#L-2009

ns29b
02/23/88

First Supplement to Memorandum 88-8

Subject: Study L-2009 - AB 2841 (1988 Probate Legislation--proposed changes)

PRIORITY FOR APPOINTMENT AS ADMINISTRATOR WITH THE WILL ANNEXED

The Commission at the January meeting considered a staff suggestion that the person who will receive the largest portion of the estate should have priority for appointment as administrator with the will annexed. The Commission rejected that suggestion and decided instead that the rule should continue to be that a person who takes under the will has priority over one who does not, but the court should have discretion to appoint a person who does not take under the will in a appropriate case. A draft of such a provision appears in Memorandum 88-8.

We have received the letter attached as Exhibit 1 from Larry R. Cox of Bakersfield. Mr. Cox also takes the position that a person who takes under the will should have priority. He notes that pretermitted heirship statutes are no longer favored, and points out that the direction of the law is to effectuate the testator's intent to the extent practical. He observes that a spouse taking under a pretermitted heir statute may have been a spouse only for a few months, and administration should be conducted by a named devisee under the will instead.

The staff believes that Mr. Cox's arguments could be used to support the Commission's current approach to prefer a person named under the will but to allow the court to vary this in an appropriate case.

LITIGATION INVOLVING DECEDENT

Attached as Exhibit 2 is a letter from Garrett H. Elmore of Burlingame. Mr. Elmore has substantial criticisms of the provisions of AB 2841 (and of last year's AB 708) relating to creditor claims and litigation involving a decedent. Mr. Elmore's points are analyzed below, to the extent we have been able to summarize them accurately. On a related matter, we have received a letter from Kenneth M. Klug of

Fresno concerning the problem of distribution of an estate where there are contingent or installment claims or where there is pending unresolved litigation. We will deal with Mr. Klug's points at a future meeting.

Code of Civil Procedure § 353. Death of party before expiration of limitation period (page 7 of the bill as introduced).

Before enactment of the Commission's 1987 probate legislation, the rule was that the statute of limitations on a cause of action against a decedent was tolled by the decedent's death until one year after the opening of probate. The Commission's 1987 probate legislation limited the tolling period to one year after the decedent's death, due to the possibility of an estate that is not probated until many years later.

Mr. Elmore is concerned about the burden this change in law puts on a creditor in cases where the decedent's heirs have chosen not to open a probate proceeding. The creditor who wishes to pursue the cause of action is forced to open probate in order to preserve the cause of action on which the statute of limitations will run one year after the decedent's death.

Mr. Elmore seeks to mitigate this situation by giving the decedent's heirs an incentive to open probate. He would toll the statute of limitations for an additional year (a total of two years after the decedent's death) if probate is not opened within 120 days after the decedent's death. He is particularly concerned that such a rule should apply to claims that arose before the operative date of the new law. "It may be doubted that many creditors or business concerns having potential claims know of the 1987 changes here mentioned or that a retroactive shortening of the statue of limitations with one year cut off date (July 1, 1989) has been made." On the other hand, the staff thinks it also may be doubted that many creditors or businesses have been aware of the law that tolls their cause of action, in case of the death of their debtor, indefinitely in the future until one year after an administration proceeding is commenced.

Mr. Elmore also suggests an expansion of the law to allow a suit by a creditor directly against the decedent's beneficiaries without the need to open an estate. The staff has been working on this concept as one of the "back burner" probate projects. It goes beyond the scope of, and does not directly affect, the current bill.

Probate Code § 550. Action against insurance company authorized (page 33 of the bill as introduced).

A person who has a claim against a decedent must as a general rule file the claim in the decedent's estate proceeding and, if the claim is rejected, bring an action against the personal representative. California law makes an exception for claims where the decedent was protected by liability insurance. In that case the claimant may proceed directly against the insurance company to the extent of the insurance coverage without making a claim in probate. Indeed, the claimant may proceed against the insurer whether or not the decedent's estate is ever probated.

Section 550 states the basic insurance claim rule that an action by the claimant to "establish the decedent's liability for which the decedent was protected by insurance" may be "commenced or continued" to obtain the insurance coverage without the need to join the personal representative as a party. Mr. Elmore is concerned about the scope of the statute. He suggests restricting it, possibly to casualty insurance. The staff sees no need to restrict the statute. It should be available to a claimant any time there is insurance coverage of any type protecting the decedent.

Mr. Elmore also states that technically speaking, an action against the decedent that was commenced before the decedent died cannot be "continued" against the insurance company, since the complaint will have to be amended or a supplemental complaint filed in order to bring the action within the terms of the insurance claim provisions. The staff does not believe this is a problem. Section 550 provides that an action may be commenced or continued "subject to the provisions of this chapter", which provisions state the necessary requirements for continuation of the insurance claim lawsuit.

Moreover, existing law has for more than 15 years referred to an action that is "continued" against the insurer, without apparent problem. See Code Civ. Proc. § 385(b); Prob. Code § 709.1.

Probate Code § 9002.5. Waiver and estoppel (not in bill).

Mr. Elmore would add to the creditor claim statute the following general provision:

> 9002.5. The provisions of this part do not preclude application of principles of estoppel and, to the extent not inconsistent with this part, principles of waiver.

The staff does not believe such a provision is necessary. The Comment to Section 9150 (how claim is filed) already makes clear that "the requirement of a formal claim would not preclude application of estoppel or other equitable doctrines if warranted under the facts of the case." In addition, Section 9154 addresses the issue of waiver expressly, stating the circumstances under which a personal representative may waive formal defects and treat a demand as a claim.

Probate Code § 9053. Immunity of personal representative and attorney (not in bill).

The provisions of the 1987 legislation requiring the personal representative to give actual notice to known creditors also excuse the personal representative from making a search for creditors. Mr. Elmore would modify this immunity where a creditor has commenced an action against the decedent and served the decedent with process:

> Nothing in this subdivision relieves the personal representative or attorney for the personal representative of the duty to make reasonable inquiry for the existence of pending civil actions or proceedings in which the decedent was served with process and which were pending at the time of decedent's death.

The reason for the basic immunity of the statute is to avoid the need of the personal representative to make a massive search, as well as to avoid litigation over whether the scope of any search made was reasonable. In support of Mr. Elmore's suggestion it might be argued that if process were actually served, there should be some trace of this in the decedent's papers, the knowledge of which the personal

representative should be charged with. By the same token, however, any traces in the decedent's papers would be discovered in the ordinary course of administration, and a special search duty for this limited purpose is unnecessary.

Probate Code § 9103. Late claims (page 124 of the bill as introduced).

Because the basic probate creditor claim procedure requires a claim to be made within four months after administration proceedings are commenced, the law provides for late claims in hardship cases. The Commission in its 1987 legislation recognized that the late claim procedure need not be as liberal as it has been in the past because of the new requirement imposed in 1987 that the personal representative give actual notice of administration to known creditors. In AB 2841, we are consolidating the general late claim provisions with special late claim provisions that relate to causes of action for injury or death and to pending actions. The consolidation is based on the theory that all late claims should be treated alike. Under the consolidated provision, the court may allow a late claim up to one year after opening estate administration if the creditor had no actual knowledge of the administration during the four month claim period, and the creditor applied for permission to file a late claim within 30 days after learning of the administration.

Mr. Elmore's general concern is that liberal late claim provisions were originally written into the law because in many situations creditors will be unaware of the need for prompt action. He is concerned that the consolidation of late claim provisions makes the provisions too restrictive in some cases. He argues that the fact that the personal representative must notify known creditors is an inadequate substitute because the personal representative is not required to make a search for creditors, and many creditors will hold contingent or not yet due claims of which neither they nor the personal representative are aware at the time the claim filing requirement runs. "No reason to repeal the statutes that give flexibility and that are appropriate to a highly populated and mobile state such as

California can be given, unless over-weight is to be given to claims of court and estate efficiency." Mr. Elmore's specific concerns are detailed below.

The 1987 legislation required the claimant to demonstrate lack of knowledge of administration by clear and convincing evidence. Mr. Elmore objects. "No reason appears for imposing a special burden of proof in this limited situation, to favor estate administration."

Under AB 2841, the creditor may apply for permission to file a late claim only if the creditor did not have actual knowledge of the administration during the four-month claim filing period. Mr. Elmore would make the Comment to this provision more precise, perhaps as follows:

> 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 that comes to the attention of the creditor. 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). The standard applicable to the creditor's attorney is different. The attorney is not held responsible for any actual knowledge the attorney may have of the decedent's death unless the attorney is representing the creditor in the matter involving the decedent.

The staff does not have a problem with making this clarification. The staff also suggests it may be worthwhile to add to the statute as an alternate ground for a late claim that the creditor was unaware of the potential existence of the claim because of its contingent or not-yet-due nature. This would help cure many of the cases that most trouble Mr. Elmore.

Existing Section 709, governing late claims on a pending action, requires an application by the creditor within a "reasonable" time after the creditor learns of the decedent's death. Mr. Elmore believes the requirement in AB 2841 that the creditor apply for leave to file a late claim within 30 days after learning of the administration is "unrealistic, considering the varying fact situations." He states that

the "reasonable" standard of existing law was intended to give the court power to rule on individual cases. He would either make the 30 days subject to extension or would change the time limit to 90 days. The staff does not have a good sense of the practicalities here.

Existing Section 720, governing late claims on a cause of action for injury or death that was not pending at the decedent's death, requires the court to allow a late claim if made within one year of accrual of the cause of action. Mr. Elmore believes this section should not be merged with the other late claim provisions, although the court might be given discretion whether to allow the late claim and the one year filing period might be limited to six months.

He suggests that if a stringent late claim statute is to be enacted, it should in fairness also require that a party or attorney notify the opposition of the death of a party; failure to give the required notice would be grounds for granting relief to file a late claim. Massachusetts has such a statute, and "most other jurisdictions" require civil litigants to "suggest the death of a party." This concept may be worth developing in California.

Probate Code § 9353. Bar of rejected claims (page 127 of the bill as introduced.

Section 9351 provides that a pending action may not be continued against a decedent unless a claim is first filed. Section 9353 requires a law suit on a rejected claim to be filed within three months after rejection. Mr. Elmore suggests that reading these two provisions together could imply that on rejection of a claim, a pending lawsuit must be dismissed and a new one commenced. This is not the intent of the statute. We would add clarifying language, thus:

> Regardless of whether the statute of limitations otherwise applicable to a claim will expire before or after the following times, a claim rejected in whole or in part is barred as to the part rejected unless an action or proceeding was pending against the decedent at the time of death or unless, within the following times, the creditor commences an action on the claim or the matter is referred to a referee or to arbitration.

Probably as a result of this provision, Mr. Elmore believes that the treatment of claims in a pending action is inadequate, confusing, and generally unsatisfactory. He would create a separate set of provisions dealing only with pending actions, including separate provisions on late claims and on continuing an action against the personal representative or against the insurance company. That would mean duplicating a number of provisions that are the same for pending actions and for causes of action. If we end up having different rules, as Mr. Elmore advocates, then separate treatment would appear more appropriate.

Probate Code § 9355. Claim covered by insurance (page 128 of the bill as introduced).

Section 9355 makes clear that an insurance claim may be pursued independently without making a claim in administration, but if the creditor seeks damages beyond insurance policy limits or coverage, a claim must be made in probate for the excess.

Section 9355 also makes clear that if the insurance company seeks reimbursement from the decedent under the policy, e.g., for deductible amounts paid by the insurance company, the insurance company must file a claim in the decedent's estate. Mr. Elmore wonders how this will work--the typical case will be a creditor who has brought an insurance claim action to the extent of the policy coverage, and no estate is ever opened. In order for the insurance company to get reimbursement from decedent, an estate would have to be opened for this purpose, which is the very object we're trying to avoid by allowing a lawsuit for insurance coverage only. Alternatively, if an estate had been opened, the insurer would have to immediately file a contingent claim for whatever reimbursement it might eventually be entitled to, thereby tying up the estate until the outcome of the insurance claim litigation.

Perhaps this section should be revised to provide that where there is an insurance claim action for the insurance coverage, any claim of the insurer for reimbursement may be offset against the liability on the insurance coverage and need not be processed in probate. This would reduce the creditor's total recovery and might encourage

creditors to go into probate rather than directly for the insurance coverage. The staff does not believe this would be a substantial problem, however.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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February 8,1988

LAW REV. COMM'N

FEB 22 1988

RECEIVED

Nathaniel Sterling
Executive Secretary California Law
Review Commission
400 Middlefield Road
Palo Alto, CA 94303

Dear Mr. Sterling:

I have recently received a copy of a letter dated December 17, 1987 written to you by Mr. Dillon. Mr. Dillon was kind enough to present this letter to me as well as a copy of your First Supplement to Memorandum dated 12-28-87. Please be advised that I disagree with the recommendations of Mr. Dillon.

For your perusal and consideration in this matter, I am enclosing a copy of briefs filed in this matter with the Court. Secondly, I am enclosing a copy of the Mullane case for your ready reference.

The undersigned does not agree that a defect exists in the statute. The cases interpreting section 409 are very clear that the Court believes that a person specifically pointed out by the decedent as a beneficiary is one that should take priority under the legislatively enacted statute. Such a holding makes since.

Mr. Dillon has indicated to you that such does not make sense in the case of a pretermitted heir statute. I disagree and I would point out the following:

Pretermitted heir statutes are an example of the legislature forcing upon a decedent an inheritance which is contrary to the Will of the decedent. While I realize this concept has been in existence for a long time, it is a dying concept. If you will note, over a period of years, the legislature has slowly, but nevertheless clearly limited the application of the pretermitted heir area. Additionally, you will find that if you analyze numerous cases with regards to pretermitted heir, you will come to the conclusion that courts in California have historically attempted to enforce the written desire of the testator and not the

legislative imposed distribution as set forth in the pretermitted heir statute. Therefore, I recommend that you withdraw your recommendation to give pretermitted heirs more rights by virtue of your recommended changes.

I would also point out to you as apparently you were not aware that in the matter of the estate of Jeanette Irene Schrock Fancher there was involved a very short term marriage. The marriage in that manner was substantially less than one year. It did not involve one of many years as is often comes to light in the case when one considers pretermitted heirs.

I would therefore ask that you reconsider your decision as set forth in your memo of December 28, 1987. In my opinion, it is impossible to refute the logic of the premise that a person who takes under a Will is a person that has been selectively picked out by the testator to be testator and should be preferred. It is that this person that has more of the testators confidence than one who is not even mentioned in the document nor received any indication from the decedent that the decedent wanted that person to receive the objects of his bounty. In deed, the only method that the person receives is through a legislatively enforced principle which is not favored by the courts and which is being curtailed by the legislature. The controlling consideration should be who is envisioned by the Testator by his written word and not based on the proportion of the estate received. Were the controlling principle who receives the property, a testator would be unable to designate an executor who does not take the lions share. Obviously, this does not make sense and the proposed change would not be a proper result.

I certainly appreciate the opportunity to provide these comments to you. Additionally, I appreciate Mr. Dillon allowing me to be aware of this matter.

Very truly yours,

LARRY R. COX

LRC/tf
Enclosure
cc: Thomas Glasheen
Francis B. Dillon

Copy for Commission

1st. Supp. to Memo 88-8 EXHIBIT 2 Study L-2009

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CAL. LAW REV. COMM'N.

FEB 22 1988

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Current: P. O Box 643
Burlingame, Ca. 94011

February 19, 1988

Hon. Elihu Harris
Room 6000
State Capitol
Sacramento, Ca.
94814

Re: Opposition to parts of A. B. 2841 (Harris) and To Amendment of C. C. P. 353 made by A. B. 708 (Harris) (1987; Stats. Ch. 923)

Dear Chair Harris:

Basically, this letter expresses opposition to parts of your current bill, A. B. 2841, carried for the Law Revision Commission and to a 1987 change in C. C. P. 353 made by your A. B. 708, also carried for the Commission.

Much as most of us admire the work of the Commission, it is possible for the Commission to err. In the writer's view, the Commission has seriously erred in those parts of A. B. 2841 dealing with Creditor Claims and Actions Pending Against Decedent At Time of Death.

The points that the undersigned makes, in general, are:

First, The Commission proposes repeal of many existing laws that might be called "State Bar amendments" enacted in 1963-1971 period; only a "pruning" is required.

Second, what is offered in substitution is far from being adequate when the provisions are analyzed in detail.

Third, subtle changes in code structure, new headings, and use of the word "claim" with comments leave the intent of the Commission unclear in the important area of Pending Actions. For example, the Commission text does nothing to call attention to Plaintiff-claimant's right to sue and continue the suit, if the cause of action survive. True, a claim is required. But existing law does not require permanent abatement, if the

action is one that survives. Re-wording and re-structuring is needed. The new structure is so far different that a single "Comment" will not do the job.

Fourth, the present "late claim" statutes, except for those that are duplicative, should be fine tuned and retain until the Commission or other entity can make a real, substanti study of problems. For example, California does not have any general rule or statute found in federal practice and most state jurisdictions requiring the "suggestion of death" of a party to a pending action. A statute could easil be placed near C. C. P. 385 which deals with continuation of actions that survive. The present dilemma of an at- of record for a defendant in not knowing whether client dut forbids him or her to suggest death formally should be removed, in favor of the affirmatively stated duty to disclose. Other instances of gamesmanship, such as the "non probated" estate are pointed out, with suggestions for code provisions, in the attached Memorandum

Fifth, the broadened definition of "claim" in sec. 9000 in combination with the major cut back now proposed in the field of late claims will result in loss of rights such as contribution (contract or tort) and of contractual rights that are express contingent obligations. The victims of torts are also apt to suffer. Thus, if left unamended, the framework proposed in A. B. 2841, will result in windfalls to heirs and insurers, The public interest that compels these proposed changes does not appear. It may be assumed the principal beneficiaries will be persons of mean and insurers.

Sixth. The proposal with 198, changes makes the system overbalanced in favor of Estate administration, and unbalanced as to rights and interests that need protection.

The enclosed Memorandum states the writer's objections and suggestions for improvement of A. B. 2841.

Yours truly,

Garrett H. Elmore.

CC: California Law Revision Commission

Copy For
LAW REVISION
COMMISSION

Garrett Elmore (415-343-5047)
P. O. Box 643, Burlingame, Ca
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February 15. 1988

PARTIAL CHECK LIST OF POINTS IN OPPOSITION TO PARTS OF A. B. 2841

Point 1. Structure, Placement, Erroneous Assumption A Pending Action Claim Can Be Treated Like Any Claim
Reference: Bill, p. 33, 34-New Chapter on "litigation involving decedent" placed in a remote Division.
Objection:This treatment is inadequate, confusing and generally unsatisfactory.
Reasons: 1)Erroneous assumption by drafters that a pending action cannot be continued, if it survive, upon amendment of pleading or supplemental complaint in the action itself; it clearly is permitted under present law; 2) Subject matter belongs logically in new Part 4 of Division 7 (commencing with Sec. 9000) with restructuring; included should be "Part 4. Creditor Claims And Claims On Pending Actions" (Bill, p. 49) and new chapter 5.5 (Bill p. 56) that would state ; the several rights to continue by substitution (C. C. P. 385 (a), by suing as a substituted defendant "Estate of (etc.,) where no Representative exists after a certain period (infra)* or by accepting a reduction and opting for insurance protection only, provisions for cumulative remedies with right to pursue at same time retained (see proposed Sec. 550(b)). But in an independent section (not proposed Sec. 9103 (Bill, 124, 125))"late claim provisions for Pending Actions". For Present rule of continuance: See C. C. P. 385,(substitution of Representative if action survive), Falkner v. Hendy, 107 Cal. 49 (1895)(file supplemental complaint alleging death and due presentation), Gould v. Title Ins. & Trust Co., 47 Cal. App. 557 (1920) (amended complaint to substitute representative), Salinas Nat. Bank v. Cook, 101 Cal. App. 2d 423 (1950) (must assert non presentation defense in trial court;judgment not void), Wills v.

* This procedure is now allowed for "insurance protection"; whether it should be "generalized" is discussed infra.

v. Williams, 47 Cal. App. 2d 941 (1974), at p. 946 (insurer in error to try to force plaintiff to an election that would have involved waiver of excess (C. C. P. 385(b)). See also Kinsler v. Superior Court, 121 Cal. App. 3d 808 (1981) (death did not abate unresolved part of a dissolution action pertaining to property matters where court granted dissolution but reserved jurisdiction), Herring v. Peterson, 116 Cal. App. 3d 608 (1981) (death of defendant stalls the case; plaintiff not required to obtain appointment of a personal representative or to serve process upon the insurer).*

Summmary: Present distinctions and remedies where action is pending should be retained and treated separately.

Point 2. If a Major Change In Procedural Rights Is Intended, It is Unfair To Litigants And Gives An Unfair Advantage to Estate Administrators And Heirs.It may involve due process.

Reference: Proposed Sec. 9103 (a) (2)-Bill, p. 125, placing both types of claims in one category;failure of Official Comments or Report to refer to C. C. P. 385 (a) substitution procedure, in sufficient detail.

Reasons: 1)No discussion of any intent to change the law and to remit the pending action claimant to a new action i. e., a suit on a rejected claim against the Representative appears in the Report. 2) California law of abatement or survival of actions is current; it depends in part upon common law and statute. Actions upon contract generally survive; likewise, tort actions not of a personal nature. See e. g. present Prob. Code 573 (based on original legislation Proposed or Amended at the request of the State Bar and upon Commission earlier study). The change in remedy given to support the substantive right of survival (if such is the Commission intent) will involve giving up a pending action (in which substantial expense may

*A change in the Dismissal statute made in the recent Commission measure does not seem to affect the result; however, the open end status is not desirable. A practical "close off" may exist in the Commission amendment of C. C. P. 353 (special statute of limitations) in Ch. 923 (1987).The point has not been studied.

have been incurred by plaintiff claimant; settlement offers may have been made or be under consideration, the pending action may be awaiting trial shortly, attorney fee contracts would require revision. Requiring a new suit, i.e., one based on a rejected claim, and abatement and dismissal of a pending civil action will be detrimental to the creditor's right to pursue a pending action that survives. No compensation would be paid for aborting the pending action. Remedy of suing on a rejected claim also subjects the plaintiff who has sued to "in terrorem" provisions; that is, new legislation proposing in rejected claim suit there be a "prevailing party" (not defined) and that if the court finds prosecution or defense was "unreasonable" (not defined), "litigation expenses" may be assessed against the non-prevailing party. See new Sec. 9354 (c), Bill, p. 125. Non abatement of the "pending action" does not involve the same setting or "Terrorem" wording. In the circumstances, a proposal to satisfy a creditor who has brought suit with a "rejected claim" suit raises due process questions as to actions which "survive."* Provisions or comments should forbid any such intent. Summary:The treatment of pending action rights and creditor remedies not sued upon in lifetime as the same should be corrected, to prevent any inference or basis for later judicial decision.A Comment could be added to clarify.

Point 3. Court Permission To A Creditor To Make A Late Filing Should Be Broadened, Not Narrowed As A. B. 2841 Proposes.

References: Proposed Sec. 9103, Bill, p. 124, 125, proposed repeal of existing code sections 709 (second proviso), 720,

* The writer has not studied the law on "substitute remedies" in this setting, but there is a point legally at which deprivation of normal enforcement remedies becomes an improper impairment of a substantive right. Actions on contract and many other actions survive at common law or by statute. See e. g. Sec. 573.

721 (Bill, p. 35 (repeal of Ch. 12, 13).
Reasons: 1) Existing laws,all aimed at relieving the hashness of rigid "probate claim" statutes, came into being in California in the period, roughly, 1965-1971, as the result of efforts of litigators, the Conference of Delegates of the State Bar and the "old" Committee on Administration of Justice of the State Bar. Despite allegations of uncertainty and confusion in the Commission 1988 Report, they have been construed and applied by our appellate courts without undue difficulty. Indeed, one decision interpreted "late claim" provisions in Sec. 709,second proviso, to be intended as the "exclusive" statute governing a pending action, as against the plaintiff's contention that she could rely on the "out of state" provisions, to save the pending stockholder's suit and damage claims.

Davis v. Eastwood, 100 Cal. App. 3d 894 (1980).But other cases uphold the remedial purpose of the "no claim" or "late claim" provisions, and apply a "modern" construction to recent amendments of the 5-year "dismissal" statute, thereby preserving "trial on the merits." Herring v. Peterson, 116 Cal. App. 3d 608 (1981), Wills v. Williams, 47 Cal. App. 3d 941. In the "lead" Nathanson case (Nathanson v. Superior Court,12 Cal. 3d 353 (1974)) the majority laid down a strict rule for compliance and overruled its earlier rule that permitted non-formal claims. A sharp dissent by Justice Tobriner, concurred in by Justice Mosk, says: "The Legislature has frequently amended the statutory provisions on the filing of creditor claims...Most of its amendments have served to liberalize filing requirements to reduce the number of instances in which a just claim is lost through lack of strict compliance...To terminate payments necessary to the support of decedent's child because the attorney used the wrong form and used words of future demand, inflicts a personal tragedy.. In our concern tor efficient administration, we must not forget

that attorneys are fallible, and that behind every erring attorney is a suffering client." No reason to repeal the statutes that give flexibility and that are appropriate to a highly populated and mobile state such as California can be given, unless over-weight is to be given to claims of court and estate efficiency. (2) "Late claims" are apt to involve mega-bucks, contingent business claims, and malpractice-created claims resulting from the difficulty of working with new Sec. 9000 (defining a "claim"). It may safely be predicted that very substantial rights will be lost for failure to make claim in situations where the affected person or business did not even know of the claim or need for filing. Also, room for gamesmanship exists in California as well as in Florida and Minnesota, to cite examples. Florida is a UPC state, without "late claim." Its filing requirement is broadly stated, much like Sec. 9000.After a plane crash, the petitioner, plane owner, failed to file a claim against the estate of one of two operators. No suit had been filed against petitioner as plane owner. After the "claim period" had run, the survivor filed suit against Petitioner.* Held, petitioner's claims for indemnity or contribution were barred; the Florida statute permitted no exception. Dictum: Even if petitioner did not know an accident had occured, the statute barred the claim. The court acknowledged the "harshness of the holding," saying"it is especially harsh when the party affected is a manufacturer who may not have even known of the accident." Gates Learjet Corp. v. Moyer, 459 So. 2d 1082. (Fla. App. 1984. Minnesota is a UPC state, permitting a "late claim" proceeding based upon "good cause." In the case of an auto accident in a family situation, an injured party, the son, delayed commencement of an action until after

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* The occupants were brothers; ownership was in a family corporation.

the probate claim period had run, with no claim filed. He then filed suit. The appellate court reversed the trial court ruling that a late claim be denied. It says that otherwise a plaintiff could manipulate the right of action by postponing its commencement. Estate of Morse, 364 N. W. 2d 802 (Minn. App. 1985).Between these two approaches, the Minnesota approach properly tempers the possible unfairness of the probate claim statute. (3) The new procedure for notifying known creditors is not calculated to give special notice to creditor claimants in situations apt to involve large claims. Sec. 9050 states the Representative has "knowledge" if he or she"is aware that the creditor "has demanded payment.." Such wording excludes creditors of many classes who hold obligations of the decedent upon borrowings to become due, indemnity and contribution duties, as well as many express or implied in law obligations in tort cases.Sec. 9053 states that neither the Representative or his or her attorney has a duty "to search for creditors."No obligation is imposed for the decedent or his attorney during lifetime to keep track of pending lawsuits, of outstanding business transactions, or major accidents. Even if such information existed,the way the law is now written the representative or attorney could ignore the data, on the ground it would amount to a search for creditors. (d) Proposed Sec. 9103 imposes new limits of ateehnical nature. Petition must be filed within 30 days after notice or acquiring knowledge; this is unrealistic, considering the varying fact situations.The time should be subject to extension or should be changed to 90 days. Present law states "a reasonable time" to give the court power to rule on individual cases.Also, Sec. 720 would be repealed; strong policy reasons support its retention, even if shortened

(4)If a stringent late claim statute is to be enacted, it should, in fairness, be accompanied by reforms that require civil litigants to "suggest the death of a party" so that substitution of parties may be made. California does not have a general rule of this type; most other jurisdictions do. Such a rule alone is insufficient; it should be backed by a rule or statute that failure of the party or the party's attorney to give such notice is ground for granting relief to file a late claim. Massachusetts has a procedure of this type. See ch. 228, Sec. 5A, 5B, 5C, Mass. Laws Ann., applied to "save" a contract claim against the estate of a wealthy decedent in Hastoupis v. Gargas (1980) 396 N. E. 2d 745 (Mass, App.); see also 1958 Annual Report, State Bar Committee On Administration of Justice, 33 State Bar J. p. 413, referring to draft amendments then prepared to permit filing of a late claim based on a "pending action" and citing the predecessor Massachusetts statute. (5) unless a more complete treatment can be made in pending A. B. 2841, that goes beyond Probate Code procedures,existing statutes such as Sec. 709, 709.1, 720, 721 should not be repealed but should be amended in a limited manner; for example, the "mandatory" wording of Sec. 720 could be changed and a shorter time limit prescribed such as 6 months after accrual of the cause of action; part of the present Sec. 721 procedure could be worked into the proposed Sec. 550-554 series, as an optional procedure; that is, permitting a potential "insurance protection" plaintiff first to file a petition for leave, to bring out early whether the insurer admits or denies liability and permit opportunity for the Representative to disclose any clouds, such as prior assignment of loss under a fire policy. Summary:The substitute provisions on "late claims" are inadequate; existing law should be amended for time being.

Unless a revised procedure includes civil procedure change to provide for "Sugg estion of Death of Party" with consequences, the present unsatisfactory situation of "gamesmanship " will continue.To smooth out the present structure (which gives options will not require many changes.Thus, an equitable and properly balance framework will exist.*

Point 4 There Is An Unexplained Failure To Deal With The Problem Of The Unprobated Estate; Suggested Further Amendment of C. C. P. 353, And Possible Generalization Of C. C. P. 385 (b). References: Changes Made In C. C. P. 353 by A. B. 708 (Harris), ch. 923 (1987); existing Sec. 707, Probate Code,existing C. C. P. 385 (b) proposed to be repealed. Bill, p. 8, p.38. Objections. 1-The 1987 amendments to Sec. 353 (statute of limitations) were not supported by adequate reason in the 1987 Report; the retroactive subsection (sub.(c)), was added in the Senate without prior drafting or recommendation by the Commission.They do not adequately deal with the long standing gamesmanship problem of the "unprobated estate." Further, in subsec. (c) insufficient time is alloted to presentation of claims and, it seems, opening of a probate by the creditor. The latter is a burden not/upon the creditor generally when the heirs fail to open probate. 2-An important issue is presented as to repeal of the optional procedure of suing an Estate even though no Representative exists; presently this is allowed only is recovery is limited to insurance protection. Grounds: 1-C. C. P. 353. In 1987, the Commission recommended the following change: deletion of "after the issuing of letters ...." and insertion of "after the date of death." The reason stated omitted any reference to the case law; it presented the change as an enlargement of time for a creditor. 1987 Report, p. 307 under heading "Action On Rejected Claim" However, Sec.

now

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Among possible changes: Limit Sec. 709, second proviso, to 90 days after discovery of administration or existence of cause of action, cut down Sec. 720 to six months, remove "mandatory" wording; save the preliminary petition procedure of Sec. 721 but make it optional.As to "Estate of___" procedure if estate is subject to summary probate, change is needed but at this time none has been found by the writer. See discussion under Point 4.

353 (before the Commission change) already provided a one year extension; it ran from issue of letters. The statute did not run as to an unprobated estate. See Smith v. Hall, 19 Cal. 85 (1861), Silva v. Superior Court, 89 Cal. App. 2d 521 (1948) (attempt by successors of judgment debtor to have the statute of limitations run though they did not probate the estate; suggested non probate was to attempt to have the obligation barred). Another reason for the unprobated estate in case of the pending action where the defendant died was to obtain the benefit of the 5 year "dismissal statute." This defense was successful in the form of the dismissal statute in 1899 (no exceptions). However, under a different form of dismissal statute, it is held that Davis reasoning is inapplicable, and that until the plaintiff elects to pursue the "insurance protection" only cause of action, the 5-year statute is tolled during the time the estate is unprobated. Herring v. Petersen, 116 Cal. App. 3d 608 (1980), Wills v. Williams, 47 Cal. App. 3d 941 (1975), Polony v. White, 43 Cal. App. 3d 44 (1974).* If the claimant is forced to open a probate when the heirs have opted not to do so, the situation created is 1) unfair to a creditor who must incur additional expense; 2) unfair to the due administration of justice and respect for law; the practice of a creditor probate with the Representative an employee in the office of plaintiff attorney is well known and appears from the cases; the situation is unhealthy from ethical points of view. But no state official is apt to take on the task. 3) The new provision will lead to creditor-probates, to avoid malpractice claims, increased attorney fees, an added court burdens.This assumes that creditors and their attorneys will not take the business risk of not keeping the actions or judgments alive, and opt to risk malpractice claims.Also, the new law is directly opposed to the claims made for "reform" that expedition is needed in estate administration. However, the law is passed.

*The "open end" case status noted in Herring will be modified by practical needs and by potential dismissal under inherent power.

Suggested amendments: First, amend C. C. P. 353 to provide a practical incentive for the heirs to open timely probate. This could take the form of increasing the statute's extension if the heirs did not open probate promptly. Illustrative:

Sec. 353.(.....

(b)..... (An action may be commenced against the person's representatives, after the expiration of that time, and within one year after date of death, or an action against the estate.....expiration of the time otherwise limited for the commencement thereof. If letters testamentary or letters of administration are not issued within 120 days of the date of death, the time so limited is extended for an additional year.

Second, amend C. C. P. 353 (c) (shortening of statute of limitations retroactively) to allow greater time for compliance and to provide more equitably for the unprobated estate.

Sec. 353 (c) If a person against whom an action may be brought died before July 1, 1988.....an action may be commenced against the person's representatives,.. * or an action against the estate provided for by Section 385, subdivision (b) of the Code of Civil Procedure or Section 707 or 721 of the Probate Code, may be commenced within one year of the time otherwise limited for the commencement thereof, before expiration of the later of the following times:

(1) July 1, 1989, or one year (*) after the issuing of letters testamentary, or, if no letters testamentary or of administration are issued within 120 days of the date of death, July 1, 1990 ..(*)...

*Wording not shown to be retained

It may be doubted that many creditors or business concerns having potential claims know of the 1987 changes here mentioned or that a retroactive shortening of the statute of limitations with one year cut off date (July 1, 1989) has been made.

On the broader aspects of the "unprobated estate," the undersigned would hope to see thought given to adapting the approach of the Sec. 385 (b) and Sec. 707 provisions so that could be used as a lever.This would involve removing the summary probate qualification and the restriction to insurance protection. The generalizing would require some procedure to permit the named adminstrator or ex ecutor and the principal heirs to be cited, to see if they wish to let the matter go by default. The amendments here suggested are of lower rank as a matter of priority.

5 Particular Proposed Sections Or Comments Or Additions

1. Following the pattern of the Dismissal project of LRC General Provisions (Sec. 9000 ff) should include:

Illustrative)

9002.5 The provisions of this Part to not preclude application of principles of estoppel and, to the extent not inconcsistent with this part, principles of waiver.

Reason: An express statement is desirable to make clear such principles are not abrogated and also to give notice so to speak to the bench and bar.

2.Sec. 550-554-Insurance Protection. Also see Sec. 9355.

Wording- There is varying wording as to what the action is:"liability for which the decedent was protected by insurance" (Sec. 550), "damages..within the limits and coverage of the insurance" (Sec. 554) "enforceable only from insurance coverage " (Sec. 554)

The above wording raises many technical questions; a single broader term should be defined and used (such as "to the limits of insurance protection only,"as

in present Sec. 721. Any cause of action for failure to settle within policy limits could or could not be considered as within "insurance protection." Should this problem be treated, rather than made to depend upon drafting words? A question is suggested: If the intent is to apply to any insurance protection (such as fidelity, indemnity, loan guarantee, are present procedural provisions enough? Will the procedure be honored by those types of insurers. Florida statutes use " casualty insurance." The subject matter is also covered in New Sec. 9355, referring to deductibles, costs and attorneys fees and need for a claim against decedent's estate. Bill, p. 128. Suppose no estate has been opened. The Plaintiff Creditor has chosen to bring an "insurance protection action." Will that be delayed until someone (the insurer, heir or even the Claimant opens an estate)? Should the insurer's duty be qualified by wording: "If a general personal representative has been appointed..." or can a Comment handle the problem. The other side of the coin relates to claims for contribution or indemnity, if the Claimant wins and "insurance protection" See Gates v. Learjet, cited, supra, p.5, also to a point made above that new Sec. 9000 maybe construed broadly; it is new wording. The insurer would have to file a contingent claim; it has no way of knowing the amount of reimbursement required until after the trial and judgment in the civil action. New Sec. 9355 if retained, should have a Comment that "normally" the claim will be contingent, with a reference to New Sec. 9000. Again, the undersigned believes there is a practical problem with all-inclusive definitions of "claim." A 1980 decision deals with the claim defense by a co-obligor's representative ; alleged claim for contribution by one of the co obligors, in paying more than his share of a joint judgment entered after had opened; the judgment was on a claim duly presented. Under pre-Sec. 9000 definition, the court held that the contribution claim was one arising after death; it was

not required to be filed; it was an implied in law claim arising by payment of a filed claim in part reduced to judgment after the claim period. Borba Farms v. Acheson _____ Cal. App. 3d ____ Jan. 4, 1988.(Hearing status not checked). With broader claim definition (Sec. 9000) the result is doubtful now.This type of obligation , is common in both tort and contract law. It points out the need for a "liberal" relief power, as is herein urged.

3. C. Sec. 9103 and Comments; compare S9050.The Comment to Sec. 9103 goes beyond the statute and should be changed. Sec. 9103 requires actual knowledge either of the Representative or attorney. The Comment states various circumstances that will satisfy this requirement, including a clip service (which the Claimant may receive but not examine) and, as to the Claimant's attorney, the mere fact of being the attorney for Claimant "in the matter." The latter ignores entirely "actual knowledge." Contrast: compare the liberal relaxed treatment given by Sec. 9050 and 9054, as to the duty to notify "known creditors" i. e., those who have made demand, with the exonerating wording of no duty to "search for creditors."

Further objection to Sec. 9103:The words "clear and convincin evidence" are not in present law. No reason appears for imposing a special burden of proof in this limited situation, to favor estate administration.With the correction of 9103 comments. Sec. 9054 should be amended: "Nothing in this subsection relieves the (Representative) of the duty to make reasonable inquiry for the existence of pending civil actions or proceedings in which the decedent was served with process and which were pending at time of decedent's death."

4. Combining of "commence" and "continue" for brevity.See Sec. 550. A pending action is not "continued" if Claimant elects "insurance proection"; the former action is for full liability if pending at death. The inaccuracy leads to

confusion. A separate section is needed. The Comment might well refer to the case law permitting continuance by supplemental complaint, or by amendment if the action is being defended by the insurer at date of death.