 at 159 ("Under agency law the managers of [an unincorporated nonprofit association] would in most cases be considered as having apparent authority to bind the [association] for acts in the ordinary course of the [association's] business. Therefore a member who is also a manager would be considered to be an agent of the [association] but this is because that person is a manager as well as a member of the [association], and therefore the agency authority is not 'solely by reason of being a member.'").

131. *Id.*

132. The default management rights of managers under RUUNAA are described in a manner consistent with the rights of partners in a general partnership and managers of a limited liability company under the uniform acts governing those entities. Compare *id.* § 22(4)–(6) at 162 with UNIF. P'SHIP ACT § 401(f), (j) at 133 and REVISED UNIF. LTD. LIAB. CO. ACT § 407(c), 6B U.L.A. 484 (2008). The comments to the default management rules set forth in the Revised Uniform Limited Liability Company Act distinguish the approach taken in these provisions from the corporate board model and suggest that courts may view the position of manager as clothing a person in that role with apparent authority to take actions that reasonably appear to be within the ordinary course of business. REVISED UNIF. LTD. LIAB. CO. ACT § 407 cmt. at 486.

133. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 2(3) at 144.

under which the directors collectively act to set policy and make management decisions but are not individually agents. In that type of structure, the execution of board decisions is carried out by officers and other agents who may have apparent authority by virtue of a title or a course of dealing, but should not necessarily be clothed with apparent authority to act on every matter in the ordinary course of business. The members of an unincorporated nonprofit association are free to adopt a corporate board structure (or any other management structure) by agreement,¹³⁴ but the comments suggest that the default rules set forth in RUUNAA preclude the association from having any assurance that its directors, officers, or other types of “managers” do not have broad apparent authority.¹³⁵ Given the wide variety of unincorporated nonprofit associations and the frequent utilization of a corporate board structure by such associations, an approach specifying default rules for decision making but leaving agency issues to be determined by the law of agency as applied to the particular facts and circumstances in each case might be preferable to the approach in RUUNAA.

As a default rule, it appears that the effect of RUUNAA’s management provisions is to make each manager of an unincorporated nonprofit association an agent with actual authority to act in the ordinary course of activities of the association so long as the manager has no reason to believe the matter may be the subject of a disagreement requiring resolution by a majority of the managers.¹³⁶ Acts outside the ordinary course

134. *See id.* § 22 cmt. 4 at 163.

135. *See id.* § 15 cmt. 1 at 159; *see also id.* § 22 cmt. 3 at 163 (noting that the rights given to managers are consistent with both the rights of general partners in a partnership and the managers of a limited liability company).

136. *See id.* § 22(4), (6) at 162–63 (providing that “each manager has equal rights in the management and conduct of the association’s activities” and that “a difference among managers is decided by a majority of the managers.”). The comments to RUUNAA characterize the rights of managers of an unincorporated nonprofit association as “consistent with the rights of general partners in a partnership and managers of a limited liability company.” *Id.* The comments to the comparable management provisions of the Revised Uniform Limited Liability Company Act state that a single manager of a multi-manager limited liability company has the actual authority to bind the company in the ordinary course of its activities unless the manager has reason to know that the other managers might disagree or that consultation for some other reason is appropriate. REVISED UNIF. LTD. LIAB. CO. ACT § 407 cmt., 6B U.L.A. 486 (2008). The basis for this conclusion is that these provisions do not require managers to act in concert or after consultation; rather they indicate “that several (as well as joint) activity is

of business of an unincorporated nonprofit association may be undertaken with the approval of a majority of the members as a default rule.¹³⁷ Because these rules may be varied by the association's governing agreements, and the governing agreements may be oral or established by a course of conduct as well as in a record,¹³⁸ the principal focus in determining questions of actual authority will be on the governing agreements.

F. Internal Governance of Unincorporated Nonprofit Associations

The comments to UUNAA explain that “troublesome questions of governance and membership” were left to common law or statutes on the subject¹³⁹ because efforts to develop default internal governance rules “demonstrated the complexity and difficulty of fashioning rules that would reasonably fit a wide variety of nonprofit associations—large and small, public benefit, mutual benefit, and religious, and of short and indefinite duration.”¹⁴⁰ Although RUUNAA also applies to this wide variety of nonprofit associations, the drafters of RUUNAA obviously concluded that it was possible to devise appropriate rules addressing various governance and membership issues with respect to these varied organizations. Unincorporated nonprofit associations that are large, well-established, or formally structured will likely have addressed many of these issues in governing documents or by established practices. Most of the rules addressing membership and governance issues are default rules, that is, rules that only apply if the governing agreements of the unincorporated nonprofit

appropriate on ordinary matters, so long as the manager acting in the matter has no reason to believe that the matter will be controversial among the managers and therefore requires a decision under” the provision specifying that a difference arising among the managers regarding a matter in the ordinary course of business may be decided by a majority of the managers. *Id.* Although the management provisions in section 22 of RUUNAA do not contain any indication that meetings are required for managers to make decisions as a default rule, RUUNAA elsewhere states that “[n]otice and quorum requirements for meetings of managers and the conduct of meetings of managers are determined by the governing principles.” REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 24 at 164.

137. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT §§ 16(a), 17 at 159–60.

138. *See infra* notes 152–55 and accompanying text.

139. UNIF. UNINCORPORATED NONPROFIT ASS'N ACT Prefatory Note (amended 1996), 6B U.L.A. 711 (2008).

140. *Id.* § 2 cmt. 3 at 719.

association do not otherwise provide.¹⁴¹ Thus, the statutory rules will apply only as gap-fillers or when an unincorporated nonprofit association's governing agreements are inconsistent with a rule under RUUNAA that cannot be varied by the governing agreements.

1. Key Terms in Understanding RUUNAA Governance Rules: "Member," "Manager," "Governing Principles," and "Established Practices"

Understanding the governance rules set forth in RUUNAA requires an understanding of the meaning of several key terms used in the provisions. Most of the statutory governance rules are default rules that apply in the absence of contrary provisions in the "governing principles," which are the express or implied agreements governing the purpose or operation of an unincorporated nonprofit association and the rights and obligations of its members and managers, as further discussed below.¹⁴² RUUNAA refers to the roles of "members" and "managers" in an unincorporated nonprofit association, and these roles are defined in functional terms. An unincorporated nonprofit association need not have any participants labeled by the association as "members" or "managers," and the labels used by an unincorporated nonprofit association do not control for purposes of applying the statute.¹⁴³

A "manager" is "a person that is responsible, alone or in concert with others, for the management of an unincorporated nonprofit association,"¹⁴⁴ and a "member" is "a person that, under the governing principles, may participate in the selection of persons authorized to manage the affairs of the unincorporated nonprofit association or in the development of the policies and activities of the association."¹⁴⁵ The comments to RUUNAA state

141. RUUNAA uses the term "governing principles" to refer to the express or implied agreements "that govern the purpose or operation of an unincorporated nonprofit association and the rights and obligations of its members and managers." REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 2(2) at 144. The "governing principles" are further discussed *infra* Part IV.F.1.

142. See *infra* text accompanying notes 152–54.

143. See REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 2 cmts. 3–4 at 145.

144. *Id.* § 2(3) at 144. Because a "person" is defined to include entities as well as individuals, a manager need not be an individual. See *id.* § 2(5).

145. *Id.* § 2(4).

that the definition of “member” may have a somewhat broader scope than the definition used by some courts and that the definition ensures the statutory insulation from liability extends to all cases in which the common law might have imposed liability.¹⁴⁶ A donor or supporter is not a “member” within the meaning of RUUNAA (even if the association refers to the person as a member) if the person does not have the right to participate in the selection of managers or the development of policies and activities of the association.¹⁴⁷ On the other hand, the definition of a “member” encompasses persons who are not denominated “members” by the association but are entitled to participate in selecting the persons authorized to manage the association’s affairs or in developing the association’s policies and activities; therefore, the executive director, officers, and members of the governing body of many associations will fall within the definition of a “member” as well as a “manager.”¹⁴⁸ Interestingly, the definition of a “member” hinges on whether the governing principles permit a person to participate in the selection of management or in the development of policy,¹⁴⁹ and the default provisions of the statute confer on “members” the right to select a manager and determine the policy of the association unless otherwise provided by the governing principles.¹⁵⁰ If the governing principles address neither point, there is some circularity in the statute that may present difficulty in satisfying the literal definition of a “member.” This

146. *Id.* § 2 cmt. 4 at 145.

147. *See id.* § 2(4) at 144.

148. *See id.* § 2 cmt. 4. Note that to constitute a “member” under RUUNAA, one need only be entitled to participate in the selection of those authorized to manage the affairs of the association *or* be entitled to participate in the development of the association’s policies and activities. Both rights are not required to be classified as a member. *Id.* § 2(4) at 144. Because participating in the development of policies and activities is typically viewed in other contexts as a management function (see *infra* note 163), the right to do so arguably casts the member as a “manager” as well. On the other hand, that the statute defines a member in terms of having a role in policy making and requires approval of policy by members as a default matter suggests that a role in policy making is not alone enough to constitute one a “manager” under RUUNAA. The issue is more than merely semantics inasmuch as a member does not, “solely” by being a member, have any fiduciary duties to an unincorporated nonprofit association as a default rule, while a manager has fiduciary duties of loyalty and care that are not subject to change in the governing agreements.

149. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2(4) at 144.

150. *Id.* § 16(a)(2), (7) at 159. In addition to the rights mentioned, members have additional rights enumerated in the default provisions. *See id.* § 16(a)(1)–(7).

difficulty is somewhat unlikely to arise inasmuch as the governing principles include agreements established by a course of conduct,¹⁵¹ thus minimizing the likelihood that there is not some discernible agreement as to what persons are vested with these rights. In the final analysis, it appears that the definitions of “member” and “manager” will result in some overlap in most unincorporated nonprofit associations.

Another key defined term for purposes of RUUNAA’s governance provisions is “governing principles.” The “governing principles” are “the agreements, whether oral, in a record, or implied from its established practices, that govern the purpose or operation of an unincorporated nonprofit association and the rights and obligations of its members and managers,” including “any amendment or restatement of the agreements constituting the governing principles.”¹⁵² Thus, the governing principles may be formally or informally established as in the case of a partnership.¹⁵³

The governing principles may include provisions arising from a course of conduct referred to in RUUNAA as “established practices.”¹⁵⁴ The “established practices” of an unincorporated nonprofit association are defined as practices used by the association “without material change during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence.”¹⁵⁵ The principle that a pattern of conduct followed over a period of time should be considered in determining what rules have been adopted to govern a nonprofit association’s affairs is obviously sound; whether the principle should be rigidly defined based on usage for a period of five years or a lesser period dating from the inception of the association’s

151. See the discussion of “established practices” in text accompanying *infra* notes 154–58.

152. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2(2) at 144. The definition actually does not state whose agreements constitute the governing principles, but the statute specifies that the members must approve the adoption, amendment, or repeal of the governing principles unless otherwise provided by the governing principles. *Id.* § 16(a)(3) at 159. This is one of several areas in which there is some potential circularity in the statutory provisions.

153. See *id.* § 2 cmt. 2 at 145 (“The ‘governing principles’ of [an unincorporated nonprofit association] do not have to be in a written form.”). Under the Uniform Partnership Act, a “partnership agreement” is “the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement.” UNIF. P’SHIP ACT § 101(7) (amended 1997), 6 Pt. I U.L.A. 61 (2001).

154. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 2(2) at 144.

155. *Id.* § 2(1).

existence might be debated. It could be persuasively argued that the concept should be more flexible as it is in the case of determining whether an unincorporated nonprofit association has been formed, i.e., whether there is “an agreement that is oral, in a record, or implied from conduct” to join together for a common, nonprofit purpose.¹⁵⁶ It is somewhat of a curiosity that the statute does not attempt to specify the time period over which a course of conduct is sufficient to imply an agreement to form an unincorporated nonprofit association,¹⁵⁷ but a course of conduct begun at a point subsequent to the formation of the association, i.e., which has not been followed for the association’s “entire existence,” will not become part of its governing agreements until the practice has been followed for five years.¹⁵⁸ A practice consistently followed on a frequent, repetitive basis, e.g., in connection with weekly or monthly meetings, arguably should be respected as part of the governing principles of an unincorporated nonprofit association even though the practice does not date all the way back to the association’s inception and does not yet span a period of five years. On the other hand, a practice followed on one or two occasions over a period of five years or since the association’s inception may not merit recognition as part of the governing principles in every case.

2. *Allocation of Governance Powers Between Members and Managers*

As a default rule, RUUNNA specifies certain matters that require approval of the members and leaves all other matters to the managers.¹⁵⁹ If the governing principles specify that approval of the members is required for an unincorporated nonprofit association to take a particular action, then approval of the

156. *Id.* § 2(8) at 145.

157. *Id.* For example, monthly meetings of a group of individuals to engage in a social or recreational activity could presumably indicate an agreement to join together for a common nonprofit purpose in less than five years. The comments to RUUNAA note that “implied from conduct” is used in the definition of an “unincorporated nonprofit association” rather than “implied from its established practices” because the “agreement to form [an unincorporated nonprofit association] precedes or is contemporaneous with its existence, and established practices can only exist after the [association] is in existence.” *Id.* § 2 cmt. 8 at 146.

158. *Id.* § 2(1)–(2) at 144.

159. *See id.* §§ 16, 22(5) at 159, 162.

members is required for the unincorporated nonprofit association to take that action.¹⁶⁰ In addition, unless otherwise provided by the governing principles, the following matters require approval of the members: (1) admission, suspension, dismissal, or expulsion of a member; (2) selection or dismissal of a manager; (3) adoption, amendment, or repeal of the governing principles; (4) sale, lease, exchange, or other disposition of all or substantially all of the association's property, with or without the association's goodwill, outside the ordinary course of business; (5) dissolution or merger; (6) any other act outside the ordinary course of the association's activities; and (7) determination of the policy and purposes of the association.¹⁶¹ Each member is entitled to one vote, and the affirmative vote of a majority of the votes cast by the members at a meeting of the members constitutes member approval as a default rule.¹⁶²

The scope of the requirement that members determine the "policy" of the association is unclear. Depending upon the meaning ascribed to "policy," setting policy is generally viewed as a management function,¹⁶³ and the segregation of this function from the management responsibilities vested in managers under RUUNAA is not the subject of any explanation in the comments to the statute.¹⁶⁴ In essence, the effect of vesting policy-making authority in the members as a default rule may be that the members constitute a type of governing board while the managers essentially function as officers.

Matters not reserved for approval by the members are decided

160. *Id.* § 16(b) at 159.

161. *Id.* § 16(a)(1)–(7).

162. *Id.* § 17(a) at 160.

163. 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9.1 (3d ed. 2010) ("According to accepted wisdom, the board of directors appoints the chief executive officer and other corporate officers, determines corporate policies, oversees the officers' work, and in general manages the corporation or supervises the management of its affairs.")

164. In the course of a discussion of the definition of a "member," which rests in part upon whether a member has the right under the governing principles to participate in the development of the "policies and activities of the association," the comment to section 2 of RUUNAA refers to the policies as "governing policies." REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 2 cmt. 4 at 145–46. The comment also distinguishes "participat[ion] . . . in the development of policies and activities" (which is the language used to determine if one is a member) from "determin[ation] [of the] policies and activities." *Id.* Note that the language used in section 16 requires member approval to "determine the policy and purposes" of the association. *Id.* § 16 at 159.

by the managers.¹⁶⁵ Unless otherwise provided by the governing principles, only the members may select managers (who may be members or nonmembers), and all members are managers if the members do not select a manager.¹⁶⁶ As a default rule, each manager has equal rights in the management and conduct of the association's activities, and a difference among managers is decided by a majority of the managers.¹⁶⁷ As noted above, the apparent effect of these management provisions is to make each manager of an unincorporated nonprofit association an agent with actual authority to act in the ordinary course of activities of the association so long as the manager has no reason to believe the matter may be the subject of a disagreement requiring resolution by a majority of the managers.¹⁶⁸ These statutory default rules are modeled after the rules for general partners¹⁶⁹ rather than rules in the corporate context under which officers are agents of the corporation who carry out decisions of, or exercise decision-making authority delegated by, a board consisting of directors who collectively make decisions but are not individually agents of the corporation.¹⁷⁰

3. *Mechanics of Member and Manager Action: Meetings, Voting, Notice, etc.*

RUUNAA provides very skeletal rules regarding the mechanics of decision making by members and managers. Unless the governing principles provide otherwise, each member has one vote, and the affirmative vote of a majority of the votes cast at a meeting of the members constitutes approval of the members.¹⁷¹ The

165. *Id.* § 22(5) at 162.

166. *Id.* § 22(1)–(3) at 162–63. The comment to section 22 states that in unincorporated nonprofit associations with many members, such as a church, the default rule that all members are managers will rarely be applicable because the governing principles will usually provide a selection process for managers. *Id.* § 22 cmt. 2 at 163. Read literally, however, RUUNAA would make all members managers despite governing principles that provide for a selection process if for some reason managers were not selected, e.g., due to a deadlock, and the governing principles did not specify the effect of a failure to select a manager.

167. *Id.* § 22(4), (6) at 162–63.

168. *See supra* note 136 and accompanying text.

169. *See* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 22 cmt. 3 at 163.

170. *See* REINIER H. KRAAKMAN ET. AL, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 12–15 (2d ed. 2004).

171. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 17(a) at 160. There are no default provisions specifying alternative means, such as written

statute as approved by NCCUSL in 2008 contains no default notice and quorum provisions; such requirements are determined by the governing principles.¹⁷² In an informal unincorporated nonprofit association in which these requirements are not set forth in written bylaws or other governing documents and the members do not by oral agreement explicitly adopt any rules covering such matters, it may be difficult to determine from the course of conduct what the “established practices” that constitute the governing principles require.¹⁷³ In 2011, NCCUSL approved a Harmonized Uniform Business Organization Code, which included revisions of various uniform acts to facilitate their integration into a single uniform code of entity laws.¹⁷⁴ For purposes of the Harmonized Uniform Business Organization Code, RUUNAA was amended to provide a new default rule under which “customary usages and principles of parliamentary law and procedure apply” to: the calling, location, and timing of member meetings; notice and quorum requirements of member meetings; conduct of member meetings; taking of action by members by consent without a meeting or casting ballots; and member participation in meetings by telephone or other means of electronic communication.¹⁷⁵

As previously discussed, as a default matter, RUUNAA appears to have adopted a partnership model of management for the

consents, for members to take action. These alternatives would need to be provided by the governing principles to be available.

172. *Id.* § 17(b).

173. For example, in a small, informal unincorporated nonprofit association in which all members attend the first several meetings but no explicit rules regarding a quorum are adopted, is the attendance of all members required for a quorum? The attendance of all members is consistent with any quorum requirement. The comment to section 17 seems to indicate that meeting procedures adopted at an initial meeting do not become part of the governing principles until followed for a period of time so as to become an established practice, but this comment is somewhat misleading. *Id.* § 17 cmt. 4 (stating that a newly formed unincorporated nonprofit association can create meeting procedures at its initial meeting and that “these requirements, even if oral, become over time the [unincorporated nonprofit association’s] established practices and, therefore, part of the [unincorporated nonprofit association’s] governing principles”). Adoption of oral or written meeting procedures should constitute part of the governing principles upon their adoption because the possibility of establishing governing principles over time by established practices is an alternative, not an additional requirement, to agreements made orally or in a record. *See id.* § 2(2) at 144.

174. *Uniform Harmonized Business Code Approved*, UNIF. L. COMM’N (July 12, 2011), <http://www.nccusl.org/NewsDetail.aspx?title=Uniform%20Harmonized%20Business%20Code%20Approved>.

175. HARMONIZED UNIF. BUS. ORG. CODE § 17(c) (2011), http://www.law.upenn.edu/bll/archives/ulc/hobe/2011am_approved.pdf.

managers of an unincorporated nonprofit association.¹⁷⁶ In the event of a disagreement among the managers, the will of a majority of the managers prevails.¹⁷⁷ If a difference requiring resolution by a majority of the managers arises, any means by which the approval or agreement of a majority of the managers can be established would arguably satisfy the statute. Though RUUNAA does not contain a default rule expressly specifying that a meeting of the managers is required for the managers to make a decision, the statute contemplates the possibility of meetings of managers inasmuch as it specifies that requirements regarding notice, quorum, and the conduct of meetings of managers are determined by the governing principles.¹⁷⁸ In 2011, RUUNAA was amended for purposes of the Harmonized Uniform Business Organization Code¹⁷⁹ to provide a new default rule under which “customary usages and principles of parliamentary law and procedure apply” to: the calling, location, and timing of manager meetings; notice and quorum requirements of manager meetings; conduct of manager meetings; taking of action by managers by consent without a meeting or casting ballots; and manager participation in meetings by telephone or other means of electronic communication.¹⁸⁰

4. *Membership Matters*

Unless the governing principles of an unincorporated nonprofit association otherwise provide, RUUNAA requires the approval of the members for the admission, suspension, dismissal,

176. See *supra* note 136 and accompanying text.

177. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 22(6) at 163.

178. *Id.* § 24 at 164. Although the statute appears to defer completely to the governing principles with respect to rules for the conduct of meetings of managers, the comment indicates directors or other types of managers of an unincorporated nonprofit association could not validly give another person a proxy to vote on a matter. *Id.* § 24 cmt. 2 at 165. After stating that the use of manager proxies will be determined by law other than RUUNAA, the comment offers a rather confusing observation involving duties and responsibilities of managers, stating that directors or other types of managers of an unincorporated nonprofit association may generally delegate one or more duties to another person consistent with the governing principles but are not authorized to give another person a proxy to vote on a matter. *Id.*

179. See *Uniform Harmonized Business Code Approved*, *supra* note 174.

180. HARMONIZED UNIF. BUS. ORG. CODE § 24(b) (2011), http://www.law.upenn.edu/bll/archives/ulc/hobe/2011am_approved.pdf.

or expulsion of a member.¹⁸¹ An unincorporated nonprofit association may not admit a person as a member without that person's consent.¹⁸² RUUNAA provides that "[a] member may resign as a member in accordance with the governing principles."¹⁸³ Although this provision of RUUNAA might be understood to allow the governing principles to prevent a member from voluntarily withdrawing, the comment states that a provision in the governing principles precluding withdrawal would be "unconstitutional and void on public policy grounds."¹⁸⁴ The comment further states, however, that an unincorporated nonprofit association should be able to impose reasonable restrictions on withdrawal, such as notice thirty days in advance.¹⁸⁵ A member may resign at any time in the absence of applicable governing principles.¹⁸⁶ As a default rule, the suspension, dismissal, expulsion, or resignation of a member does not relieve the member from any previously incurred obligation or commitment, such as an unpaid capital contribution, dues, assessments, or fees.¹⁸⁷ A member is not permitted to transfer the member's interest or any right under the governing principles as a default rule.¹⁸⁸

5. *Duties of Members and Managers; Exculpation; Indemnification*

Under RUUNAA, a member owes to the unincorporated nonprofit association and the other members an obligation of good faith and fair dealing, but does not owe "a fiduciary duty to the unincorporated nonprofit association or another member solely by reason of being a member."¹⁸⁹ In contrast, a manager owes to the association and its members the fiduciary duties of loyalty and care.¹⁹⁰ RUUNAA does not provide for variation in the governing

181. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT §§ 16(1), 19(a) at 159, 161. The vote of the members required for these matters as a default rule is a majority of the votes cast at a meeting of the members. *Id.* § 17(a) at 160.

182. *Id.* § 19(a) at 161. This rule is not qualified by the proviso that the governing principles may otherwise provide, and that result seems sensible.

183. *Id.* § 20(a) at 162.

184. *Id.* § 20 cmt.

185. *Id.*

186. *Id.* § 20(a).

187. *Id.* §§ 19(b), 20(b) at 161–62.

188. *Id.* § 21 at 162.

189. *Id.* § 18(a) at 160.

190. *Id.* § 23(a) at 163. Though a member does not owe fiduciary duties to the association or other members solely by virtue of being a member, a member who is also a manager is subject to the fiduciary duties of a manager. *See id.* § 18 cmt. 1 at

principles of the fiduciary duties owed by a manager¹⁹¹ or the obligation of good faith and fair dealing owed by a member,¹⁹² although the statute permits the governing principles to exculpate managers from liability within certain parameters¹⁹³ and to provide for broad rights of indemnification.¹⁹⁴

Though a member does not owe the unincorporated nonprofit association or the other members any fiduciary duty by virtue of member status, a member is required to “discharge the duties to the unincorporated nonprofit association and the other members and exercise any rights under [RUUNAA] consistent with the governing principles and the obligation of good faith and fair dealing.”¹⁹⁵ This obligation is not a fiduciary duty but rather a contract principle the drafters of RUUNAA found appropriate based on the consensual or contractual nature of an unincorporated nonprofit association.¹⁹⁶ Reference to “the” duties rather than “any” duties of a member in describing a member’s obligation of good faith and fair dealing raises the question of what duties a member owes the association and the other members since the statute does not itself expressly impose any duties.¹⁹⁷ Unlike other uniform unincorporated entity statutes, which provide some freedom to vary the obligation of good faith and fair dealing in the governing agreements, RUUNAA does not allow for any alteration or variation of the obligation.¹⁹⁸ Possible indemnification rights under the governing principles for liabilities arising from a breach

161.

191. *See id.* § 23(a)–(d) at 163.

192. *See id.* § 18(b) at 161.

193. *Id.* § 23(e) at 163–64.

194. *Id.* § 27(b) at 166.

195. *Id.* § 18(b) at 161.

196. *See id.* § 18 cmt. 2. RUUNAA bases the definitions of “unincorporated nonprofit association” and “governing principles” on the concept of an “agreement” rather than a “contract.” The comments explain that “agreement,” rather than “contract,” is the appropriate term to use in the definitions “because the legal requirements for an agreement are less stringent and less formal than for a contract.” *Id.* § 2 cmt. 8 at 146. As an example, the comments point out that both an agreement and a contract rest on mutual consent, but an agreement need not be supported by consideration. *Id.*

197. *See id.* § 18(b) at 161 (referring to a member’s obligation to “discharge the duties” and “exercise any rights” consistent with the obligation of good faith and fair dealing).

198. *Id.* § 18 cmt. 2 (pointing out the difference between RUUNAA and the Uniform Partnership Act and Revised Uniform Limited Liability Company Act in this respect).

of this obligation are discussed below.¹⁹⁹

A manager owes a fiduciary duty of loyalty to the unincorporated nonprofit association and its members.²⁰⁰ RUUNAA does not define the duty of loyalty, but the duty presumably includes a duty on the part of the manager to refrain from conflict of interest transactions, usurpation of association opportunities, and competition with the association's activities.²⁰¹ RUUNAA provides that a specific act or transaction that would otherwise violate a manager's duty of loyalty may be authorized or ratified, after full disclosure of all material facts, by a majority of the members that are not directly or indirectly interested in the act or transaction.²⁰² This procedure would prove virtually useless in the case of an unincorporated nonprofit association with a large number of members.²⁰³ It is not clear why the statute does not provide alternatively for authorization or ratification by a majority of disinterested managers, or at least permit the governing principles to so provide.²⁰⁴ It is hard to imagine that a court would not as a matter of common law provide a nonprofit association the latitude to specify in its bylaws or articles of association a procedure similar to that allowed in the nonprofit corporation context, and perhaps a court would view the provision in RUUNAA as nonexclusive. RUUNAA does not permit the governing principles of an unincorporated nonprofit association to exculpate a manager for a breach of the duty of loyalty,²⁰⁵ so the issue is a matter of no small consequence.

A manager owes a fiduciary duty of care to the unincorporated nonprofit association and its members, and RUUNAA describes the requisite standard of care as well as a business judgment rule

199. See *infra* notes 214–18 and accompanying text.

200. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 23(a) at 163.

201. See *id.* § 23 cmt. 4 at 164 (indicating that these activities are potential breaches of the duty of loyalty).

202. *Id.* § 23(c) at 163.

203. Note that section 23(c) of RUUNAA apparently requires that the authorization or ratification be made by a majority of all disinterested members rather than a majority of the votes cast by disinterested members at a meeting. *Id.*

204. Cf. *id.* § 27(c) at 166 (providing that a majority of disinterested managers may authorize advance payment of expenses of a person who is made or threatened to be made a party in an action based on the person's activities on behalf of the association); MODEL NONPROFIT CORP. ACT § 8.60 (2008) (providing procedures for approval of interested director transactions including approval by a majority of disinterested directors).

205. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 23(e)(4) at 163–64.

protecting a manager who makes a good faith business judgment under specified conditions.²⁰⁶ RUUNAA requires a manager to “manage the unincorporated nonprofit association in good faith, in a manner the manager reasonably believes to be in the best interests of the association, and with such care, including reasonable inquiry, as a prudent person would reasonably exercise in a similar position and under similar circumstances.”²⁰⁷ The statute permits a manager to rely in good faith on information provided by another person that the manager reasonably believes to be a competent and reliable source of information.²⁰⁸ A good-faith business judgment by the manager satisfies the manager’s fiduciary duty of care if the manager is disinterested and independent with respect to the subject matter of the business judgment, is reasonably informed, and believes that the business judgment is in the best interests of the association and consistent with its purposes.²⁰⁹

Subject to certain exceptions, RUUNAA permits the written governing principles to limit or eliminate a manager’s liability for damages to the unincorporated nonprofit association or its members with respect to an action taken as a manager or a failure to take action as a manager.²¹⁰ Liability of a manager for the following matters may not be limited or eliminated: (1) financial benefit improperly received by the manager; (2) intentional infliction of harm on the association or a member; (3) intentional violation of criminal law; (4) breach of the duty of loyalty; and (5) improper distributions.²¹¹ Thus, while RUUNAA does not specify that the governing principles may alter the duties of care and loyalty, a manager’s liability for damages for a breach of the duty of care could be eliminated by written governing principles so long as

206. *See id.* § 23(a)–(b), (d) at 163.

207. *Id.* § 23(b).

208. *Id.*

209. *Id.* § 23(d). This provision specifies that compliance with the provision satisfies the duties specified in subsection (a), i.e., the duty of loyalty as well as the duty of care, but a duty of loyalty challenge to a manager’s business decision will generally involve a conflict of interest or lack of independence, which precludes application of the business judgment rule. *See id.* § 23(d)(1).

210. *Id.* § 23(e) at 163–64. The provision specifies that the exculpation can be accomplished by means of governing principles “in a record.” *Id.* § 23(e) at 163. “Record” is a defined term meaning “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” *Id.* § 2(6) at 144.

211. *Id.* § 23(e) at 163–64.

the breach did not involve any of the types of conduct excepted by the statute from the purview of permissible exculpation. The comments to RUUNAA, however, point out that a manager could still be bound by an injunction or other equitable remedy, even if the manager has been exempted from money damages under the governing principles.²¹²

RUUNAA provides rules for indemnification of current and former members and managers, and for advancement of expenses incurred before final disposition of a proceeding.²¹³ As a default rule, the statute requires reimbursement of authorized expenses reasonably incurred by a member or manager on behalf of an unincorporated nonprofit association, and permits the association to indemnify a member or manager for any “liability incurred in the course of the member’s or manager’s activities on behalf of the association if the person seeking indemnification has complied with sections 18 and 23.”²¹⁴ Section 18 imposes on a member an obligation of good faith and fair dealing, and section 23 imposes on a manager the fiduciary duties of loyalty and care.²¹⁵ Thus, as a default matter, the statute does not appear to permit an unincorporated nonprofit association to indemnify a member or manager for a liability arising from a breach of any of these duties. However, the statute permits written governing principles to “broaden or limit indemnification.”²¹⁶ Thus, although the duties themselves may not be altered and the extent to which the governing principles may provide for exculpation is limited, there are no express limits placed on the extent to which indemnification may be permitted or required by written governing principles. As an example of how indemnification might be broadened, the comments state that the governing principles could make mandatory the indemnification permitted by the statute as a default rule.²¹⁷ Since the statute does not place any limits on the

212. *Id.* § 23 cmt. 5 at 164.

213. *Id.* § 27 at 166–67.

214. *Id.* § 27(a)–(b) at 166.

215. *Id.* §§ 18(b), 23(a) at 161, 163. Section 23 also elaborates on these duties to some extent by requiring a manager to manage in good faith and in accordance with a specified standard of care, setting forth a business judgment rule, and providing a means for approval of an act or transaction that would otherwise violate a manager’s duty of loyalty. *Id.* § 23(b)–(d) at 163.

216. *Id.* § 27(b) at 166 (specifying that the limitation or broadening of indemnification can be accomplished by means of governing principles “in a record”).

217. *Id.* § 27 cmt. 2 at 167.

extent to which written governing principles may “broaden” indemnification, the statute may be understood to permit the governing principles to permit, or even mandate, indemnification for liabilities arising from any breach of duty, even those that cannot be exculpated. If interpreted in this manner, the RUUNAA indemnification provision is considerably more lax than the indemnification provisions in the business entity statutes that are characterized as being similar to RUUNAA in the comments.²¹⁸

RUUNAA specifies a procedure pursuant to which an unincorporated nonprofit association may advance or reimburse expenses to a person who is made, or threatened to be made, a party in an action based on the person’s activities on behalf of the association.²¹⁹ Written governing principles may broaden or limit the advance payments or reimbursements authorized in the statute.²²⁰ As in the case of the discretionary indemnification authorized by the statute, there are no express constraints on the ability to broaden the right to advancement of expenses in a proceeding.²²¹

RUUNAA makes clear that an unincorporated nonprofit association may purchase insurance on behalf of a member or manager to protect the person from liability in the person’s capacity as a member or manager, even if the insurance covers liability or expenses that the association would not be authorized under the statute to reimburse, indemnify, or advance.²²²

218. *See id.* The comments to section 27 state that the rights to reimbursement and indemnification are similar to those found in other business entity statutes, citing section 408 of the Revised Uniform Limited Liability Company Act and sections 8.50–58 of the Model Nonprofit Corporation Act. *Id.* § 27 cmt. 1. However, the ability to expand the indemnification provided by the cited provisions of these statutes is expressly limited in each of these statutes in contrast to the unlimited authorization for expansion of indemnification rights apparently conferred under RUUNAA. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 110(g), 6B U.L.A. 444 (2008) (limiting the ability to provide for indemnification with respect to breach of the duty of loyalty, receipt of a financial benefit to which a member or manager is not entitled, breach of a duty imposed with respect to limitations on distributions, intentional infliction of harm on the company or a member, and intentional violation of criminal law); MODEL NONPROFIT CORP. ACT § 8.58 (2008) (limiting the scope of provisions for indemnification in articles of incorporation, bylaws, corporate resolutions, or a contract).

219. REVISED UNIF. UNINCORPORATED NONPROFIT ASS’N ACT § 27(c) at 166.

220. *Id.* (specifying that the limitation or broadening of advancement can be accomplished by means of governing principles “in a record”).

221. *See id.* § 27(b)–(c) at 166.

222. *Id.* § 27(d) at 167.

6. *Information Rights*

RUUNAA does not require an unincorporated nonprofit association to keep any particular records, but the statute requires any records that are kept regarding the association's "activities, financial condition, and other circumstances" to be made available to a member or manager for inspection and copying "to the extent the information is material to the member's or manager's rights and duties under the governing principles."²²³ Logically, the right should extend to information that is material to the member's or manager's rights or duties under RUUNAA, even if such rights or duties are not addressed in the governing principles,²²⁴ but the statute stops short of literally conferring the right in those circumstances.

RUUNAA authorizes the governing principles to impose "reasonable restrictions on access to and use of information" that the association is required to furnish, such as designating information as confidential and imposing obligations of nondisclosure and safeguarding on the recipient.²²⁵ The association may charge for reasonable copying costs and specify a reasonable location for making the records available.²²⁶ A person making a demand for access to information must provide reasonable notice and is entitled to access only during the association's regular operating hours.²²⁷

223. *Id.* § 25(a) at 165. A former member or manager may obtain information "to which the former member or manager was entitled while a member or manager if the information pertains to the period during which the person was a member or manager." *Id.* § 25(d).

224. For instance, information that is necessary for a manager to discharge the manager's fiduciary duties under the statute or for a member to vote in an informed manner on a matter requiring member approval should be available to the manager or member even if the governing principles are silent on these issues and the sole source of the fiduciary duty or right is thus the statute. *See id.* § 23(a) at 163 (specifying that managers owe fiduciary duties of loyalty and care); *id.* §§ 16(a), 17(a) at 159–60 (listing matters requiring member approval and specifying voting rights of members in absence of contrary provisions in governing principles).

225. *Id.* § 25(b) at 165.

226. *Id.* § 25(a), (c).

227. *Id.* § 25(a). The concept of "regular operating hours" may be difficult to apply in the case of small organizations that have no staff or offices and whose books and records are merely held by volunteers who are currently serving in roles such as secretary and treasurer.

7. *Distributions and Other Payments*

RUUNAA prohibits an unincorporated nonprofit association from paying dividends or making distributions to a member or manager other than as permitted by the statute in limited circumstances.²²⁸ The statute permits an unincorporated nonprofit association to pay reasonable compensation or reimburse reasonable expenses to a member or manager, confer benefits on a member or manager in accordance with the association's nonprofit purposes, repurchase a membership interest or repay a member's capital contribution to the extent authorized by the governing principles, and make distributions to members upon winding up and termination if certain conditions are met.²²⁹ "Distribution" is not a defined term in RUUNAA, and the inclusion of reasonable compensation and reimbursement of reasonable expenses for services rendered as an exception to the prohibition on distributions to members or managers, while various other types of payments that might be made to members or managers are not listed as an exception, could create some uncertainty regarding the types of payments that constitute distributions and thus are prohibited. Since the statute expressly authorizes reimbursement, indemnification, and advancement of various expenses and liabilities under section 27 of RUUNAA,²³⁰ such payments should not be treated as prohibited distributions, but some confusion might arise by virtue of the fact that reimbursement of reasonable expenses for services rendered is listed in section 26 as an exception to the prohibition on distributions whereas other types of reimbursement and indemnification authorized by section 27 are not listed as exceptions.²³¹ Similarly, it might be argued that a purchase of property by an unincorporated nonprofit association from a manager or member involves a payment that is not specified as permissible in section 26 and is thus prohibited, even though the terms of the sale were entirely fair and reasonable.²³²

228. *Id.* § 26(a) at 166.

229. *Id.* § 26(b).

230. *See id.* § 27.

231. *See id.* § 26(b)(1).

232. In the case of a manager who sells property to the association, the transaction would create a duty of loyalty concern, but the transaction would apparently be permissible if approved by a majority of disinterested members after full disclosure of all material facts. *See id.* § 23(c) at 163. A member does not owe a fiduciary duty to the association solely by reason of being a member. *Id.* § 18 at 160.

Although RUUNAA does not address liability associated with an impermissible distribution, the comments state that an action to recover an improper distribution could be brought by the unincorporated nonprofit association or by a member as a derivative action if authorized by state law.²³³ The comments further note that the Attorney General may have authority under state law to bring a disgorgement action.²³⁴ The comments also state, however, that a distribution to members in violation of the statute would “disqualify” an unincorporated nonprofit association from continuing to be an unincorporated nonprofit association.²³⁵ These comments reflect something of a conflict in philosophy regarding the effect of a prohibited distribution. If a prohibited distribution causes an unincorporated nonprofit association to cease to be such, the association and its members can no longer rely on its entity status under RUUNAA to assert the claim. Certainly, a pervasive pattern of prohibited distributions or even a single prohibited distribution in a significant amount might indicate that the members are no longer joined for a nonprofit purpose; however, it does not appear that each and any instance of a prohibited distribution should cause the unincorporated nonprofit association to cease to be such. It may well be that the members are still joined under an agreement to operate for a common nonprofit purpose and desire to continue as an unincorporated nonprofit association while holding accountable those who authorized or received the prohibited distribution. Despite the comments to the statute, it is not clear that the statute requires the conclusion that payment of any prohibited distribution disqualifies an unincorporated nonprofit association from continuing as an unincorporated nonprofit association.

G. Dissolution, Winding Up, and Termination

RUUNAA lists circumstances under which an unincorporated nonprofit association may be dissolved and provides a skeletal set of rules for the winding up and termination upon dissolution.²³⁶ Under RUUNAA, an unincorporated nonprofit association is dissolved at the time or by the method provided by the governing

233. *Id.* § 26 cmt. 3 at 166.

234. *Id.*

235. *Id.* § 26 cmt. 1; *id.* § 5 cmt. 4 at 150.

236. *Id.* §§ 28–29 at 167–68.

principles or upon approval by the members.²³⁷ If no member can be located and the association has been inactive for three years, the association may be dissolved by the managers or, if the association has no current manager, by its last manager.²³⁸ The statute also provides that an unincorporated nonprofit association may be dissolved by court order or under law other than RUUNAA.²³⁹ The statute does not specify grounds for judicial dissolution, but the comments state that a court order of dissolution would be appropriate if it is impossible or impracticable to continue or if the other grounds for dissolution in the statute (i.e., a time or method specified by the governing principles, member approval, or manager action in an inactive association) are inapplicable.²⁴⁰

A dissolved unincorporated nonprofit association continues to exist until its activities have been wound up and the association is terminated pursuant to RUUNAA.²⁴¹ RUUNAA does not define a point in time when the association is terminated, but simply requires that all known debts and liabilities be paid or adequately provided for and specifies how remaining property should be distributed. Presumably, the association is terminated when these steps are completed. The statute does not provide any other winding up rules or procedures that are often found in entity statutes, such as procedures addressing notice to known and unknown claimants.²⁴²

H. Merger

RUUNAA has merger provisions under which an unincorporated nonprofit association may merge with another unincorporated nonprofit association or any other organization whose governing law authorizes a merger with an unincorporated nonprofit association.²⁴³ A jurisdiction considering the adoption of RUUNAA should carefully examine the merger provisions to ensure consistency with other merger statutes in the jurisdiction and to consider unique concerns that may be encountered in the

237. *Id.* § 28(a)(1)–(2) at 167.

238. *Id.* § 28(a)(3) at 168.

239. *Id.* § 28(a)(4)–(5).

240. *Id.* § 28 cmt. 2.

241. *Id.* § 28(b).

242. See MODEL NONPROFIT CORP. ACT §§ 14.06–14.08 (2008); REVISED UNIF. LTD. LIAB. CO. ACT §§ 703–04, 6B U.L.A. 508–10 (2008).

243. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 30(b) at 169–70.

context of a merger involving an unincorporated nonprofit association. The inclusion of inter-entity merger provisions in RUUNAA might lead one to expect that there would also be conversion provisions, but RUUNAA does not contain any conversion provisions.

Though the merger provisions in RUUNAA reflect an attempt to address concerns peculiar to the nonprofit context, the application of these provisions may be unclear in some cases. For instance, the statute states that the “plan of merger may not permit members of an unincorporated nonprofit association to receive merger consideration if a distribution of such consideration” would not otherwise be permissible under the provisions specifying exceptions to the prohibition of distributions to members, including the exception that permits distributions of remaining property in the winding up of an unincorporated nonprofit association.²⁴⁴ This provision suggests that a merger may be treated as a winding up and termination of an unincorporated nonprofit association for purposes of distributing merger consideration to the members. The rationale appears to be that a merger of an unincorporated nonprofit association (which is not technically a winding up and termination, but rather is a continuation of all the property, rights, and obligations of the constituent organizations in the surviving organization) is equivalent to a winding up and termination of the association for purposes of distributing merger consideration, at least in some cases.²⁴⁵ It is not entirely clear if the effect of the provision is to permit a distribution to a member under the winding up provisions in any merger of an unincorporated nonprofit association or whether the provision requires an analysis of the merger to determine if it is analogous to a winding up and termination of the association. For example, an argument could be made that the analogy is appropriate if the

244. *Id.* § 30(c)(2)(E) at 169.

245. The statute states that “the plan of merger may not permit members of an unincorporated nonprofit association to receive merger consideration if a distribution of such consideration would not be permitted in the absence of a merger under Sections 26 and 29.” *Id.* Section 26 prohibits distributions to members with four exceptions, one of which is “distributions of property to members upon winding up and termination to the extent permitted by Section 29.” *Id.* § 26(b)(4) at 166. Section 29 specifically deals with the disposition or distribution of property in winding up and termination, including permitting distributions to members in some circumstances. *Id.* § 29(4)(B) at 169–70. There would be no purpose in referencing section 29 in section 30(c)(2)(E) unless section 29(4)(B) had some potential application in a merger context.

nonprofit association is not the surviving entity and the merger transaction is effectively accomplishing an acquisition of the association's assets by the surviving entity, but not if the unincorporated nonprofit association is the surviving organization. Even this type of approach to the provision might permit an unincorporated nonprofit association that is the surviving entity in a merger to distribute merger consideration to its members in some cases. The analogy to a winding up and termination in that scenario appears less apt. However, if the overall result in a particular merger is that the identity of an unincorporated nonprofit association that technically survived the merger has in substance been overtaken by the identity of a constituent entity that technically did not survive the merger, it might be argued that the surviving nonprofit association has effectively terminated and should be permitted to distribute the merger consideration to its members.

The RUUNAA merger provisions contain a provision similar to a provision in the Model Nonprofit Corporation Act that prohibits "property held for a charitable purpose under the law of the state" from being "diverted from the objects for which [the property] was given" as a result of a merger absent an appropriate order by a court or the Attorney General for the disposition of the property.²⁴⁶ Another provision of RUUNAA that is quite similar to a provision of the Model Nonprofit Corporation Act makes clear that the surviving organization succeeds to a bequest, devise, gift, grant, or promise to a nonsurviving organization that takes effect after the merger, and property that is transferred to the surviving organization by virtue of such a devise, gift, grant, or promise is subject to a trust obligation that would govern the property if transferred to the nonsurviving organization.²⁴⁷ Some other restrictions included in the Model Nonprofit Corporation Act merger provisions are not included in the RUUNAA provisions.²⁴⁸

IV. CONCLUSION

The law governing unincorporated nonprofit associations in many jurisdictions consists of common-law principles (some of

246. See *id.* § 30(e) at 170; MODEL NONPROFIT CORP. ACT § 11.01(b).

247. See REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 30(f) at 170; MODEL NONPROFIT CORP. ACT § 11.02(e).

248. See MODEL NONPROFIT CORP. ACT § 11.01(c)-(d).

which are problematic or difficult to ascertain due to the absence of well-developed case law in the jurisdiction) and perhaps a smattering of statutes.²⁴⁹ NCCUSL has made two attempts to improve the law with uniform statutes. UUNAA has been adopted in twelve states and the District of Columbia.²⁵⁰ NCCUSL's more recent product, RUUNAA, has been adopted by four jurisdictions, including the District of Columbia and one other state that had previously adopted UUNAA.²⁵¹ An examination of the different approaches taken in UUNAA and RUUNAA and the manner in which these statutes address particular issues reveals that there are advantages and disadvantages to the overall approach in each as well as challenges involved in articulating particular provisions.

UUNAA adopts an entity approach to unincorporated nonprofit associations with respect to specific issues.²⁵² Although it only deals with a limited number of issues, it arguably encompasses the areas that have proved most troublesome for unincorporated nonprofit associations and their members under the common law.²⁵³ Nevertheless, UUNAA has been criticized for its skeletal approach.²⁵⁴

RUUNAA takes a more comprehensive approach, conferring entity status on unincorporated nonprofit associations and addressing, in addition to the issues addressed by UUNAA, various aspects of governance, basic rules regarding dissolution and winding up, and mergers.²⁵⁵ While the more comprehensive approach of RUUNAA has the appeal of providing rules in instances where the case law in a jurisdiction may be vague or nonexistent, the statutory rule may constrain the court in developing or applying the common law in a manner most suitable to the particular situation before the court. Myriad types of nonprofit associations are encompassed by RUUNAA; therefore, the rules have the potential to be applied in very large to very small associations, with innumerable potential structures and many different types of nonprofit purposes ranging from charitable to

249. California has developed its own somewhat comprehensive unincorporated nonprofit association statute, but it is a notable exception. *See* CAL. CORP. CODE §§ 18000–18640 (West 2006 & Supp. 2011).

250. *See supra* note 6.

251. *See supra* note 8.

252. *See supra* notes 32–35 and accompanying text.

253. *See supra* notes 19–30 and accompanying text.

254. *See supra* note 54 and accompanying text.

255. *See supra* notes 87–91 and accompanying text.

mutual benefit.²⁵⁶ Absent a statutory rule applicable to an issue before a court, the court will have to rely on and draw from common-law agency, fiduciary, contract, or other relevant principles. Though the existence of statutory rules may provide more specific parameters and thus some greater certainty, the statutory rules do so at the expense of some potential flexibility on the part of the courts in particular cases.

As an example of a rule that provides a definite standard that may constrain a court in a particular case in an unfortunate manner, RUUNAA defines the “established practices,” i.e., the course of conduct by which an implied agreement may be established for purposes of the “governing principles” of an unincorporated nonprofit association, as practices used without material change during the most recent five years or during the association’s entire existence if it has existed for less than five years.²⁵⁷ Arguably, there will be circumstances under which a practice consistently followed on a frequent repetitive basis, e.g., in connection with weekly or monthly meetings, should be respected as part of the governing principles of an unincorporated nonprofit association even though the practice does not date all the way back to the association’s inception and does not yet span a period of five years. On the other hand, a practice followed on one or two occasions over a period of five years or since the association’s inception may not merit recognition as part of the governing principles in every case. Notably, the statute does not attempt to specify the time period over which a course of conduct is sufficient to imply an agreement to form an unincorporated nonprofit association.²⁵⁸

When courts speak unclearly, too broadly, or too narrowly in the course of developing or applying common-law principles in a particular case, they have the opportunity to clarify or reinvent the principles when subsequent cases involving application of the principles arise. If a statute is imprecise, too broad, or too narrow, the courts may have less room to maneuver. Several provisions of RUUNAA provide examples of statutory rules that could present problems associated with an unclear, narrow, or broad articulation of the rule, thus pointing to areas where the rules may need

256. See *supra* note 96.

257. See *supra* notes 154–58 and accompanying text.

258. See *supra* note 157.

refinement if they are to be specified by statute.²⁵⁹ RUUNAA is certainly, however, a very useful starting point for a jurisdiction that wishes to adopt a more comprehensive statutory scheme for unincorporated nonprofit associations. Indeed, a jurisdiction that concludes it is better served by the overall approach in UUNAA (i.e., addressing areas that have been the significant problem areas under the common law and leaving other areas such as governance to the common law), may find that the manner in which RUUNAA articulates (or omits) the issues addressed in UUNAA is an improvement over the articulation in UUNAA.²⁶⁰

As courts and commentators have mused, unincorporated associations can be enigmatic and troublesome creatures. The law governing them is bound to be somewhat messy, and there is doubtless no perfect approach to addressing the various mechanical and policy issues that will arise in the context of the myriad organizations that may exist. In the end, it is productive to examine and debate varied models and to draw on the experience and wisdom gained as the statutes and case law continue to develop. A statutory band-aid like UUNAA may prove perfectly adequate in a jurisdiction whose courts are otherwise reaching sensible results under agency, fiduciary, and other common-law principles as the cases arise. The body-cast approach of RUUNAA might merely prove to prevent the courts from properly treating areas that are constrained by an ill-fitting cast. On the other hand, a jurisdiction might well determine that the common law of the jurisdiction is in need of much more than a band-aid, and that a more comprehensive and definite set of rules in the nature of those set forth in RUUNAA best serves the jurisdiction. Undoubtedly, there are still many lessons to be learned in this area regardless of the status of the law in any particular jurisdiction.

259. See, e.g., *supra* notes 202–04, 214–18, 223–24, 229–32 and accompanying text.

260. For example, the UUNAA provisions regarding the limited liability of members and managing persons leave some literal gaps, although the apparent intent is to provide corporate-type liability protection. See *supra* notes 81–82 and accompanying text. RUUNAA improves upon the wording in the provisions addressing the scope of the liability protection of members and managers. See *supra* notes 115–16 and accompanying text. Also, unlike UUNAA, RUUNAA does not include provisions on standing of an association to sue on behalf of its members since other law may be viewed as adequately addressing that issue. See *supra* notes 77–79, 111 and accompanying text.