

First Supplement to Memorandum 89-48

Subject: Study L-1025 - Notice to Creditors (Immunity of Personal Representative)

As a conforming change to the Commission's Tulsa notice to creditors proposal, the Commission had proposed amendment of Probate Code Section 9053 as follows:

9053. (a) If the personal representative ~~or attorney for the personal representative in good faith~~ believes that notice to a particular creditor is or may be required by this chapter and gives notice based on that belief, the personal representative ~~or attorney~~ is not liable to any person for giving the notice, whether or not required by this chapter.

(b) If the personal representative ~~or attorney for the personal representative in good faith~~ fails to give notice required by this chapter, the personal representative ~~or attorney~~ is not liable to any person for the failure, unless the person establishes that the failure was in bad faith. An action to enforce the liability for failure to give notice required by this chapter may not be commenced later than one year after expiration of the time notice is required. ~~Liability, if any, for the failure in such a case is on the estate.~~

(c) Nothing in this chapter imposes a duty on the personal representative ~~or attorney for the personal representative~~ to make a search for creditors of the decedent.

This amendment was designed to achieve several purposes:

(1) Eliminate the implication that the attorney may be responsible for giving notice; this is a duty of the personal representative.

(2) Shift the burden from the personal representative to show good faith to the creditor to show bad faith.

(3) Eliminate the provision that liability for a good faith failure is on the estate; under the Commission's proposal individual distributees would have been liable if the estate had already been distributed.

(4) Impose a short statute of limitations for actions against the personal representative for liability for a bad faith failure to give notice.

Because the Senate Judiciary Committee deleted the notice to creditors provisions from AB 156, we deleted the conforming changes (including the Section 9053 amendment) from AB 158. As the staff reported to the Commission by letter on June 6, the proposed amendment of Section 9053 was so interrelated with the basic notice to creditors scheme that it was inappropriate to proceed with it until the Commission had an opportunity to review the matter in light of the action of the Senate Judiciary Committee.

Attached to this memorandum as Exhibit 1 is a letter from the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section concerning this matter. The Bar Committee believes that some aspects of the Section 9053 amendment are independent of the Tulsa notice to creditors problem and should be made regardless of the legislative decision not to act on the Commission's proposed Tulsa solution. Specifically, the Bar Committee would pursue all changes originally proposed by the Commission with the exception of the statute of limitations provision, which they would omit, and would modify the proposed bad faith standard to require "intentional conduct constituting bad faith." They would seek to obtain enactment of this amendment of Section 9053 in AB 158, independently of the Tulsa recommendation.

The staff agrees with this assessment in part, and disagrees with it in part. (1) It is clear to us that removing the attorney from the section is independent of the Tulsa matter, since we cannot visualize any circumstances under which the Commission would want to impose a notification duty on the attorney. (2) Shifting the burden to the creditor to show bad faith may also be appropriate; however, the Commission has previously specifically considered and rejected the "intentional conduct constituting bad faith" language proposed by the California Bankers Association. (3) We should not delete the provision that liability for good faith failure to give notice is on the estate; the original proposal to delete it was based on the assumption of distributee liability, which has not been enacted. (4) The statute of limitations applicable to the personal representative's liability for a bad faith failure to give notice is independent of the general statute of limitations for a decedent's liability, and could stay in the statute.

Thus the staff's suggested revision of AB 9053, assuming the law on notice to creditors continues unchanged, looks somewhat different from that proposed by the Bar Committee:

9053. (a) If the personal representative ~~or attorney for the personal representative in good faith~~ believes that notice to a particular creditor is or may be required by this chapter and gives notice based on that belief, the personal representative ~~or attorney~~ is not liable to any person for giving the notice, whether or not required by this chapter.

(b) If the personal representative ~~or attorney for the personal representative in good faith~~ fails to give notice required by this chapter, the personal representative ~~or attorney~~ is not liable to any person for the failure, unless the person establishes that the failure was in bad faith. Liability, if any, for the failure ~~in such a case to give notice, other than a bad faith failure,~~ is on the estate. An action to enforce the liability for a bad faith failure to give notice may not be commenced later than one year after expiration of the time notice is required.

(c) Nothing in this chapter imposes a duty on the personal representative ~~or attorney for the personal representative~~ to make a search for creditors of the decedent.

Comment. Section 9053 is amended to make clear that the burden of proof of bad faith of the personal representative is on the person seeking to impose liability and is subject to a one-year statute of limitations running from the time notice is required. Notice is generally required within four months after issuance of letters. Section 9051.

The personal representative is otherwise immune from liability to a known creditor who was not given notice. The liability, if any, in such a case follows the property in the estate. Thus, if the estate remains open, the property is reached through the late claim procedure. Section 9103 (late claims).

The section is also amended to delete the references to the attorney for the personal representative. This chapter imposes no duty on the attorney to give notice.

If the Commission approves this revision, it could be added to AB 158, assuming the other political problems of AB 158 can be worked out. Otherwise, it could be included in the Probate Code reenactment (AB 759) next session.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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REPLY TO: Anne K. Hilker, Esq. Gibson, Dunn & Crutcher 333 S. Grand Avenue Los Angeles, CA 90071

June 28, 1989

BY FEDERAL EXPRESS

Mr. Nathaniel Sterling Law Revision Committee 4000 Middlefield Road Suite 2-D Palo Alto, California 94303-4739

Re: AB 158

Dear Nat:

As we have discussed, this letter will set forth the concerns of the Executive Committee of the Estate Planning, Probate and Trust Law Section of the State Bar with respect to the recent amendments in AB 158, in particular the reappearance of the requirement that a personal representative show he or she has acted in good faith to defend the late filing of a creditor's claim.

First, the committee understands that in view of the last minute difficulties in persuading the legislature of the purpose of a uniform one-year statute of limitations, it was necessary to change the language of ABA 158 following the Commissioners' meeting on April 13, 1989. However, one of those changes need not have been made for this purpose. That is the requirement that a creditor show the personal representative acted in bad faith with respect to failure to send notice to a reasonably ascertainable creditor before such creditor can establish a late claim.

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The policy behind this language is not related to the length of the statute of limitations. Its major function is to preserve the efficiency and timeliness of estate administrations by placing the burden of proof on the creditor that the particular claim was specifically jeopardized by the actions of the personal representative--not that the personal representative show good faith with respect to an omitted notice. As we discussed in some depth at the April meeting, placing the burden of showing good faith on the personal representative will force the prudent representative either to keep minutely detailed notes of his or her thoughts and actions, in hopes of recording that single thought or act that shows good faith with respect to a certain claim, or hold virtually all estate assets in reserve until the time for the creditor to act has run. While the time when claims may be due and creditors may have causes of action is in dispute, the burden of proof has been many times laid to rest--on the creditor--and must remain so. Therefore, pursuant to the Commission's last discussion of this subject, and its agreement at that time, this language should be replaced in 158.

I have enclosed a copy of that portion of AB 158, as it was agreed upon at the April meeting, from your prior memorandum 89-39, with the insertion of language relating to intentional conduct that Ms. Padden indicated she would recommend to the California Bankers' Association.

We realize that this does not address the CBA's concern about a statute of limitations, but this is no longer addressed in the bill. We are not seeking to address this now.

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Please include this in your information packet to the commissioners in hopes that we may add this language in AB 158 at the July meeting. I look forward to seeing you then.

Sincerely,


Anne K. Hilker
Captain, Team 3

AKH:bm

cc: Maureen Padden, Esq. (California Bankers' Association)
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Probate Code § 9053 (amended). Immunity of personal representative

9053. (a) If the personal representative ~~or attorney for the personal representative in good faith~~ believes that notice to a particular creditor is or may be required by this chapter and gives notice based on that belief, the personal representative ~~or attorney~~ is not liable to any person for giving the notice, whether or not required by this chapter.

(b) If the personal representative ~~or attorney for the personal representative in good faith~~ fails to give notice required by this chapter, the personal representative ~~or attorney~~ is not liable to any person for the failure, unless the person establishes that the failure was in bad faith, ~~if any, for the failure in such a case is on the estate.~~ due to intentional conduct constituting bad faith.

(c) Nothing in this chapter imposes a duty on the personal representative ~~or attorney for the personal representative~~ to make a search for creditors of the decedent.

Comment. Section 9053 is amended to make clear that the burden of proof of bad faith of the personal representative is on the person seeking to impose liability. The personal representative is otherwise immune from liability to a known creditor who was not given notice. The liability, if any, in such a case generally follows the property in the estate. Thus, if the estate remains open, the property is reached

through the late claim procedure. Section 9103 (late claims). If property has been distributed, distributees are liable to the extent of the property. Section 9392 (liability of distributee). The creditor's right to recover is subject to a one-year statute of limitations from the date of the decedent's death. Code Civ. Proc. § 353.

The section is also amended to delete the references to the attorney for the personal representative. This chapter imposes no duty on the attorney to give notice.