

Memorandum 87-80

Subject: Study L-1025 - Litigation Involving Decedent (Review of
Comments on Tentative Recommendation)

This memorandum reviews the comments we have received on the *Tentative Recommendation Relating to Litigation Involving Decedent* (July 1987) which was distributed for comment this summer. Comments directed to specific sections are discussed following each relevant provision in the attached revised recommendation.

At the meeting, we plan to consider only those sections that someone wishes to discuss or that we have received comments about. After reviewing the comments, we hope that the Commission will be able to approve this recommendation for printing, subject to any needed revisions.

Several persons approved of all the tentative recommendations that were distributed without singling out any particular recommendation or making any specific comments. (These letters are not reproduced here.) Professor Benjamin D. Frantz of McGeorge School of Law (Exhibit 5) has "nothing but praise for the suggested revisions" and is "particularly pleased with cleaning up the sections on insurance coverage." Jeffrey A. Dennis-Strathmeyer (Exhibit 7) thinks that the tentative recommendation is a "very helpful recodification" and suggests that the input of trial attorneys should be sought. Rawlins Coffman (Exhibit 8) finds the recommendation to be "excellent." [To clarify a technical point raised by Mr. Coffman: the Section 9354 referred to in various places is part of the tentative recommendation, not part of AB 708; the Section 9354 referred to in an earlier tentative recommendation is now Section 9304 (replacing Section 732) and is a part of AB 708.]

Luther J. Avery (Exhibit 2, pp. 2-3) raises some policy questions about the liability of community property for malpractice claims and the appropriate level of protection of surviving spouses. He writes, "In my opinion, if you are going to deal with litigation involving a decedent, you should also deal with C.C. section 5120.110 and C.C. section 5122." The Commission has worked on these issues in the past, and may be called upon to do so again in the future, but in this particular recommendation we are considering procedural aspects of litigation against decedent's

estates and the effect of liability insurance. The broader questions raised by Mr. Avery are not before us.

References in the recommendation to "AB 708" should be read as "Chapter 923 of the Statutes of 1987, operative July 1, 1988."

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

MYRON W. CURZON
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August 13, 1987

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation relating to
Probate Law and Procedure - Litigation
Involving Decedent - July 1987

Gentlemen:

Here are my comments. The form of creditor's claim to be submitted in a decedent's probate need not specify the grounds of claim, with the particularity required in a pleading. A simple statement of the approximate ground, with leeway to the creditor to make changes in his theory and statement of facts, is sufficient. New facts and theories may come to the attention of the creditor between the time the creditor learns of the death of decedent and the time the creditor has to file his creditor's lawsuit.

Very truly yours,



Myron W. Curzon

MWC/sg

OUR FILE NUMBER

9911.81-35

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August 18, 1987

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

**Tentative Recommendations Relating
to Probate Law and Procedure
Litigation Involving Decedent
July 1987**

Dear John:

The following comments are based upon analysis of the proposed legislation:

Under C.C.P. section 353 the draft proposes to continue the limitation of claims on behalf of the estate to six months while in Part 13 you seem to be expanding and extending the ability to act against the estate. I fail to see the logic of that. In fact, in my opinion, the ability to sue the estate should be more restricted than the ability of the estate to sue. I would suggest that if there is one year to sue an estate, there should be one year for the estate to sue.

Of particular concern is what statute of limitations applies to malpractice actions against professionals who die. Is the proposed new statute an invitation to all clients of a deceased lawyer or doctor to sue within one year, or if there is insurance to pursue the insurance company?

Probate Code section 550 has a test that is unworkable: "An action to establish the decedent's liability for which the decedent was protected by insurance." It is routine these days for insurance companies to accept the defense of a matter under a reservation of rights. Is such a situation one covered by P.C. section 550? What about the situation where the complaint has five causes of action but only one is covered by insurance and that one is later eliminated in the course of litigation?

Mr. John H. DeMouilly
August 18, 1987
Page 2

While I have reservations about the wisdom of the extension of jurisdiction by P.C. section 550, I suggest that the test should be: "An action to establish the decedent's liability for which the decedent carried insurance which obligated the insurer to finance a defense for the decedent."

I do not understand why P.C. section 550(b) is proposed. The effect of that provision is to put the estate at risk and to hold up the completion of the probate until the litigation involving claims against the decedent is finished (which may go many years if there is an appeal and a retrial). In the interest of justice, it seems to me that the remedy of pursuing the decedent's insurance carrier should be an exclusive remedy. Is that the intention of P.C. section 554? It is not clear.

Your analysis ignores what to me may be the most important issue in the situation where a married person dies with pending litigation or claims which are "community property liabilities." Assume, for example, a doctor dies with three malpractice cases pending against him. The claims exceed the community assets of the decedent and his wife, who has no separate property. It would appear that the surviving spouse will lose everything (except possibly for the operations of the probate homestead and the temporary probate support). See C.C. section 5120.110. It is not clear to me whether the wife has to be a named party to the litigation. Even more confusing is the operation of C.C. section 5122, which seems to say the wife is not liable for the injury or damage caused by the decedent. Does that mean the community property of the wife is free of claims despite C.C. section 5120.110? Does that mean that the wife's separate property is safe? What does C.C. section 5122(b)(2) mean? If the doctor is working and commits malpractice, is the work "an activity for the benefit of the community"? Does C.C. section 5122 intend that the community property of the spouses should be liable for the malpractice liability?

Mr. John H. DeMouilly
August 18, 1987
Page 3

In my opinion, if you are going to deal with litigation involving a decedent, you should also deal with C.C. section 5120.110 and C.C. section 5122. Essentially, the policy question is: What protection will be afforded the surviving spouse and dependents of the decedent. In my opinion, the recent limitation of the probate homestead and the limits to the widow's allowance operate unfairly in the situation. The family of the decedent needs more protection, particularly in the case of decedent professionals who are subject to potential suits for malpractice. This is particularly true in an environment where the decedent may not have been able to buy or afford malpractice insurance.

It is difficult for me to understand the public policy behind P.C. section 551. If the ability to sue a decedent has one day to go before he dies, why should an additional year be added on to the period for which the estate can be sued? What about the needs of the family at the time of death? In my opinion, the action should abate if the normal statute of limitations runs.

Why should you propose in P.C. section 573(b) the survival of punitive damages claims? Punitive damages cannot be a lesson to the decedent so he will avoid similar conduct in the future. Moreover, most malpractice insurance policies do not cover punitive damages. It is my understanding of the law that punitive damages do not survive death. Dook v. Superior Court (1968) 257 Cal. App. 2d 825; anno. 27 3d A.L.R. 1362 (1969); Vander Lind v. Superior Court (1983) 146 Cal. App. 3d 358.

It seems to me that P.C. section 573 is a vast expansion of liability for estates. The present law precludes recovery for heir's grief, sorrow or mutual suffering. Krouse v. Graham (1977) 19 Cal. 3d 59.

Yours sincerely,



Luther J. Avery

LJA:cet/3



Writer's Direct Dial Number

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SEP 03 1987

September 1, 1987

California State Law Revision Commission
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Ladies and Gentlemen:

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|---------------------|-----------------------|
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| JOHN R. GRISET | DAVID BEALES |
| EDWARD N. DURAN | TERRY C. ANDRUS |
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| BENJAMIN P. DE MAYO | NICHOLAS S. CHRISOS |
| HOWARD SERBIN | DAVID G. EPSTEIN |
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| GENE AXELROD | WANDA S. FLORENCE |
| ROBERT L. AUSTIN | HOPE E. SNYDER |
| DONALD H. RUBIN | THOMAS C. AGIN |
| DAVID R. CHAFFEE | SHERIE A. CHRISTENSEN |
| CAROL D. BROWN | SUSAN M. NILSEN |
| BARBARA L. STOCKER | SARA L. PARKER |
| JAMES F. MEADE | SHARON LOWSEN |
| STEFEN H. WEISS | |

DEPUTIES

Thank you for sending me your tentative recommendations relating to accounts, abatement, rules of procedure in probate, and litigation involving decedents.

My comments on matters of special interest follow. As with my previous comments to you, please note that these are my individual views. I do not write here as a representative of the Orange County Counsel, the Orange County Public Administrator/Public Guardian, or the County of Orange.

I. Recommendations Relating To Accounts:

- A. Proposed Section 10900: I do not support the proposed change. In the particular case of the Orange County Public Administrator/Public Guardian, it would probably cost money to change the form of accounts as allowed by the proposed law, due to modifications that would be needed in the computer system. Of more general interest, I do not think an account which only summarizes categories of receipts, disbursements, etc., generally gives interested persons sufficient information about how an estate has been managed. If an account only lists, for example, the amount of rents received, but not the specific payments, this will only engender more calls and questions from interested persons. While 10901 would provide a procedure to obtain the supporting documentation, I believe it would be fairer to require the party presenting the account to list all receipts therein, rather than to require the recipient of the account to pursue the information under 10901. After all, the preparer had to have the individual receipts available when preparing the account, so as to provide the total.

This matter is perhaps most important where the recipient of an account will be the successor administrator. The Public Administrator fairly often succeeds a personal representative who has mismanaged an estate or absconded. The accounting by the former administrator or his attorney is often the starting point for determining a surcharge and for

determining what needs to be done to close the estate. In receiving such an account, I, as attorney for the successor, would want to know, for example, not just the total of rents received but exactly which months' rent the predecessor did collect. This may be something I would need to know promptly, and it should be a part of the account.

- B. Proposed Sections 10952 and 10953: I support these changes. It will be helpful to have the sixty-day time limit. In the past, it sometimes takes the predecessor representative too long to present his account. This, of course, delays the administration of the estate and collection of any surcharge.
- C. Proposed Section 11000(c): I support this change. Perhaps a note should clarify whether the exact amount of fees must be set forth.
- D. Proposed Section 11002: I support the discontinuance of a jury trial being available in a contest of an allowed claim.
- E. Proposed Section 11005(b): I support the proposed change.

II. Recommendations Relating to Abatement:

- A. Proposed Section 21402: The explicit preference for specific gifts over general gifts makes the statute comply with the case law as I understand it.
- B. Proposed Section 21403: I support this, as it seems to be the most likely way to carry out implied testamentary intent.
- C. Proposed Section 21405: I support the addition of (b). This sets forth a solution that not only can help a beneficiary, but can make the eventual distribution as much as possible the way the testator wanted it.

III. Recommendations Relating To Rules Of Procedure In Probate:

- A. Proposed Section 7050(b): I support this provision.
- B. Proposed Section 7200: I support this provision.
- C. Proposed Section 7240(a): I think it is helpful to have this explicit provision that orders granting or revoking letters of special administration are not appealable.
- D. Proposed Section 7241(b): I support this addition.

IV. Recommendations Relating To Litigation Involving Decedent:

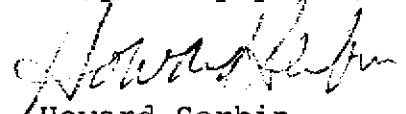
A. Proposed Section 505: I am not certain of all the ramifications of the proposed change, but in general the proposal appears to me to be a good one. Expanding the procedure to estates that do not qualify under 13100 seems particularly well-taken.

B. Proposed Section 9103(a): I support this addition.

V. General Comment:

The Commission may recall that I appeared at one of your recent meetings and commented in opposition to one of your proposals. I did not then also take the opportunity to indicate that I have supported the vast majority of your proposals and have found a number of them helpful in my work. Let me use this occasion to thank you for your good work.

Very truly yours,



Howard Serbin
Deputy County Counsel

HS:mm

cc: William A. Baker, Public Administrator/Public Guardian
Carol Gandy, Asst. Public Administrator/Public Guardian
Dwight G. Tipping, Jr., Supv. Deputy Public Administrator
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SEP 03 1987

California Law Revision Commission
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Re: Tentative Recommendation Relating to
Probate Law and Procedure: Litigation
Involving Decedent (July 1987)

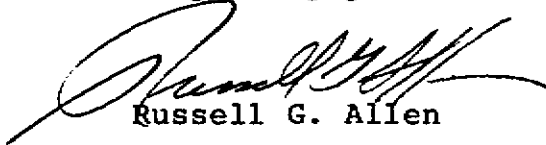
Dear Ladies and Gentlemen:

Perhaps I have not spent enough time analyzing this recommendation in the context of the proposed provisions concerning creditors' claims and payment of debts, but I am concerned about the proposed language of Section 353 of the Code of Civil Procedure. Read by itself, that Section suggests that a person with a cause of action against a decedent has one year after the date of death to file the action -- even if the statute of limitations applying to the action generally would have expired before then. There is no explicit cross reference to the Probate Code for treatment either of insured or uninsured claims. Proposed Section 9350 of the Probate Code requires a claim before commencement of an action against a personal representative based on a cause of action against the decedent. Proposed Section 9100 of the Probate Code sets forth the times within which a claim must be filed and, at the outside, provides a maximum of one year after date of death. I am concerned that the language of proposed Section 353 of the Code of Civil Procedure may provide an ambiguity and suggest that the maximum one year period applies in all circumstances, rather than only in those in which the decedent was insured or a late claim is permissible.

Page Two - California Law Revision Commission -
August 31, 1987

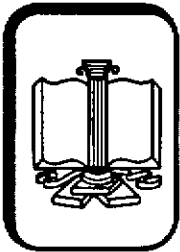
Would confusion be less likely if Section 353 simply provided a cross reference to the Probate Code provisions establishing the time within which a claim must be brought and, thereafter, an action filed?

Very truly yours,



Russell G. Allen

RGA:lb

**McGEORGE SCHOOL OF LAW**

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

September 1, 1987

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Attention: Mr. John H. DeMouilly, Executive Secretary:

Subject: Recommendations of July 1987;
L-1025, L-1027, L-1038, and L-1048

Dear Mr. DeMouilly:

I have nothing but praise for the suggested revisions.

I am particularly pleased with cleaning up the sections on
insurance coverage.

Very truly yours,

A handwritten signature in cursive script that reads "Benjamin D. Frantz".

BENJAMIN D. FRANTZ
Professor of Law

BDF:bk

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September 2, 1987

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attention: John H. DeMouilly
Executive Secretary

Re: Tentative Recommendations Regarding Probate Code

Dear Mr. DeMouilly:

Once again thank you for inviting me to comment on the tentative recommendations.

As in the past, I find myself in general agreement with most of the proposed changes. I have the following comments and suggestions:

1. C.C.P. §385: I do not believe it should be necessary to bring a motion to substitute the Representative for the Decedent in an existing action. Assuming the Representative has been properly appointed, the function of the trial court is ministerial at best, since the Court cannot deny the Representative's standing to represent the interests of the Decedent. Thus, it seems some summary ex-parte procedure would be appropriate. Perhaps the a procedure similar to the one utilized in amending a complaint to substitute the names of "Doe" defendants could be adapted.

2. C.C.P. §7241: It does not appear there is any bonding requirement by the Appellant. Given the fact that a stay is automatic, I believe that this is a serious oversight.

Sincerely,


STUART D. ZIMRING

SDZ:mpa



CALIFORNIA CONTINUING EDUCATION OF THE BAR

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September 3, 1987

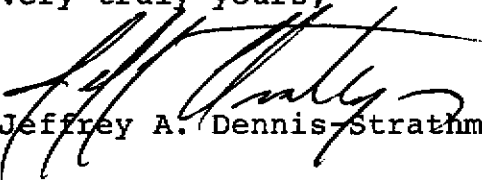
John H. DeMouly, Esq.
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-1025: Litigation Involving
Decedent

Dear John:

I think the tentative recommendation is a very helpful recodification. However, there may be issues involved which would be of concern to trial attorneys. Their input should be sought.

Very truly yours,



Jeffrey A. Dennis-Strathmeyer

JAD:dp

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September 3, 1987

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4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Gentlemen:

Thank you for permitting me to review Tentative Recommendations #L-1025, #L-1027, #H-408 and #L-1038.

TR #L-1025 entitled "LITIGATION INVOLVING DECEDENT" is excellent. Hopefully, the legislature will follow your recommendations.

(NOTE: Reference is made in the footnote on page 8 to "Claim covered by insurance §9354". At page 10 reference is made to §9354 in §554 (b). I have trouble with these references. There is no §9354 in my Probate Code; there is no §9354 in AB 708 [Harris]; in your January 1987 Blue Book entitled RECOMMENDATIONS relating to Probate Law (received in my office July 13, 1987) I can find no §9354 in Part 4, Creditors Claims. To further complicate this matter, the July 1986 TR Study L 1025 at page 23 contains a comment which reads as follows: "Comment §9354 continues formal Probate Code §732 without substantive change". I agree. On the other hand, §732 relates to "Converting Attachment Lien to Judgement Lien"! WHERE DO I GO FROM HERE?)

TR #L-1027 entitled "ACCOUNTS" embodies the procedures followed in my office. May I offer two suggestions?

First: when I report the reasons for the delay in distribution of an estate as required by §1025.5 of the Probate Code, I include an interim account. In my opinion, this should be mandatory;

Second: in almost every probate it is necessary, after final distribution, to file a brief account supplemental to the final account to pick up additional interest, refunds, unused closing expenses, etc. which cannot be determined until several weeks or months after actual distribution. I suggest this be required by statute. In the absence of a request by an interested distributee, no hearing need be held nor approval sought from the court with respect to such supplemental account.

With respect to TR #H-408 relating to "UNIFORM DORMANT MINERAL INTERESTS ACT", I have no comment. I have never had occasion, in my practice, to get involved in this problem. On the other hand I am happy to know that the California statutes offer guidance.

With respect to TR #L-1038 entitled "ABATEMENT", locating the new provisions with the other rules of construction of wills, trusts, and other instruments is appropriate.

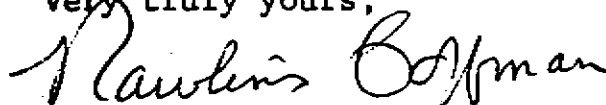
With respect to TR #L-1048 entitled "RULES OF PROCEDURE IN PROBATE", the new limitations on jury trials in the probate court met with my approval. As a matter of fact I would hope that §1081 could be amended to deny jury trials in 1080 proceedings.

I agree that contents of the judgment rule should be left to Judicial Council rule. This in turn should eliminate §1050.

Section 1020 requires the signature of all petitioners; §1021 requires verification by only one of several petitioners. Why the inconsistency?

Please keep me on your mailing list.

Very truly yours,

A handwritten signature in cursive script that reads "Rawlins Coffman". The signature is written in dark ink and is positioned above the printed name.

RAWLINS COFFMAN

RC:mm

LAW OFFICES

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September 12, 1987

John DeMouly
California Law Review Commission
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Re: Probate Law and Procedure Recommendations - Accounts and
Litigation Involving Decedent

Dear John:

I enclose the following that contain my comments about those recommendations:

1. A white sheet containing two columns of recommended redrafting of the sections that are numbered.

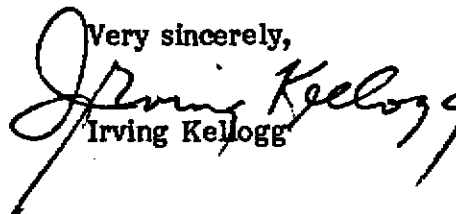
In doing this, I applied these principles of drafting:

- (a) Put as much into active voice as possible.
 - (b) Put conditions and exceptions at the beginning of the sentence so that the reader proceeds with a knowledge of what is excepted and what is the condition, rather than read to the end of the sentence to be surprised by the exception or the condition. Further, there is the danger that the reader may, under anxiety, fail to reach the exception or condition. In statutes, that is undesirable.
 - (c) Number or letter series so that the reader puts them together.
2. A number of the printed sheets contained in the recommendations. Those printed sheets contain my handwritten drafting corrections which I hope are legible. I did not have the time to retype all of them, and some are not changes in drafting but in word clarification.

I hope that these suggestions are helpful.

By the way, I have written about financial statements in my book, How To Find Negligence and Misrepresentations in Financial Statements. The book contains a chapter on Fiduciary Accounting and how to find negligence in fiduciary reports. Enclosed is a brochure about the book.

Very sincerely,


Irving Kellogg

Enclosures.

353. (a) If (1) a person entitled to bring an action dies before the expiration of the time limited for the commencement of the action, and (2) the cause of action survives, then the person's representative may commence the action after the expiration of that time but not later than six months after the person's death.

(b) [The same principles of correction apply to this subdivision].

(c) [In this subdivision, the last line should read:]

the later of the following dates: [the use of the word, times, is ambiguous; time is a period, but date is a fixed day. In (1) and (2) the statute uses fixed days.]

(1) July 1, 1989, or one year after the issuing of letters testamentary..... whichever is the earlier date.

(2) The date when the right to commence the action expires.

385. If a cause of action survives or continues, the death or disability of a party or the transfer of any interest in the cause of action does not abate the action or proceeding. If a party dies or is disabled, the court, on motion, may allow the action or proceeding by or against the party's representative or successor in interest. If any other transfer of interest occurs, the transferee may continue the action or proceeding in the name of the original party, or the court may allow the transferee to be substituted in the action or proceeding.

9354. (a) Without first filing a claim as provided in this part, a person may commence or, under Section 550, continue an action to establish the decedent's liability for which the decedent was protected by insurance.

(b) Unless a claim is first made as provided in this part, a person may not commence or, under Section 550, continue an action to establish the decedent's liability for damages outside the limits or coverage of the insurance.

(c) If the insurer seeks reimbursement under costs and attorney fees, an insurer defending an action under Section 550 shall file a claim as provided in this part.

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

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 ^{join as a party} make the decedent's personal representative or successor in interest a party.

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

Comment. This chapter replaces former subdivision (b) of Section 385 of the Code of Civil Procedure, former Probate Code Sections 707, 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 13100-13115 (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).

CROSS-REFERENCES

Definitions

Personal representative § 58

Claim covered by insurance § 9354

§ 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 Code of Civil Procedure Section 353(b) 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, ^ano cause of action ^{not}is lost by reason of the death of any person; ^{to}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 ^{the}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 the ^{person's}decedent's personal representative are limited to the loss or damage the decedent sustained or incurred ^{before}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 ^{or excluded}.

(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 ^{that person's}the decedent's 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 restates former Section 573 [AB 708] without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Prob. Code § 573 [AB 708] (repealed). Survival of actions

SEC. . Chapter 8 (commencing with Section 573) of Division 3 of the Probate Code is repealed.

Comment. Former Section 573 [AB 708] is restated in Section 573 without substantive change.

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).

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

~~(c) 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 for filing a claim 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~~ (1) 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 15 days before expiration of the time provided in Section 9100, and the petition was filed within 30 days 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 creditor's 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 ^{date} times:

(1) The ^{date} 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) [AB 708]. 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 [AB 708]. 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) [AB 708].

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) Whether the statute of limitations otherwise applicable to a claim will expire before or after the time prescribed in Section 9257, 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 the notice of rejection is given, three months after the notice is given.~~

~~(2) If the claim is not due at the time the notice of rejection is given, 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.~~

~~(c) 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) The prevailing party in the action shall be awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party shall be awarded 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 ⁽¹⁾ a claim is first filed as provided in this part and ⁽²⁾ the claim is rejected or is allowed or approved only in part.

Comment. Section 9350 restates former subdivision (c) of Section 9002 (claim requirement) 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) [AB 708]. 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) [AB 708]. 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) 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 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 ^{period} during which there is a vacancy in the office of the personal representative:

(1) If the claim is due at the time the notice of rejection is given, ^{not later than} three months after the notice is given.

(2) If the claim is not due at the time the notice of rejection is given, ^{not later than} 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 [AB 708]. 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) The prevailing party in the action shall be awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party shall be awarded 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

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September 16, 1987

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Re: Tentative Recommendation Relating to
Litigation Involving Decedent

Dear Jim:

The Executive Committee of the Estate Planning, Trust and Probate Law Section considered the tentative recommendation at its meeting last Saturday.

At that time, the Committee unanimously resolved that Section 9013 (a)(2) should not be amended to include the actual knowledge of a creditor's attorney in determining the availability of the non-resident late claims procedures. Many non-residents have attorneys in California and such attorneys may have knowledge of the administration of a decedent's estate without also having knowledge that their non-resident client is a creditor of the decedent. Moreover, there is concern about the general concept of painting creditors and their attorneys, or personal representatives and their attorneys with one brush. A personal representative and his attorney are separate and distinct. Similarly, creditors and their attorneys are separate and

distinct except to the extent that the attorney is acting as an agent for the creditor and within the course and scope of such agency.

The Committee was unanimously concerned as to the impact of the first two sentences of the second paragraph of the comment to Section 9350 "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.".

These sentences appear to imply that a person who takes possession of a decedent's property pursuant to a Probate Code Section 630 Affidavit (now Probate Code Section 13100 et seq.) remains liable to creditors who fail to file timely claims against a decedent's estate. This is contrary to Probate Code Section 9002(b) which provides "a claim that is not filed as provided in this part is barred".

If a claim is barred, it cannot be prosecuted against anyone. Thus, the claims procedure in the decedent's estate provides universal protection to all holders of the decedent's property (e.g. protection to the estate, to distributees from the estate, to heirs and beneficiaries of the decedent who retained without administration property of the decedent which was not needed for administrative purposes, to persons taking possession of the decedent's property pursuant to Affidavit, and to the trustees of inter vivos trusts of which the decedent was the settlor).

This is equitable because, if the creditor but files his claim in the estate, he will be paid from the estate if assets are sufficient. If assets are not sufficient, he will still be paid by the personal representative marshalling assets from the holders of the decedent's property outside of probate. The creditor was not harmed by the initial exclusion of the assets from probate administration. But the holder of the non-probate assets could be seriously harmed by having to pay a debt which would have been satisfied from the residue of the decedent's estate if the creditor had complied with probate claim procedures.

The following technical comments were not submitted to the Committee but are offered for the consideration of the Commission:

1. I was under the impression that the chapter as a whole was to be made applicable only to decedent's dying on or after its effective date so that claims that are barred by existing law would not be revived. Would you please confirm the Commission's intent in this regard.

2. Section 552--Procedure contemplates only a single insurer. If there is more than one insurer, then all insurers from whom the plaintiff seeks recovery should be served.

3. Section 553--Defenses does not appear to contemplate a contest of liability by answer, or by contribution from other insurers, unless the concept of contribution is embodied in "contests its liability by cross-complaint". Perhaps amendments in this regard may be of help.

Respectfully submitted,



H. Neal Wells III

cc/ Valerie Merritt
Charles G. Schulz
Leonard W. Pollard, II
Anne K. Hilker
John A. Gromala
Charles Collier, Jr.
Keith Bilter
Irwin D. Goldring
James Opel
James Devine
Lloyd Homer
Hermione Brown

P.S. It would be advisable to amend section 9355 by substituting the words "or otherwise" for the word "to" in the third line of the section. This is to cover nonjudicial foreclosures such as a nonjudicial sale under a deed of trust.

Staff Draft

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.

Late Claims

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.² Existing law tempers this requirement by permitting a late claim in some circumstances.³ The special late claim provisions differ from the general rules governing late claims in

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, and 721. For a general description of some of the statutes, see Marshall, Suits Against Decedents, 47 Cal. St. B.J. 588 (1972).

2. Prob. Code §§ 709, 716(a).

3. Prob. Code §§ 709, 720.

probate⁴ 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 debts⁵ (including injury or death) and for pending litigation of any kind.

(2) The creditor must have been unaware of the administration for the first three and one-half months of the four-month creditor claim period.

(3) The application for leave to file a late claim must be made within 30 days 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 the many 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

4. Prob. Code § 9103 (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988).

5. 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) (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988).

concept in a straightforward manner.⁶ 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.⁷

(2) Court approval is not required before the plaintiff may commence or continue an action.⁸

(3) The estate of the decedent need not qualify for treatment under the affidavit procedure for collection or transfer of personal property.⁹

(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

6. 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, 709, 709.1, 721.

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

8. Compare Prob. Code § 707 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.

9. Prob. Code §§ 13100-13115. Compare Prob. Code Prob. Code § 707 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.

or death of a person caused by the wrongful act or neglect of the decedent, or otherwise.¹⁰

(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.¹¹

10. See Code Civ. Proc. § 385(b) and Prob. Code § 707 (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 (1982) which applies to claims protected by liability insurance.

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

10/02/87

Outline of Proposed Legislation

CODE OF CIVIL PROCEDURE

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

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

PROBATE CODE

Probate 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
- § 555. Application of chapter

CHAPTER 2. SURVIVAL OF ACTIONS

- § 573. Survival of cause of action

Probate Code § 573 [AB 708] (repealed). Survival of actions

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

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

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

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

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

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

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

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

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

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

Probate 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

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. (a) 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 the person's representatives, after the expiration of that time, and within six months from the persons's death.

(b) Except as provided in subdivision (c), 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 the person's 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.~~

(c) If a person against whom an action may be brought died before July 1, 1988, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced against the person's representatives before the expiration of the later of the following times:

(1) July 1, 1989, or one year after the issuing of letters testamentary or of administration, whichever is the earlier time.

(2) The time limited for the commencement of the action.

Comment. The part of Section 353(b) that related to commencement of an action to enforce insurance liability is restated in Probate Code Section 551 (statute of limitations) without substantive change. In certain circumstances, a creditor claim in probate proceedings is a prerequisite to bringing an action against a decedent's personal representative. See Prob. Code § 9350.

Note. *Luther J. Avery (Exhibit 2) objects to the difference in the time limits applicable under this section (six months) versus that*

under draft Probate Code Section 551 (one year) which applies to insured claims. He writes that "the ability to sue the estate should be more restricted than the ability of the estate to sue. I would suggest that if there is one year to sue an estate, there should be one year for the estate to sue." It should be recognized that the recommendation does not create the differing time periods. It merely continues the existing scheme in this regard. The Commission has not undertaken a complete study of the area of survival and abatement of causes of action, but only that part of the subject that needs to be cleaned up as a part of the study of creditor claims procedure. (See Memorandum 87-43, considered at the July meeting, and the first paragraph of the recommendation text, *supra*.) This issue is also discussed under Probate Code Section 551 below.

Note. Russell G. Allen (Exhibit 4) also raises some questions about the statute of limitations and the relationship between the Code of Civil Procedure provisions and the Probate Code provisions. Mr. Allen is concerned that the language of Code of Civil Procedure Section 353 as proposed to be amended "may provide an ambiguity and suggest that the maximum one year period applies in all circumstances, rather than only in those in which the decedent was insured or a late claim is permissible." The existing one-year period is set out in subdivision (b) of Section 353. It is intended to apply to the commencement of any action against the decedent's personal representative. It is not, nor has it been, limited to insured claims. (It should also be remembered that the one year period runs from the decedent's death, by virtue of an amendment in AB 708, rather than one year from the date of appointment of a personal representative, as the law has read for some time. This tightens up the statute quite a bit, and should also help alleviate some of Mr. Avery's concerns discussed above.)

Mr. Allen also notes that there is no specific reference to the claim filing requirement in the statute. Of course, this continues the current situation, in line with our current approach of minimal revision of these abatement and survival sections. However, to help clarify the relationship, the staff has added the second sentence to the comment.

The staff is sympathetic to Mr. Allen's concerns. This is a confusing area that is full of ambiguities. However, as noted, the Commission has not attempted to deal with all of the problems at this time.

Note. Editorial suggestions made by Irving Kellogg (Exhibit 9) concerning this section and Section 385 have not been adopted since we have not undertaken to rewrite these sections.

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 13000) 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). In certain circumstances, a creditor claim in probate proceedings is a prerequisite to continuing an action against a decedent. See Prob. Code § 9351.

Note. *Stuart D. Zimring (Exhibit 6) argues that it should not be necessary to make a motion to substitute the personal representative for the decedent in a pending action:*

Assuming the Representative has been properly appointed, the function of the trial court is ministerial at best, since the Court cannot deny the Representative's standing to represent the interests of the Decedent. Thus, it seems some summary ex parte procedure would be appropriate. Perhaps . . . a procedure similar to the one utilized in amending a complaint to substitute the names of "Doe" defendants could be adapted.

The staff is inclined to agree with this point. In an earlier, more comprehensive draft, we had redrafted this provision to require the court to allow the action to be continued by the personal

representative. This would have codified the holding that substitution is not discretionary with the court. See, e.g., *Pepper v. Superior Court*, 76 Cal. App. 3d 252, 260, 142 Cal. Rptr. 759 (1977). The situation is more complicated where the plaintiff has died. However, it was decided not to undertake a complete revision of Code of Civil Procedure Sections 353 and 385 at this time, but rather to work on those provisions directly involved with the main objective of disposing of the claim filing provisions in probate. (See Memorandum 87-43, considered at the July meeting, and the first paragraph of the recommendation text, supra.) Mr. Zimring's comments relate to material that we have reserved for further consideration in the future.

Note. The staff has added the second sentence to the comment to clarify the relationship of this section to the creditor claims procedure.

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:

Note. Enactment of this part assumes the repeal of existing Division 3 of the Probate Code in companion legislation.

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 join as a party the decedent's personal representative or successor in interest.

(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, 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 13100-13115 (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).

CROSS-REFERENCES

Claim covered by insurance § 9354

Definitions

Personal representative § 58

Note. Luther J. Avery (Exhibit 2) writes that the language in subdivision (a) relating to the decedent's liability "for which the decedent was protected by insurance" is "unworkable" and continues:

It is routine these days for insurance companies to accept the defense of a matter under a reservation of rights. Is such a situation one covered by . . . Section 550? What about the situation where the complaint has five causes of action but only one is covered by insurance and that one is later eliminated in the course of litigation?

The language in subdivision (a) avoids the technical terminology of the insurance industry, which may change from time to time, and is intended to make this chapter applicable to all situations where the plaintiff may ultimately recover from the insurance company. As noted in the comment, the qualification of existing law to the effect that the insurer must have accepted the defense has been deleted. Otherwise, it would seem that insurance companies might routinely refuse to "accept the defense" in cases where the insured has died. Under the recommendation, the plaintiff can decide whether to continue the proceedings against the insurance company, taking on the burden of showing that the insurer is liable. It is not clear to the staff whether there are situations in which the insurer is obligated to indemnify the insured but has no obligation to defend the insured. We have assumed that if the insurer was obligated to indemnify to some extent, that the obligation to defend would follow. We judge that existing law makes the same assumption since there is no mention of the obligation to defend or to finance a defense in Code of Civil Procedure Section 385 or Probate Code Sections 707 or 721. The "accepted the defense" standard appears only in Probate Code Section 709 which applies to pending actions.

Mr. Avery suggests the following standard to replace the "unworkable" standard in subdivision (a): "An action to establish the decedent's liability for which the decedent carried insurance which obligated the insurer to finance a defense for the decedent." On its face, this language seems to focus on the insurer's obligation to defend and the costs of litigation, rather than the liability for damages. Does the Commission think that the insurer's obligation to defend should be incorporated into subdivision (a)? If so, consider the following language:

(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 join as a party the decedent's personal representative or successor in interest.

Mr. Avery asks what happens where the complaint has five causes of action, only one of which is covered by insurance, and that one is later eliminated. This chapter deals with liabilities that are covered by insurance. The four uninsured claims could not be pursued in that action without a court order substituting parties under Code of Civil Procedure Section 385 and filing a claim in the estate under draft Probate Code Section 9351. In any event, if this situation presents a problem, it is not a new one and is not something made worse by the recommendation.

Mr. Avery also questions subdivision (b) on the grounds that it puts the "estate at risk" and would "hold up the completion of the probate until the litigation involving claims against the decedent is finished." He suggests that the remedy of pursuing the insurance carrier be made exclusive. It should be recognized that Section 550(b) is a continuation of existing Probate Code Section 721(f). The staff is not clear on the intent of this provision, but we were concerned that something would be lost if we omitted it. The staff does not believe that this provision results in holding up the completion of probate. If the plaintiff seeks only the insured amount, the estate is obviously not affected. If for some reason the plaintiff chooses to file a claim for the full amount of alleged liability in the estate, the probate is not held up. If the plaintiff brings an action for the amount covered by insurance and also files a claim in the estate for the excess, the estate is not any more "held up" than where the whole amount is claimed in the estate. See also draft Section 554.

Note. Howard Serbin, Deputy County Counsel, Orange County (Exhibit 3) approves of the expansion of the procedure to estates that do not qualify under the affidavit procedure of Section 13100 et seq.

Note. Irving Kellogg (Exhibit 9) makes several editorial suggestions that have been implemented in this section.

§ 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 part of Code of Civil Procedure Section 353(b) without substantive change.

Note. Luther J. Avery (Exhibit 2) questions the policy of this section which extends the statute of limitations for as much as a year (less one day) simply because the potential defendant dies the day before the statute was due to expire. Mr. Avery suggests that the needs of the family of the decedent should take precedence here, and he proposes that the statute of limitations should operate in the normal fashion, notwithstanding the death of the potential defendant. At least part of the staff is also puzzled by this policy of existing law. See Code Civ. Proc. § 353 (one year from date of death for claims

generally, one year extension of statute of limitations for certain insured claims). Why shouldn't the potential plaintiff file the action within the normal time? Why should the plaintiff benefit from the death of the defendant? The fact of death need not prevent the filing of an action needed to satisfy the statute of limitations. The needs of the estate can be met by the requirement that a claim be filed in the estate as a precondition to continuing the action and by the requirement that the personal representative be substituted for the decedent. It should be recognized that this is a general problem, not limited to insured claims. We should not alter the rule in draft Section 551 and leave the general extension intact in Code of Civil Procedure Section 353, since this would result in a significantly different statute of limitations depending on the remedy employed. Does the Commission want to consider this issue now, or should it be reserved for future resolution?

§ 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

Note. Irving Kellogg (Exhibit 9) suggests an editorial change that has been implemented in this section.

Note. H. Neal Wells III (Exhibit 10) says that this procedure contemplates only one insurer. He suggests that, if there is more than one insurer, all should be served. This matter would seem to fall within the scope of that wonderful old saying "the singular number includes the plural, and the plural, the singular" (which, luckily for us, happens to be codified in Probate Code Section 10).

§ 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

Note. *H. Neal Wells III (Exhibit 10) writes that this section "does not appear to contemplate a contest of liability by answer, or by contribution from other insurers, unless the concept of contribution is embodied in 'contests its liability by cross-complaint.' Perhaps amendments in this regard may be of help." At least part of the staff has urged the abolition of this provision because it is overly specific and incomplete (as noted by Mr. Wells) and also because it is unnecessary. Perhaps the least we can do is eliminate the words "by cross-complaint" and thus avoid the terminological issue.*

§ 554. Damages

554. (a) Except as provided in subdivision (b), a judgment in favor of the plaintiff in an action under this chapter is enforceable only from the insurance coverage and not against property in the estate.

(b) Subdivision (a) does not apply to the extent that both of the following conditions are satisfied:

(1) The insurer accepts the defense of the action and makes an appearance on behalf of the decedent.

(2) The plaintiff files a claim under Section 9354.

Comment. See the Comment to Section 550.

CROSS-REFERENCES

Definitions

Property § 62

Note. *The staff has redrafted subdivision (a) for clarity and to eliminate unnecessary language. As set out in the tentative recommendation, subdivision (a) read as follows:*

(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.

Note. *Irving Kellogg (Exhibit 9) makes several editorial suggestions that have been implemented in this section.*

§ 555. Application of chapter

555. (a) This chapter applies only to an action against a person who dies on or after July 1, 1989.

(b) The applicable law in effect before July 1, 1989, continues to apply to an action against a decedent who died before July 1, 1989, notwithstanding its repeal by the act that enacted this chapter.

Note. This is a new section that is drafted to deal with a concern of H. Neal Wells III (Exhibit 10) who suggests that the chapter should be applicable only to decedents dying after its operative date "so that claims that are barred by existing law would not be revived." Because of the substantial revision of the provisions relating to insured claims, it is prudent to limit the new law in this fashion. It is doubtful that the draft would have the effect of reviving barred claims, but it is better to play it safe.

CHAPTER 2. SURVIVAL OF ACTIONS

§ 573. Survival of cause of action

573. (a) Except as provided in this section, a cause of action is not 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 (1) damages awardable under Section 3294 of the Civil Code or (2) 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 the decedent's personal representative are limited to the loss or damage the decedent sustained or incurred before 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 the decedent's 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 restates former Section 573 [AB 708] without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. Luther J. Avery (Exhibit 2) asks why the Commission proposes the survival of punitive damages claims in subdivision (b). Mr. Avery must have overlooked the word "except" in the third line. The effect of this provision is that all damages may be recovered against the personal representative except punitive damages. This is existing law.

Note. Irving Kellogg (Exhibit 9) makes several editorial suggestions that have been implemented in this section.

Probate Code § 573 [AB 708] (repealed). Survival of actions

SEC. . Chapter 8 (commencing with Section 573) of Division 3 of the Probate Code is repealed.

Comment. Former Section 573 [AB 708] is restated in new Section 573 without substantive change.

Probate Code §§ 707-721 [AB 708] (repealed). Actions involving decedent SEC. . Article 1 (commencing with Section 707 [AB 708] of Chapter 12 of Division 3 of the Probate Code is repealed.

Note. The text of Sections 707-721 is set out in the Appendix attached to this recommendation.

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

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

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

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

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

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

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.

~~(c) 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 for filing a claim 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~~ (1) 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 15 days before expiration of the time provided in Section 9100, and the petition was filed within 30 days 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 creditor's 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 time 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) Regardless of whether the claim is later established in whole or in part, Property 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) [AB 708]. 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 [AB 708]. 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 [AB 708] (claims governed by special statutes) and 9202 [AB 708] (claim by Director of Health Services).

Note. Howard Serbin, Deputy County Counsel, Orange County (Exhibit 3) supports the revision of subdivision (a).

Note. Irving Kellogg (Exhibit 9) makes several editorial suggestions that have been implemented in this section.

Note. H. Neal Wells III, on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 10), writes that the Executive Committee

unanimously resolved that Section 9013(a)(2) should not be amended to include the actual knowledge of a creditor's attorney in determining the availability of the non-resident late claims procedures. Many non-residents have attorneys in California and such attorneys may have knowledge of the administration of a decedent's estate without also having knowledge that their non-resident client is a creditor of the decedent. Moreover, there is concern about the general concept of painting creditors and their attorneys, or personal representatives and their attorneys with one brush. A personal representative and his attorney are separate and distinct. Similarly, creditors and their attorneys are separate and distinct except to the extent that the attorney is acting as an agent for the creditor and within the course and scope of such agency.

Does the Commission wish to reconsider this provision in light of this objection?

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 tells 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 tells the statute of limitations during the administration of the estate.~~

~~(d) Whether the statute of limitations otherwise applicable to a claim will expire before or after the time prescribed in Section 9257, 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 the notice of rejection is given, three months after the notice is given.~~

~~(2) If the claim is not due at the time the notice of rejection is given, 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.~~

~~(c) 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) The prevailing party in the action shall be awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party shall be awarded 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 former subdivision (c) of Section 9002 (claim requirement) 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) [AB 708]. 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 are statutorily 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

Note. H. Neal Wells III, on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 10), argues that there is a conflict between Section 9002(b), which bars claims not filed, and the cross-reference in the comment to actions against other persons who may be liable for the decedent's debts. The staff does not understand the problem here. The sections cited in the comment provide for such a liability. Section 9002 begins with the following words: "Except as otherwise provided by statute." We have substituted the words "are statutorily" for "may be" in the comment to make the point clearer.

§ 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) [AB 708]. 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

Note. Myron W. Curzon (Exhibit 1) states the following concern:

The form of creditor's claim to be submitted in a decedent's probate need not specify the grounds of the claim, with the particularity required in a pleading. A simple statement of the approximate ground, with leeway to the creditor to make changes in his theory and statement of facts, is sufficient. New facts and theories may come to the attention of the creditor between the time the creditor learns of the death of decedent and the time the creditor has to file his creditor's lawsuit.

Mr. Curzon's concern seems to be that an action on a claim may be found to be barred for failure to make a creditor's claim in probate due to a difference in facts or theory of recovery, even though the underlying cause is the same. The staff wonders if this is a problem under existing law, since the draft does not change this aspect of the law in any material way. Does the Commission think that this is a problem? Should the statute provide that an action on a claim is not barred to the extent that the creditor made a claim in probate that is based on the same underlying cause or arising out of the same facts?

§ 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) 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 (1) the creditor commences an action on the claim or (2) 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 the notice of rejection is given, three months after the notice is given.

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

Comment. Subdivisions (a) and (b) of Section 9352 continue former subdivisions (a) and (c) of Section 9253 [AB 708] with the addition of provisions relating to partial allowance. Subdivision (c) combines former subdivision (d) of Section 9253 [AB 708] and subdivision (a) of former Section 9257 [AB 708] 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 [AB 708]. 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) The prevailing party in the action shall be awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the

prevailing party shall be awarded reasonable litigation expenses, including attorney's fees.

Comment. Section 9353 restates subdivisions (b)-(d) of former Section 9257 [AB 708] 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) Unless a claim is first made as provided in this part, 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.

(c) 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, an insurer defending an action under Section 550 shall file a claim as provided in this part. 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 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 13100-13115 (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 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

Liability of decedent covered by insurance §§ 550-554

Note. Irving Kellogg (Exhibit 9) makes several editorial suggestions that have been implemented in this section.

§ 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

Note. H. Neal Wells III (Exhibit 10) suggests substituting the words "or otherwise" for "to" in the third line "to cover nonjudicial foreclosures such as a nonjudicial sale under a deed of trust." The staff does not believe that this is necessary. This section is an exception to rule that prevents bringing an action against a decedent unless a creditor claim is first filed in the estate. The claims requirement apparently does not apply to enforcement of a liability by way of sale under a power of sale that survives the obligor's death. See *More v. Calkins*, 95 Cal. 435, 438-39, 30 P. 583 (1892); see also *Estate of Farley*, 63 Cal. App. 2d 130, 132-33, 146 P.2d 249 (1944). Put a different way, the power to conduct a nonjudicial sale is not a "claim" within the terms of former Code of Civil Procedure Sections

1493 and 1500 (the predecessors of Probate Code Sections 707 and 716, which in turn are the predecessors of Probate Code Sections 9000 and 9002 [AB 708] and draft Sections 9350 and 9355. The holder of a private power of sale may file a claim and benefit from the priority provided in Section 11420(a)(6) [AB 708] (ahead of general debts) or may ignore the probate proceedings and conduct the sale. The staff sees no particular harm in this, since the seller is not entitled to a deficiency under Code of Civil Procedure Section 580d (except for certain bond liability foreclosures). But it is inconsistent with the requirements applicable to a creditor who seeks to bring a judicial foreclosure action.

Appendix

Text of Repealed Probate Code Sections

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

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.

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

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.

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

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.

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

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.

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

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 [AB 708]) of Part 4 of Division 7.

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

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.