

Memorandum 87-43

Subject: Study L-1025 - Litigation Involving Decedent (Draft of Tentative Recommendation)

Attached to this memorandum is a draft of the tentative recommendation relating to litigation involving a decedent. The draft incorporates changes made by the Commission at the February meeting in San Diego.

However, the draft omits some material considered at the February meeting. The omitted material involves primarily Code of Civil Procedure provisions that relate to proper parties in litigation involving a decedent. We have omitted this material from the draft because we have discovered a number of issues that we believe are not adequately resolved and that require further staff work before they are ready to be reviewed by the Commission. The affected provisions are not directly involved with our main objectives to dispose of the claim filing provisions in probate and to complete the work of revising the Probate Code. We plan to return to this matter when we have completed the main Probate Code project.

Survival of Actions

Existing Probate Code Section 573 deals with survival of actions. It also impacts the Code of Civil Procedure provisions governing proper parties in litigation involving a decedent. For this reason we are continuing Section 573 without revision in AB 708 as well as in the present recommendation. We have, however, incorporated one clarifying change made by the Commission at the February meeting relating to assignability of causes of action. See Section 573(e) of the draft tentative recommendation.

Late Claims

Under existing law a creditor must file a claim before commencing or continuing litigation against a decedent. The claim filing period is the standard four-month period applicable to creditors generally.

However, the court may allow a late claim in two classes of cases: (1) where the claim is a cause of action for injury or death, and (2) where the claim is for a pending action of any kind against the decedent. The late claim is available only if the plaintiff was unaware of the administration of the estate during the first 3½ months after administration was commenced.

This must be compared with the law governing late claims by general creditors. The Commission's redraft of existing law authorizes the court to allow a late claim in cases involving non-business debts. The late claim is available if the creditor was unaware of the administration of the estate during the first four months after administration was commenced by reason of being out of the state.

Besides the difference between the 3½ and four month periods in these two provisions, there are other little differences, such as standards of proof, the ability of the court to impose conditions on allowing a late claim, and the ability of the court to deny a late claim if it will cause inequities among interested persons. The staff does not believe there is a real reason for these differences, other than that the two late claim provisions were enacted independently of each other in different contexts at different times. In the current draft the staff has combined the two late claim provisions into a single statute with the following features, drawn from both provisions:

(1) The late claim is available for causes of action for non-business debts (including injury or death) and for pending litigation of any kind.

(2) The creditor must have been unaware of the administration for four months.

(3) The application for late filing must be made within a reasonable time after the creditor learns of the administration.

(4) The court may condition the late claim on terms that are just and equitable.

(5) The court may deny the late claim if it appears that allowance of the claim would cause unequal treatment among interested persons.

A draft of this provision is set out as Section 9103 at pages 15-16 of the draft.

Respectfully submitted,

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Staff Draft

Tentative Recommendation
Relating to
LITIGATION INVOLVING DECEDENT

The existing statutes governing causes of action and pending actions and proceedings involving a decedent are dispersed among several codes and contain gaps, inconsistencies, and overlapping provisions.¹ The proposed law consolidates and reorganizes the statutes to the extent necessary to deal with claims in litigation involving a decedent. The Law Revision Commission anticipates a future recommendation that treats the entire body of law in a comprehensive manner.

The present recommendation makes the following substantive changes in the law governing claims in litigation involving a decedent.

Statute of Limitations on Cause of Action Against Decedent [Note: This change would also be made by AB 708; this portion of the discussion will be deleted if AB 708 is enacted with this change.]

If the statute of limitations on a cause of action against a decedent has not run at the time of the decedent's death, an action may be brought within one year after appointment of a personal representative.² This provision fails to recognize the possibility that a personal representative may not be appointed until many years after the decedent's death, if ever. Tolling the statute of limitations for an indefinite period violates the public policies that

1. Relevant provisions include Civ. Code § 954; Code Civ. Proc. §§ 353, 353.5, 369, 377, and 385; Prob. Code §§ 573, 577, 707, 709, 709.1, 716, 720, 721. For a general description of some of the statutes, see Marshall, Suits Against Decedents, 47 Cal. St. B. J. 588 (1972).

2. Code Civ. Proc. § 353.

support statutes of limitation without any discernible offsetting benefit for the administration of justice.

To cure this defect, the proposed law requires that a cause of action against the decedent be asserted within one year after the decedent's death rather than one year after appointment of a personal representative. One year is ample time for the creditor to obtain appointment of a personal representative, if necessary, in order to bring suit. The filing of a claim in probate will further toll the statute of limitations until the claim is allowed or rejected, thus preserving the rights of the creditor.³

Claims in Probate

A claim in probate is required as a condition for commencing or continuing litigation against the personal representative on a cause of action against a decedent.⁴ Existing law tempers this requirement by permitting a late claim in some circumstances.⁵ The special late claim provisions differ from the general rules governing late claims in probate⁶ in numerous respects without apparent reason for the differences. The proposed law combines the special late claim provisions applicable to litigation with the general probate late creditor claim provisions to provide a single scheme with the following features:

(1) The late claim is available for causes of action for non-business debts⁷ (including injury or death) and for pending litigation of any kind.

3. See *Recommendation Relating to Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988).

4. Prob. Code §§ 709, 716(a).

5. Prob. Code §§ 709, 720.

6. Prob. Code § 707(a).

7. A business creditor is held to a higher standard of knowledge of the probate proceeding than a non-business creditor. See Prob. Code § 9103(a)(3).

(2) The creditor must have been unaware of the administration during the four-month creditor claim period.

(3) The application for leave to file a late claim must be made within a reasonable time after the creditor learns of the administration.

(4) The court may condition leave to file a late claim on terms that are just and equitable.

(5) The court may deny leave to file a late claim if it appears that allowance of the claim would cause unequal treatment among interested persons.

Insured Claims

Of all the statutes governing litigation involving a decedent, among the most complex and confusing are those relating to claims covered by insurance. The basic concept is simple--if a liability of the decedent is covered by insurance, the creditor may proceed directly against the insurer for recovery instead of through the estate or against successors in interest--but the statutes fail to implement this concept in a straightforward manner.⁸ The proposed law unifies the existing provisions, making the following changes of law in the process:

(1) The new provisions apply uniformly to actions pending at the death of the decedent and actions commenced after the decedent's death.⁹

(2) Court approval is not required before the plaintiff may commence or continue an action.¹⁰

8. In fact, there are at least six different statutes that relate to this problem, some of which appear to be coordinated with each other and others of which do not. See Code Civ. Proc. §§ 353, 385(b); Prob. Code §§ 707(b), 709, 709.1, 721.

9. Existing law provides variant treatment depending on whether there is pending litigation on the decedent's cause of action or not. Compare Prob. Code §§ 707(b) and 721 with Code Civ. Proc. § 385(b) and Prob. Code § 709.1.

10. Compare Prob. Code § 707(b) and Code Civ. Proc. § 385(b) (court approval not required) with Prob. Code §§ 721 and 709.1 (court approval required). Among the considerations against court approval are the fact that only the insurer is at risk and no estate assets are involved, and that confusion is caused by overlapping jurisdiction of the probate and civil courts.

(3) The estate of the decedent need not qualify for treatment under the affidavit procedure for collection or transfer of personal property.¹¹

(4) The new provisions apply in any case where there is a claim for damages for which the decedent was insured, whether for injury to or death of a person caused by the wrongful act or neglect of the decedent, or otherwise.¹²

(5) The new provisions allow a direct proceeding against the insurer without regard to whether the insurer has accepted the defense of the cause or made an appearance on behalf of the decedent.¹³

11. Prob. Code § 13100 et seq. Compare Prob. Code Prob. Code § 707(b) and Code Civ. Proc. § 385(b) (proceeding limited to small estate). Current use of the summary administration standard in limited situations causes a number of problems. It requires a petition in probate that would not otherwise be required in order to ensure that the estate qualifies. Marshall, *Suits Against Decedents*, 47 Cal. St. B.J. 588, 593 (1972). It has been suggested that if the claimant is in doubt, it should be assumed that the estate does not qualify. See Nelson, Creditors' Claims, in 1 California Decedent Estate Practice § 12.13 (Cal. Cont. Ed. Bar 1986). The proposed law avoids this problem by treating all claims covered by liability insurance in the same fashion and eliminating the need to determine whether the estate qualifies under Section 13100.

12. See Code Civ. Proc. § 385(b) and Prob. Code § 707(b) (proceeding limited to claim for damages or injury to or death of a person caused by the wrongful act or neglect of the decedent). The reference to "injury" seems to mean personal injury. Witkin paraphrases the requirements of these sections by reference to personal injury. See 4 B. Witkin, *California Procedure Pleading* § 285, at 340 (3d ed. 1985). However, similar language in Probate Code Section 720 relating to a claim for "injuries" that is not the subject of a pending action has been interpreted to cover a claim based on fraud. *Estate of Hoertkorn*, 88 Cal. App. 3d 461, 464-67, 151 Cal. Rptr. 806 (1979). The proposed law avoids these confusing technicalities and dubious distinctions by treating all claims covered by insurance in the same manner. This is the approach of Section 3-803(c)(2) of the Uniform Probate Code which applies to claims protected by liability insurance.

13. Contrast Prob. Code § 709 (insurer must have accepted defense and made an appearance on behalf of decedent).

Outline of Proposed Legislation

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 353 [AB 708] (amended). Death of party before expiration of limitation period
Code Civ. Proc. § 385 (amended). Disability or death

PROBATE CODE

Prob. Code §§ 550-573 (added). Litigation involving decedent

PART 13. LITIGATION INVOLVING DECEDENT

CHAPTER 1. LIABILITY OF DECEDENT COVERED BY INSURANCE

- § 550. Action authorized
- § 551. Statute of limitations
- § 552. Procedure
- § 553. Defenses
- § 554. Damages

CHAPTER 2. SURVIVAL OF ACTIONS

- § 573. Survival of cause of action

Prob. Code § 707 [AB 708] (repealed). Insured claim

Prob. Code § 709 [AB 708] (repealed). Claim pending against decedent

Prob. Code § 709.1 [AB 708] (repealed). Continuation of pending action against estate

Prob. Code § 716 [AB 708] (repealed). Enforcement of lien

Prob. Code § 720 [AB 708] (repealed). Claim for damages for injury or death where no action pending

Prob. Code § 721 [AB 708] (repealed). Claim for liability covered by liability insurance

Prob. Code § 9002 [AB 708] (amended). Claim requirement

Prob. Code § 9103 [AB 708] (amended). Late claims

Prob. Code § 9253 [AB 708] (amended). Effect of statute of limitations

Prob. Code § 9257 [AB 708] (repealed). Action on rejected claim

Prob. Code §§ 9350-9353 (added). Claims in litigation

CHAPTER 8. CLAIMS IN LITIGATION

- § 9350. Claim prerequisite to bringing action
- § 9351. Claim prerequisite to continuing action
- § 9352. Statute of limitations for action on claim
- § 9353. Bringing action on claim
- § 9354. Claim covered by insurance
- § 9355. Enforcement of security interest

Prob. Code § 9824 [AB 708] (repealed). Executors who have not qualified

PROPOSED LEGISLATION

Code of Civil Procedure § 353 [AB 708] (amended). Death of party before expiration of limitation period

SEC. . Section 353 of the Code of Civil Procedure is amended to read:

353. If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the date of death, ~~or an action against the estate provided for by subdivision (b) of Section 385 of the Code of Civil Procedure, subdivision (b) of Section 707 of the Probate Code or Section 721 of the Probate Code may be commenced within one year after the expiration of the time otherwise limited for the commencement thereof.~~

Comment. The portion of Section 353 that related to commencement of an action to enforce insurance liability is restated in Probate Code Section 551 (statute of limitations) without substantive change.

Code of Civil Procedure § 385 (amended). Disability or death

SEC. . Section 385 of the Code of Civil Procedure is amended to read:

385. ~~(a)~~ An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

~~(b) In the case of an action for injury to or for the death of a person caused by the wrongful act or neglect of the defendant, and the defendant dies after the commencement of the action, the action may be continued, against the decedent as the original party defendant without the appointment of a representative or successor in interest, if the decedent had liability insurance applicable to the cause of action, the amount of damages sought in the action does not exceed the maximum amount of such insurance, or recovery of excess thereof is waived, and the estate of the decedent otherwise qualifies for summary probate proceedings pursuant to Part 1 (commencing with Section 1300) of Division 8 of the Probate Code. No action may be continued under this subdivision unless the insurer has been served with the complaint filed in the action. For good cause, the court, upon motion of an interested person or upon its own motion, may order the appointment of a personal representative and his substitution as the defendant.~~

Comment. The material formerly set out in Section 385(b) is replaced by Probate Code Sections 550-554 (liability of decedent covered by insurance).

Probate Code §§ 550-573 (added). Litigation involving decedent

SEC. . Part 13 (commencing with Section 550) is added to Division 2 of the Probate Code, to read:

PART 13. LITIGATION INVOLVING DECEDENT

CHAPTER 1. LIABILITY OF DECEDENT COVERED BY INSURANCE

§ 550. Action authorized

550. (a) Subject to the provisions of this chapter, an action to establish the decedent's liability for which the decedent was protected by insurance may, after the decedent's death, be commenced or continued against the decedent's estate without the need to make the decedent's personal representative or successor in interest a party.

(b) The remedy provided in this chapter is cumulative, and may be pursued concurrently, with other remedies.

Comment. This chapter replaces former subdivision (b) of Section 385 of the Code of Civil Procedure, former Probate Code Sections 707(b), 709.1, and 721, and the third sentence of former Probate Code Section 709. It makes the following significant changes in the law:

(1) The new provisions apply uniformly to actions pending at the death of the decedent and actions commenced after the decedent's death.

(2) Court approval is not required before the plaintiff may commence an action against the estate for the insured amount.

(3) The estate of the decedent need not otherwise qualify for treatment under Section 13100 et seq. (affidavit procedure for collection or transfer of personal property).

(4) The new provisions apply in any case where there is a claim for damages for which the decedent was insured, whether for injury to or death of a person caused by the wrongful act or neglect of the decedent, or otherwise.

(5) The new provisions excuse a claim in probate only where the plaintiff is proceeding under this chapter, whether or not the insurer has otherwise accepted the defense of the cause or an appearance has been made on behalf of the decedent.

If the plaintiff seeks damages in excess of the insurance policy limits, the plaintiff must file a claim and establish the liability other than under this chapter. See Section 554 (damages).

The time limited for bringing an action under this chapter is one year after expiration of the applicable statute of limitations. See Section 551 (statute of limitations).

GROSS-REFERENCES

Definitions

Personal representative § 58

§ 551. Statute of limitations

551. If the limitations period otherwise applicable to the action has not expired at the time of the decedent's death, an action under this chapter may be commenced within one year after the expiration of the limitations period otherwise applicable.

Comment. Section 551 restates the last portion of the second sentence of Code of Civil Procedure Section 353 without substantive change.

§ 552. Procedure

552. An action under this chapter shall name as the defendant "Estate of (name of decedent), Deceased." Summons shall be served on a person designated in writing by the insurer or, if none, on the insurer. Further proceedings shall be in the name of the estate, but

otherwise shall be conducted in the same manner as if the action were against the personal representative. On motion of an interested person or on its own motion, the court in which the action is pending may, for good cause, order the appointment and substitution of a personal representative as the defendant.

Comment. See the Comment to Section 550.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

§ 553. Defenses

553. The insurer may deny or otherwise contest its liability by cross-complaint in the action or by an independent action against the plaintiff. Unless the personal representative is joined as a party, a judgment on the cross-complaint or in the independent action does not adjudicate rights by or against the estate.

Comment. See the Comment to Section 550.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 554. Damages

554. (a) The damages sought in an action under this chapter shall be within the limits and coverage of the insurance, or recovery of damages outside the limits or coverage of the insurance shall be waived. A judgment in favor of the plaintiff is enforceable only from the insurance protection and not against property in the estate.

(b) Subdivision (a) does not apply to the extent the insurer accepts the defense of the action and makes an appearance on behalf of the decedent and the plaintiff files a claim under Section 9354.

Comment. See the Comment to Section 550.

CROSS-REFERENCES

Definitions

Property § 62

CHAPTER 2. SURVIVAL OF ACTIONS

§ 573. Survival of cause of action

573. (a) Except as provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's personal representative.

(b) In an action brought under this section against a personal representative, all damages may be awarded which might have been recovered against the decedent had the decedent lived except damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

(c) Where a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative are limited to the loss or damage the decedent sustained or incurred prior to death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived but not including any damages for pain, suffering, or disfigurement.

(d) This section applies where a loss or damage occurs simultaneously with or after the death of a person who would have been liable for the loss or damage if his or her death had not preceded or occurred simultaneously with the loss or damage.

(e) Nothing in this section shall be construed as affecting the assignability of causes of action.

Comment. Section 573 continues former Section 573 [AB 708] without change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Probate Code § 707 [AB 708] (repealed). Insured claim

SEC. . Section 707 of the Probate Code is repealed.

~~707. The filing of a claim is not required as a prerequisite to commencing an action against the decedent for damages for injury to, or for the death of, a person caused by the wrongful act or neglect of the decedent or to recover upon a judgment obtained in the action if (1) the decedent had liability insurance applicable to the cause of action, (2) the amount of damages sought in the action does not exceed the~~

~~maximum amount of that insurance, or recovery in excess thereof is waived, and (3) the estate of the decedent otherwise qualifies for summary probate proceedings pursuant to Chapter 3 (commencing with Section 13100) of Part 1 of Division 8. If the amount of damages sought in the action exceeds the maximum amount of the insurance, filing and presentation of a claim is required only with respect to the amount sought in excess of the maximum amount of the insurance. The defendant in the action may be designated as "Estate of (name of decedent), Deceased". No action shall be maintained under this section unless the insurer has been served with a copy of the complaint.~~

Comment. Former Section 707 is replaced by Sections 550-554 (liability of decedent covered by insurance) and 9354 (claim covered by insurance).

Probate Code § 709 [AB 708] (repealed). Claim pending against decedent

SEC. . Section 709 of the Probate Code is repealed.

~~709. If an action is pending against the decedent at the time of his or her death, the plaintiff shall in like manner file his or her claim as required in other cases. No recovery shall be allowed against decedent's estate in the action unless proof is made of the filing. If, however, the action which is pending is an action for damages, the decedent was insured therefor, the insurer has accepted the defense of the cause, and an appearance has been made in such action on behalf of the decedent, no claim shall be required except for amounts in excess of or not covered by the insurance. Further, if any action is pending against the decedent at the time of his or her death and a claim based on such action is not filed within four months after the date letters are first issued to a general personal representative, the court may thereafter allow filing of the claim on such terms as may be just and equitable, upon the claimant's petition and notice of hearing given as provided in Section 1220, if it finds that the claim was not filed previously because neither the claimant nor the claimant's attorney had actual knowledge of the decedent's death at least 15 days prior to the expiration of four months after the date letters are first issued to a general personal representative, but any property distributed pursuant to court order or any payment properly made before notice of such petition shall not be subject to the claim.~~

~~No relief shall be granted unless the petition is filed within a reasonable time after discovery of decedent's death, and in any event within one year after the expiration of four months after the date letters are first issued to a general personal representative, and before petition for final distribution has been filed.~~

~~If, at the time of filing the petition hereunder, assets of the estate have been paid to general creditors or some thereof or have been distributed by decree of preliminary distribution to heirs, devisees, or legatees (in either case after expiration of four months after the date letters are first issued to a general personal representative), and it appears that the filing and later establishment of the claim, in the circumstances, would cause or tend to cause unequal treatment between heirs, devisees, legatees, or creditors, then permission to file the claim shall be denied.~~

Comment. The first two sentences of former Section 709 are restated in Section 9351 (claim prerequisite to continuing action) without substantive change. The third sentence is replaced by Sections 550-554 (liability of decedent covered by insurance) and 9354 (claim covered by insurance).

The fourth sentence of the first paragraph and the second and third paragraphs of former Section 709 are restated in Section 9103 (late claim), with clarifying and generalizing changes made to combine it with former Section 720.

Probate Code § 709.1 [AB 708] (repealed). Continuation of pending action against estate

SEC. . Section 709.1 of the Probate Code is repealed.

~~709.1. Notwithstanding any other provision of law, the court in which an action described in Section 709 is pending may permit the action to be continued against the defendant in the name of "Estate of (name of decedent), Deceased," upon petition of the plaintiff, pursuant to the same procedure, and upon the same terms and conditions, as are provided in Section 721 for claims which were not the subject of a pending action at decedent's death. The procedure of this section is cumulative and does not supersede the procedure provided in subdivision (b) of Section 385 of the Code of Civil Procedure.~~

Comment. Former Section 709.1 is replaced by Sections 550-554 (liability of decedent covered by insurance) and 9354 (claim covered by insurance).

Probate Code § 716 [AB 708] (repealed). Enforcement of lien

SEC. . Section 716 of the Probate Code is repealed.

~~716. (a) An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. The action may be brought whether or not the claim was filed as provided in Part 4 (commencing with Section 9000) of Division 7; but no counsel fees shall be recovered in the action unless the claim was so filed.~~

~~(b) As used in this section, "lien" includes, but is not limited to, a judgment that is a lien.~~

Comment. Former Section 716 is restated in Section 9355 (enforcement of security interest), omitting the provision relating to attorney's fees.

Probate Code § 720 [AB 708] (repealed). Claim for damages for injury or death where no action pending

SEC. . Section 720 of the Probate Code is repealed.

~~720. If a claim for damages for injuries to, or death of, a person, for which no action specified in Section 709 was pending at the time of the decedent's death, is not filed within the time otherwise limited by this chapter, the court, upon application of the claimant made not later than one year after accrual of the claimant's cause of action, and upon such notice and hearing, if any, as the court may order, shall permit the filing of the claim and, if required, appoint or reappoint a personal representative. Neither the filing of the claim pursuant to this section nor its later establishment, in whole or in part, shall make payments properly made before notice of such application subject to the claim. The personal representative, distributee, or payee shall not be liable on account of such prior distribution or payment. The court shall impose reasonable conditions upon the filing of the claim to avoid unequal treatment between the heirs, devisees, legatees, or creditors of the estate.~~

~~This section shall not be applicable to claims of public entities under Chapter 5 (commencing with Section 9200) of Part 4 of Division 7.~~

Comment. Former Section 720 is restated in Section 9103 (late claim) with clarifying and generalizing changes made to combine it with former Section 709.

Probate Code § 721 [AB 708] (repealed). Claim for liability covered by liability insurance

SEC. . Section 721 of the Probate Code is repealed.

~~721. (a) Notwithstanding any other provision of law, the filing of a claim as provided in Part 4 (commencing with Section 9000) of Division 7 shall not be required and a civil action may be maintained by a claimant to establish, to the limits of the insurance protection only, a liability of the decedent for which the decedent was protected by liability insurance.~~

~~(b) The claimant shall file a verified petition in the superior court of the county in which the administration of the estate is pending, or if none is pending, in the superior court of the county in which administration may be had as provided in Section 301, alleging (1) the nature and amount of the claim, (2) the decedent was protected, in whole or in part, by liability insurance with respect thereto, (3) the interests of the estate will not be prejudiced, and (4) any recovery in the action by the claimant will be limited solely to the decedent's insurance protection. The court, upon such hearing and notice, if any, as it may order, shall grant leave to the claimant to file the action, unless it finds that the interests of the estate will be prejudiced thereby. However, if it appears that the insurer denies coverage or admits liability only conditionally or with reservation, the court may deny leave to the claimant to file the action.~~

~~(c) The action by the claimant shall name as the defendant "Estate of (name of decedent), Deceased." Summons shall be served upon a person designated in writing by the insurer or, if none, upon the insurer. Further proceedings shall be in the name of the estate, but otherwise shall be conducted in the same manner and have the same effect as if the action were against the personal representative. For good cause, the court in which the civil action is pending, upon motion of an interested person or upon its own motion, may order the appointment of a personal representative and the personal representative's substitution as the defendant.~~

~~(d) The insurer may deny or otherwise contest its liability by cross-complaint in the action or by an independent action against the claimant, but the judgment on the cross-complaint or in the independent action shall not adjudicate rights of persons who are not parties.~~

~~(e) A judgment in favor of claimant in an action pursuant to this section shall be enforceable only from the insurance protection and shall not create a lien upon real or other property in the estate.~~

~~(f) The remedies of this section are cumulative, and may be pursued concurrently with other remedies.~~

Comment. Former Section 721 is replaced by Sections 550-554 (liability of decedent covered by insurance) and 9354 (claim covered by insurance).

Probate Code § 9002 [AB 708] (amended). Claim requirement

SEC. . Section 9002 of the Probate Code is amended to read:

9002. Except as otherwise provided by statute:

(a) All claims shall be filed in the manner and within the time provided in this part.

(b) A claim that is not filed as provided in this part is barred.

~~(e) The holder of a claim may not maintain an action on the claim unless the claim is first filed as provided in this part.~~

Comment. Subdivision (c) of Section 9002 is superseded by Chapter 8 (commencing with Section 9350) (claims in litigation).

Probate Code § 9103 [AB 708] (amended). Late claims

SEC. . Section 9103 of the Probate Code is amended to read:

9103. (a) Upon petition by a creditor and notice of hearing given as provided in Section 1220, the court may allow a claim to be filed after expiration of the time provided in Section 9100 if it appears by clear and convincing evidence that all of the following conditions are satisfied:

~~(1) The creditor was out of the state during the entire four-month period after the date letters were first issued to a general personal representative.~~

~~(2) The creditor did not have~~ Neither the creditor nor the creditor's attorney had actual knowledge of the administration of the estate within four months after the date letters were first issued to a general personal representative ~~by reason of being out of the state~~ and the petition was filed within a reasonable time after the creditor or the creditor's attorney had actual knowledge of the administration.

~~(3)~~ (2) The claim is for an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is pending, for a cause of action that does not arise out of the conduct by the creditor of a trade, business, or profession in the state.

(b) The court shall not allow a claim to be filed under this section after the earlier of the following times:

(1) The time the court makes an order for final distribution of the estate.

(2) One year after the date letters are first issued to a general personal representative.

(c) The court may condition the claim on terms that are just and equitable, and may require the appointment or reappointment of a personal representative if necessary. The court may deny the petition if a preliminary distribution to beneficiaries or a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause or tend to cause unequal treatment among beneficiaries or creditors.

(d) Property distributed under court order and payments otherwise properly made before a claim is filed under this section are not subject to the claim, regardless of whether the claim is later established in whole or in part. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.

Comment. Section 9103 is amended to combine it with the fourth sentence of the first paragraph and the second and third paragraphs of former Section 709, which related to late claims in pending actions, and with former Section 720, which related to late claims involving causes of action not pending. The combination of provisions results in changes for purposes of clarification, generalization, and uniformity.

This section does not excuse the duty of the personal representative to give timely notice to a known creditor pursuant to Chapter 2 (commencing with Section 9050). A creditor has knowledge of the administration of an estate within the meaning of subdivision (a)(1) if the creditor has actual knowledge of the administration through receipt of notice given under Section 9050 or otherwise, such as information from a newspaper clipping service. Constructive knowledge through publication of a notice of death or other information that does not come to the attention of the creditor is not knowledge for the purpose of subdivision (a)(1).

It should be noted that a petition under this section must be verified. See Section 1284. This section does not apply to certain public entity claims which involve a written notice or request to the

public entity and a response time governed by other law. See Sections 9201 (claims governed by special statutes) and 9202 (claim by Director of Health Services).

Probate Code § 9253 [AB 708] (amended). Effect of statute of limitations

SEC. . Section 9253 of the Probate Code is amended to read:

9253. ~~(a) The filing of a claim tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection.~~

~~(b) A claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge.~~

~~(c) The allowance or approval of a claim further tolls the statute of limitations during the administration of the estate.~~

~~(d) Notwithstanding the statute of limitations otherwise applicable to a claim, an action on a rejected claim shall be commenced within the time prescribed in Section 9257.~~

Comment. Former subdivisions (a) and (c) of Section 9253 are continued as subdivisions (a) and (b) of Section 9352 (statute of limitations for claims on action) without change. Former subdivision (d) is combined with subdivision (a) of former Section 9257 as subdivision (c) of Section 9352 (statute of limitations for claims on action) without change.

Probate Code § 9257 [AB 708] (repealed). Action on rejected claim

SEC. . Section 9257 of the Probate Code is repealed.

~~9257. (a) A rejected claim is barred unless the creditor brings an action on the claim or the matter is referred to a referee or to arbitration within the following times, excluding the time during which there is a vacancy in the office of the personal representative:~~

~~(1) If the claim is due at the time of giving the notice of rejection, three months after the notice is given.~~

~~(2) If the claim is not due at the time of giving the notice of rejection, three months after the claim becomes due.~~

~~(b) In addition to any other county in which an action may be brought, an action on the claim may be brought in the county in which the proceeding for administration of the decedent's estate is pending.~~

~~(e) The plaintiff shall file a notice of the pendency of the action with the court clerk in the estate proceeding, together with proof of giving a copy of the notice to the personal representative as provided in Section 1215. Personal service of a copy of the summons and complaint on the personal representative is equivalent to the filing and giving of the notice. Any property distributed under court order, or any payment properly made, before the notice is filed and given is not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.~~

~~(d) If the creditor fails to recover, the creditor shall pay court costs and, in the court's discretion, reasonable litigation expenses, including attorney's fees.~~

Comment. Subdivision (a) of former Section 9257 is combined with former subdivision (d) of Section 9253 as Section 9352(c) (statute of limitations for action on claim) without change. Subdivisions (b)-(d) are continued as Section 9353(a)-(c) (bringing action on claim) without change.

Probate Code §§ 9350-9355 (added). Claims in litigation

SEC. . Chapter 8 (commencing with Section 9350) is added to Part 4 of Division 7 of the Probate Code, to read:

CHAPTER 8. CLAIMS IN LITIGATION

§ 9350. Claim prerequisite to bringing action

9350. An action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is first filed as provided in this part and the claim is rejected or is allowed or approved only in part.

Comment. Section 9350 restates subdivision (a) of former Section 716 with the addition of the implied requirement that the claim was rejected in whole or in part. For the time within which a claim must be filed, see Section 9100 (claim period). For late claims, see Section 9103. An action may be brought to enforce a liability of the decedent without first filing a claim in the case of a secured obligation. Section 9355 (enforcement of security interest).

This section relates only to an action against the personal representative. It does not affect actions against other persons who

may be liable for the decedent's debts. See, e.g., Sections 13109 (affidavit procedure) and 13550-13554 (debts of deceased spouse). See also Sections 550-554 (liability of decedent covered by insurance).

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

§ 9351. Claim prerequisite to continuing action

9351. (a) An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless a claim is first filed as provided in this part and the claim is rejected or is allowed or approved only in part.

(b) No recovery shall be allowed in the action against property in the decedent's estate unless proof is made of the filing.

Comment. Subdivision (a) of Section 9351 restates the first sentence of former Section 709 with the addition of the implied requirement that the claim be rejected in whole or in part. The personal representative must notify creditors, including plaintiffs in actions against the decedent, if the personal representative has actual knowledge of the creditor. Section 9050 (notice required). For late claims, see Section 9103.

Subdivision (b) restates the second sentence of former Section 709 without substantive change.

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

§ 9352. Statute of limitations for action on claim

9352. (a) The filing of a claim tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection.

(b) The allowance or approval of a claim in whole or in part further tolls the statute of limitations during the administration of the estate as to the part allowed or approved.

(c) Notwithstanding the statute of limitations otherwise applicable to a claim, a claim rejected in whole or in part is barred as to the part rejected unless the creditor commences an action on the

claim or the matter is referred to a referee or to arbitration within the following times, excluding the time during which there is a vacancy in the office of the personal representative:

(1) If the claim is due at the time of giving the notice of rejection, three months after the notice is given.

(2) If the claim is not due at the time of giving the notice of rejection, three months after the claim becomes due.

Comment. Subdivisions (a) and (b) of Section 9352 continue former subdivisions (a) and (c) of Section 9253 with the addition of provisions relating to partial allowance. Subdivision (c) combines former subdivision (d) of Section 9253 and subdivision (a) of former Section 9257 with the addition of provisions relating to partial rejection.

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

§ 9353. Bringing action on claim

(a) In addition to any other county in which an action may be commenced, an action on the claim may be commenced in the county in which the proceeding for administration of the decedent's estate is pending.

(b) The plaintiff shall file a notice of the pendency of the action with the court clerk in the estate proceeding, together with proof of giving a copy of the notice to the personal representative as provided in Section 1215. Personal service of a copy of the summons and complaint on the personal representative is equivalent to the filing and giving of the notice. Any property distributed under court order, or any payment properly made, before the notice is filed and given is not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.

(c) If the creditor fails to recover, the creditor shall pay court costs and, in the court's discretion, reasonable litigation expenses, including attorney's fees.

Comment. Section 9353 restates subdivisions (b)-(d) of former Section 9257 without substantive change.

CROSS-REFERENCES

Definitions

Claim § 900

Personal representative § 58

Property § 62

§ 9354. Claim covered by insurance

9354. (a) An action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued under Section 550, and a judgment in the action may be enforced against the insurer, without first filing a claim as provided in this part.

(b) An action to establish the decedent's liability for damages outside the limits or coverage of the insurance may not be commenced or continued under Section 550 unless a claim is first made as provided in this part.

(c) An insurer defending an action under Section 550 shall file a claim as provided in this part if the insurer seeks reimbursement under the insurance contract for any liability of the decedent, including but not limited to deductible amounts in the insurance coverage and costs and attorney's fees. Failure to file a claim is a waiver of reimbursement under the insurance contract for any liability of the decedent.

Comment. Section 9354 replaces part of the first sentence of subdivision (b) of former Section 707, the third sentence of former Section 709, part of former Section 709.1, and subdivision (a) of former Section 721. Section 9354, in conjunction with Section 550, makes the following significant changes in the former scheme:

(1) The new provisions apply uniformly to actions pending at the death of the decedent and actions commenced after the decedent's death.

(2) Court approval is not required before the plaintiff may commence an action against the estate for the insured amount.

(3) The estate of the decedent need not otherwise qualify for treatment under Section 13100 et seq. (affidavit procedure for collection or transfer of personal property).

(4) The new provisions apply in any case where there is a claim for damages for which the decedent was insured, whether for injury to or death of a person caused by the wrongful act or neglect of the decedent, or otherwise.

(5) The new provisions excuse a claim in probate only where the plaintiff is proceeding under Code of Civil Procedure Section 550, whether or not the insurer has otherwise accepted the defense of the cause or an appearance has been made on behalf of the decedent.

Nothing in Section 9354 affects any applicable statutes of limitation relating to the action. Cf. Code Civ. Proc. § 353; Prob. Code § 551.

CROSS-REFERENCES

Definitions

Claim § 9000

§ 9355. Enforcement of security interest

9355. The holder of a mortgage or other lien on property in the decedent's estate, including but not limited to a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien, without first filing a claim as provided in this part, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate.

Comment. Section 9355 restates former Probate Code Section 716 [AB 708], omitting the provision relating to attorney's fees.

CROSS-REFERENCES

Definitions

Claim § 9000

Property § 62

Probate Code § 9824 [AB 708] (repealed). Executors who have not qualified

SEC. . Section 9824 of the Probate Code is repealed.

~~9824.---In actions by or against personal representatives, it is not necessary to join as parties those to whom letters were ordered issued but who have not qualified.~~

Comment. Former Section 9824 is omitted; it is no longer applicable under the procedure for appointment of a personal representative. See Part 2 (commencing with Section 8000) of Division 7 of the Probate Code.