

Memorandum 87-93

Subject: Study L-1025 - Litigation Involving Decedents (Approval of
Recommendation for Printing)

Attached to this memorandum is a revised *Recommendation Relating to Litigation Involving Decedents* which implements decisions made at the October meeting. We hope that the Commission will approve this recommendation for printing, subject to any needed revisions. At the November meeting, we plan to review only the sections that have been revised. See Probate Code Sections 550 (comment), 552-554, 9103, and 9350 (comment).

Respectfully submitted,

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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 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

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.

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

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 concept in a straightforward manner.⁶ The proposed law unifies the existing provisions, making the following changes of law in the process:

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).

6. There are at least six different statutes that relate to this problem. Some provisions appear to be coordinated with each other, other provisions do not. See Code Civ. Proc. §§ 353, 385(b); Prob. Code §§ 707, 709, 709.1, 721.

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

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. Cf. 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.

10. See Code Civ. Proc. § 385(b); 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

(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

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

CODE OF CIVIL PROCEDURE

- § 353 (amended). Death of party before expiration of limitation period
- § 385 (amended). Disability or death

PROBATE CODE

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

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- § 573 (repealed). Survival of actions
- § 707 (repealed). Insured claim
- § 709 (repealed). Claim pending against decedent
- § 709.1 (repealed). Continuation of pending action against estate
- § 716 (repealed). Enforcement of lien
- § 720 (repealed). Claim for damages for injury or death where no
action pending
- § 721 (repealed). Claim for liability covered by liability insurance

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- § 9002 (amended). Claim requirement
- § 9103 (amended). Late claims
- § 9253 (amended). Effect of statute of limitations
- § 9257 (repealed). Action on rejected claim

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CHAPTER 8. CLAIMS IN LITIGATION

- § 9350. Claim prerequisite to bringing action
- § 9351. Claim prerequisite to continuing action
- § 9352. Toll of statute of limitations
- § 9353. Bar of rejected claims
- § 9354. Venue and procedure for action on claim
- § 9355. Claim covered by insurance
- § 9356. Enforcement of security interest

PROPOSED LEGISLATION

Code of Civil Procedure § 353 (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.

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 550-555 (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.

Probate Code §§ 550-555 (added), Litigation involving decedent

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

PART 13. LITIGATION INVOLVING DECEDENT

CHAPTER 1. LIABILITY OF DECEDENT COVERED BY INSURANCE

§ 550. Action authorized

550. (a) Subject to the provisions of this chapter, an action to establish the decedent's liability for which the decedent was protected by insurance may, after the decedent's death, be commenced or continued against the decedent's estate without the need to 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). Subdivision (b) makes clear that this chapter does not preclude the establishment of liability by another procedure. See, e.g., Section 9000 et seq. (creditor claims).

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 § 9355

Definitions

Personal representative § 58

Note. The comment has been revised as indicated to implement a decision at the October meeting.

The staff has researched the question of whether a claimant may proceed against the insurance protection in an action and also make a claim in the estate for the difference between the insurance coverage and the claimed liability. At the October meeting, the Commission discussed the policy issue of whether the claimant should be forced to elect remedies and waive a deficiency if the claimant seeks satisfaction from the insurance proceeds. The Commission retained the policy expressed in the language of the comment above and did not adopt this suggestion. However, further analysis may be useful. It was suggested that this would be analogous to the law applicable to enforcing security interests. The situations seem materially distinct. The tort plaintiff is not in control of the contract between the decedent and the insurance company and so should not be limited by the insurance contract, particularly where it is inadequate. It is in the interest of the estate for the plaintiff to pursue the insurance coverage since the plaintiff is the only person for whom the insurance is an asset (except where the estate seeks reimbursement for amounts paid a plaintiff). The tort plaintiff would not have been forced to elect between the insurance protection or the defendant's property if the defendant had not died.

The law is muddled in this area. We have been operating on the assumption that the cumulative remedy provision carried forward in draft Section 550 permits the plaintiff to pursue both remedies (though only one satisfaction). In *Independence Bankers Trust Co. v. Superior Court*, 138 Cal. App. 3d 238, 242-43, 188 Cal. Rptr. 14 (1982), the court cited the cumulative remedies provision of Section 721(f), and noted that the filing of a claim in the estate does not preclude maintaining an action under Section 721. The court did not intimate whether the plaintiff would be able to satisfy a deficiency from the estate. In *Neuland v. Russell*, 50 Cal. App. 3d 1, 5, 123 Cal. Rptr. 230 (1975) (cited in *Independent Bankers Trust*), the court found that a failure to file a timely creditor's claim under Section 714 did not preclude filing an action under Section 721, in part because the right of recover was limited to the amount of the liability insurance, thereby implying that no deficiency could be made up from the estate. The language of Section 721(f) can be read this way, although the court in *Neuland* did not have to do so to reach the desired conclusion.

A provision in Section 707(b) specifically provides for recovery of the excess from the estate: "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." This language applies to claims for damages for injury or death where the estate qualifies for summary probate proceedings under Section 13100. It would be odd if only small estates were liable for the excess over the insured liability. The staff is tempted to reconcile any conflict between the clear language of Section 707(b) and the more porous

language of Section 721(f) in favor of the clear language. That is, of course, the policy that is and has been reflected in the draft statute.

§ 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.

§ 552. Procedure

552. (a) 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.

(b) 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.

(c) An action against the estate of the decedent under this chapter may be consolidated with an action against the personal representative.

Comment. As to subdivisions (a) and (b) of Section 552, see the Comment to Section 550. Subdivision (c) makes clear that an action directed toward collecting from the insurance proceeds under this chapter may be consolidated with an action against the decedent's personal representative for the excess. Consolidation may be appropriate since the issues relating to liability are the same. See also Sections 550(b) (remedies cumulative), 553 (defenses).

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Note. This section has been revised as indicated to implement a decision made at the October meeting.

§ 553. Defenses

553. The insurer may deny or otherwise contest its liability by ~~cross-complaint~~ in the action under this chapter or by an independent action ~~against the plaintiff~~. Unless the personal representative is joined as a party, a judgment ~~on the cross-complaint in the action under this chapter~~ 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. This section has been revised as indicated to implement a decision at the October meeting.

§ 554. Damages

554. (a) Except as provided in subdivision (b), 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 in the action is enforceable only from the insurance coverage and not against property in the estate.

(b) Where the amount of damages sought in the action exceeds the coverage of the insurance, subdivision (a) does not apply if both of the following conditions are satisfied:

(1) The personal representative is joined as a party to the action.

(2) The plaintiff files a claim under Section 9355.

Comment. Subdivision (a) of Section 554 restates former Section 721(f) without substantive change, but makes clear that the rule limiting recovery is subject to the exception provided in subdivision (b). Subdivision (b) is generalized from the second sentence of former Section 707(b). See also the Comment to Section 550.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. At the October meeting the decision was made to revise this section as follows:

§ 554. Damages

554. (a)-Except-as-provided-in-subdivision-(b),-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 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 9355.~~

However, for the reasons discussed in the note following draft Section 550, the staff recommends that the section read as set out above.

§ 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.

Heading of Chapter 8 (commencing with Section 573) of Division 3

SEC. . The heading of chapter 8 (commencing with Section 573) of Division 3 is amended to read:

CHAPTER 8. 2. SURVIVAL OF ACTIONS

Probate Code §§ 707-721 (repealed). Actions involving decedent

SEC. . Article 1 (commencing with Section 707) of Chapter 12 of Division 3 of the Probate Code is repealed.

Probate Code § 707 (repealed). Insured claim

Comment. Former Section 707 is replaced by Sections 550-555 (liability of decedent covered by insurance) and 9355 (claim covered by insurance).

Probate Code § 709 (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 550-555 (liability of decedent covered by insurance) and 9355 (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 (repealed). Continuation of pending action against estate

Comment. Former Section 709.1 is replaced by Sections 550-555 (liability of decedent covered by insurance) and 9355 (claim covered by insurance).

Probate Code § 716 (repealed). Enforcement of lien

Comment. Former Section 716 is restated in Section 9356 (enforcement of security interest), omitting the provision relating to attorney's fees.

Probate Code § 720 (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 (repealed). Claim for liability covered by liability insurance

Comment. Former Section 721 is replaced by Sections 550-555 (liability of decedent covered by insurance) and 9355 (claim covered by insurance).

Probate Code § 9002 (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 (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 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.~~

~~(3) The claim does not arise out of the conduct by the creditor of a trade, business, or profession in the state.~~

(1) Neither the creditor nor the creditor's attorney representing the creditor in the matter had actual knowledge of the administration of the estate within 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.

(2) The claim relates to an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is pending, to a cause of action that does not arise out of the creditor's conduct of a trade, business, or profession in this 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) Property~~ 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 distributed under court order and payments otherwise properly made before a claim is filed under this section are not subject to the claim,--regardless of whether the claim is later established--in whole or in part. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.

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

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

It should be noted that a petition under this section must be verified. See Section 1284. This section does not apply to certain public entity claims which involve a written notice or request to the public entity and a response time governed by other law. See Sections 9201 (claims governed by special statutes) and 9202 (claim by Director of Health Services).

Note. New subdivision (a)(1) been revised to implement a decision made at the October meeting to limit the attorney's responsibility to situations where the attorney is representing the creditor in the matter involving the decedent.

Probate Code § 9253 (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 restated in Section 9352 (tolling of statute of limitations) without substantive change. Former subdivision (d) is combined with subdivision (a) of former Section 9257 and restated in Section 9353 (bar of rejected claims) without substantive change.

Probate Code § 9257 (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 and restated in Section 9353 (bar of rejected claims) without substantive change. Subdivisions (b)-(d) are restated in Section 9354(a)-(c) (action on claim) without substantive change.

Probate Code §§ 9350-9356 (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 , but makes express the implied requirement implied in former law~~ that the claim was first be rejected in whole or in part. For the time within which a claim must be filed, see Section 9100 (claim period). For late claims, see Section 9103. An action may be brought to enforce a liability of the decedent without first filing a claim in the case of a secured obligation. Section 9356 (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 550-555 (liability of decedent covered by insurance).

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

Note. The comment to this section has been revised as indicated to implement revisions made at the October meeting.

§ 9351. Claim prerequisite to continuing action

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

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

Comment. Subdivision (a) of Section 9351 restates the first sentence of former Section 709 with the addition of the implied requirement that the claim be rejected in whole or in part. The

personal representative must notify creditors, including plaintiffs in actions against the decedent, if the personal representative has actual knowledge of the creditor. Section 9050 (notice required). For late claims, see Section 9103.

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

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

§ 9352. Tolling of statute of limitations

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.

Comment. Section 9352 restates former subdivisions (a) and (c) of Section 9253 without substantive change. The provision relating to partial allowance is new.

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

§ 9353. Bar of rejected claims

9353. (a) Regardless of whether the statute of limitations otherwise applicable to a claim will expire before or after the following times, a claim rejected in whole or in part is barred as to the part rejected unless, within the following times, the creditor commences an action on the claim or the matter is referred to a referee or to arbitration:

(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) The time during which there is a vacancy in the office of the personal representative shall be excluded from the period determined under subdivision (a).

Comment. Section 9353 restates former subdivision (d) of Section 9253 and former Section 9257(a) without substantive change. The provision relating to partial rejection is new.

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

§ 9354. Venue and procedure for action on claim

9354. (a) In addition to any other county in which an action may be commenced, an action on the claim may be commenced in the county in which the proceeding for administration of the decedent's estate is pending.

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

(c) 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 9354 restates subdivisions (b)-(d) of former Section 9257 without substantive change. See also Section 7050 (jurisdiction in superior court).

CROSS-REFERENCES

Definitions

Claim § 900

Personal representative § 58

Property § 62

§ 9355. Claim covered by insurance

9355. (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 9355 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 9355, 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 9355 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 §§ 550-555

§ 9356. Enforcement of security interest

9356. 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 9356 restates former Probate Code Section 716, omitting the provision relating to attorney's fees.

CROSS-REFERENCES

Definitions

Claim § 9000

Property § 62