

Third Supplement to Memorandum 88-31

Subject: Study L-2009 - AB 2841 (1988 Probate Legislation--litigation
involving decedent)

Attached is a letter from Garrett H. Elmore suggesting further changes in the provisions of AB 2841 relating to litigation involving a decedent. Mr. Elmore notes that the Commission's response to his earlier comments was disappointing, although some clarifications have been made. The present letter includes what is left as to his objections to improve the bill and basic procedures.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

CALIF. CALIFORNIA LAW REVISION COMMISSION
ATT: MR. STERLING
MR. DEMOULLY

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Current: P. O. Box 643
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April 25, 1988

Hon. Elihu Harris
Author and Chair
Room 6000
State Capitol
Sacramento, CA.
94814

Re: Opposition to parts of A. B. 2841- Creditor Claims

Dear Mr. Harris:

The enclosed proposed amendments (draft form) with backup memorandum are being sent to the California Law Revision Commission, attention of Mr. DeMouly and Mr. Sterling.

With the exception of my proposed Section 9356 (Amendment 8), I believe this material is directly relevant to the form of your bill.

Proposed Section 9356 seems material for a future study. However, the remainder is seriously urged, as a thoughtful approach.

Respectfully,


Garrett H. Elmore

CC: California Law Revision Commission

Contact: Garrett Elmore, Esq. Tel. 415-343
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RE: A. B. 2841 (Harris) Creditor Claims Am. Bill 3-15-88

Suggested amendments (draft form)

Amendment 1

In Probate Code Section 554, subdivision (a), after "estate," insert "Coverage" includes sums recoverable from the insurer for failure of the insurer to perform its obligations.

Amendment 2

In Probate Code Section 8964, after "referees." insert:
Sec. 83. Section 9000.5 is added to the Probate Code, to read:

9000.5 (a) The provisions of this chapter are directory as to each of the following:

(1) A claim for contribution, indemnity or reimbursement by a person who is or may be claimed to be secondarily liable, such as a surety or guarantor or employer or principal, or who is or may be claimed to be a joint tortfeasor or a joint obligor, under contract or statute, when, at the time of decedent's death, the claim is contingent and unliquidated and has not been reduced to the form of a specific money demand that is presently due.

(2) Subject to express or implied statutory requirements to the contrary, a cause of action or claim for relief that first comes into existence because of acts, events or transactions that occur after decedent's death.

(b) This part does not limit the jurisdiction of the court having jurisdiction of the estate to apply equitable principles to avoid manifest injustice and extreme hardship, whether or not the granting of relief is specifically provided for by this part.

Amendment 3

In Probate Code Section 9001, strike out "Sec.83" and insert:

Sec. 83.5

Amendment 4

In Probate Code Section 9002, strike out "Sec. 83.5" and insert:
Sec. 85.55.

Amendment 5

In Probate Code Section 9103, strike out sub paragraph (1) and sub paragraph (2) of subdivision (a) and insert:

(1) Neither the creditor nor the attorney representing the creditor in the probate matter had actual knowledge of the administration of the estate within 15 days of the expiration of the time provided in Section 9100.

(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 under circumstances that compel an inference of actual knowledge of administration of the estate within the time specified in sub paragraph (1).

(3) The petition is filed within 30 days after the creditor has actual knowledge or, if actual knowledge is imputed under sub paragraph (2), within 30 days after the date knowledge is imputed, or within such additional time, not exceeding 30 days, as the general personal representative or the court, upon petition, with or without notice, may allow.

Amendment 6

In Probate Code Section 9103, subdivision (d) after "payment" insert:

(e) This section is cumulative to other remedies.

*Insert: of the administration of the estate.

Amendment 7

In Probate Code Section 9355, strike out subdivison (c) and insert:

(c) If an insurer defending an action under Section 550 pays out money for the benefit of the decedent or the estate of the decedent after the death of the decedent and claims the right of reimbursement under the insurance contract, the matter is one for disposition as an estate administration matter and no claim is required. As to sums paid out or expenses incurred prior to the decedent's death, the need for and form of claim depends upon the circumstances. Except as required by law, amounts claimed by the insurer as reimburseable by the insured shall not reduce the amount of insurance coverage.

Amendment 8

In Probate Code Section 9355, after "estate" insert:

9357. A claim is permitted but not required in any of the following circumstances:

(a) When the cause of action or claim for relief is used solely by way of set off as provided in Section 431.70 of the Code of Civil Procedure or similar law.

(b) When the cause of action or claim for relief is asserted by answer or cross complaint in an action brought by the decedent or the estate and relates to the same transaction, occurrence or series of occurrences as the cause of action which is alleged in the complaint.

(c) When the cause of action or claim for relief is one for contribution, indemnity or reimbursement with respect to the underlying liability issues in an action or proceeding pending

at decedent's death and a claim on the liability issues in the action or proceeding is timely filed by the plaintiff or another party.

(d) When the cause of action or claim for relief is one for contribution, indemnity or reimbursement with respect to a contract or statutory obligations on which the creditor and decedent are co-obligors or on which the liability of the creditor is secondary, as between the creditor and the decedent, and a claim on the obligation is timely filed by the obligee or other person holding the obligation.

Amendment 9

In Probate Code Section 9357, in the April text, after "filed." insert:

9358. Except as otherwise required by statute, a claim is not required for alleged damages for injuries to, or death of a person, for which no action is pending at decedent's death, when, during the entire claim period, the creditor did not, and in the exercise of reasonable diligence diligence could not, know of the injury or death, and the cause of action or claim for relief was not an accrued, cause of action or accrued claim for relief. Within 30 days after discovery of the cause of action or claim for relief the creditor shall give written notice to the general personal representative or, if none, such persons as the court may designate, as claim. The notice shall be entitled Special Notice of Claim and shall state the claim in reasonable detail. The matter shall thereafter be handled as a matter arising after the death of the decedent, as to which the claims procedure does not apply. Any action or proceeding under this section must be commenced within 180 days after the decedent's death.

ADDENDUM

Probate Code Section 9370 (as per April Bill text) strike out
Section 9370 and insert:

9370. (a) An action or proceeding pending against the
decedent at the time of death may be continued against the
decedent's personal representative, if it survive, upon condition that

(1) A claim shall be filed as in other cases.

(2) Within three months after notice of rejection of
claim or notice of formal suggestion of fact of death in the
action or proceeding, whichever is earlier, the plaintiff applies
to the court in which the action or proceeding is pending for an
order to substitute the personal representative as a party.

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

(c) The personal representative may apply to the court
having jurisdiction of the action or proceeding for an order of
temporary abatement upon the ground that (1) no claim has been
filed, or (2) a claim has been filed but has not been rejected, or
(3) application has not been made for substitution, or 4) any other
ground warranting temporary abatement.

(d) The requirements of this section are waived by failure
to plead non compliance as an affirmative defense of temporary
abatement in the trial court.

Alternative

9370

In subdivision (a), strike out "first" in sub paragraph (1)

Strike out sub paragraph (2)

Strike out "all" and insert "both" in subdivision (a)

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April 24, 1988

Re: A. B. 2841 (Harris)- Creditor Claim Part

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Remaining Criticisms And Explanation of Suggested Amendments

The writer's views, as an individual attorney trying to act pro bono, were expressed in a diffuse statement, copy to the LRC.

At the March 2 Assembly Judiciary hearing, the writer spoke very briefly in opposition, particularly expressing concern about loss of contribution and indemnity rights under the new Claims statutes.

The LRC response to the writer's diffuse statement was disappointing.

However, clarifications in drafting are understood to have been made. What is left, as to the writer's objections to improve the bill and basic procedures, appears in this Memorandum and attached draft amendments.

Whether groups that seem to have a direct interest such as trial lawyers, lenders and collection agencies, would agree or disagree is unknown.

POINTS AND SUGGESTED IMPROVEMENTS

Affirmative

This part of A. B. 2841 in its expected April form represents a very desirable change, on the whole. The LRC form removes overlapping provisions, organizes the new material well, and brings clarity of statement.

Negative

Present Probate Code Section 720, relating to damages for injuries to person or wrongful death, should not be repealed as proposed, without being retained in a less broad form.

The procedure being proposed (April text) as to pending actions (see new Sec. 9370) has provisions that unfairly burden plaintiffs in pending civil actions such for example as provisions that "stay" the civil action (which may be on the eve of trial) until the plaintiff "first" files a claim, the personal representative goes through the claim and approves or rejects, and a limited time substitution is made.

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References are to code sections per March 15 bill text. The April amended form is not available to the writer yet.

Section 9000 enacted in 1987 as part of LRC work is a new broad "claims" definition. It is integral to understanding how the new claim procedure will work.

Unless it is clarified and unless the court's power to treat some claims as arising after death (not subject to claim) is retained, the whole subject will remain a courtroom battle ground, in my opinion, for years to come. Litigation is expensive as well as a consumer of judicial resources. A few code sections can avoid much of it, in the writer's opinion.

The specific area of ambiguity is what is a "contingent" claim, that will be "barred" unless timely filed. As illustrated by the well known Learjet case in Florida, contribution and indemnity claims can be barred even though there seemed no occasion for their filing and even though the claimant may not have known his product was involved in an accident. -----

The amendments here offered are intended to provide a proper balance between creditor and heir interests. There seems some judicial support for the writer's concern over "irongate laws." After numerous appellate decisions applying the "irongate" Florida version of the Uniform Probate Code, with reluctance, the Florida Supreme Court now seems to have made a sharp turn, by construing the 1974 Florida statute as being no more than "rules of practice" and providing a "statute of limitations" rather than a "bar."

A. B. 2841 now seems to present an opportunity to simplify the paperwork by cutting down on certain types of "contingent" claims. See draft amendments attached. The Paperwork Reduction Act principles are notably in point. Claim filing can be reduced in certain areas without putting any substantial additional burden on the personal representative, in acquiring knowledge of the potentials.

Amendment Proposed

Sec. 554 (am.)

Brief Explanation

Makes clear the creditor is entitled to any damages recoverable even though policy limit is exceeded.

Sec. 9000.5 (proposed)
Sec. 9357 "

Makes filing "directory" as to general contingent claims for contribution (etc.)

Another section would skip claim of this type if claim is filed as to main pending action. If P. R. knows of main action, the potential of related claims should be assumed. A similar skip is provided where parties are co obligors (etc.) on the main obligation for which a claim was filed. The Borba Farms case (Jan. 1988) involves these facts.

Proposed Section 9000.5 includes a provision permitting the court to apply equitable principles, even if the relief is not specifically provided for. The court in probate is now a court of general jurisdiction (Prob. C. 7050) Flexibility is permitted by recognizing inherent power. It probably would not be us-

Sec. 9103. Am.

- 1) Insert "probate" before matter there may be different attorneys
- 2) the exclusion of a "trade (etc in this state fair, wording added. The exclusion rests upon questionable assumptions, and (2) should be completely removed, as arbitrary and discriminatory, in the writer's opinion.
- 3) wording added that allows 30 day extension. Assembling i fo ation, temporary absences, etc., make extension power needed.
- 4) Wording added to make clear Sec. 9103 is not intended to be the sole source of relief power.

Sec. 9355. Am.

This is an attempt to state a rule. The preferred wording, in the writer's opinion, would preclude a set off these monies against the creditor (deductible is another matter), and let the insurer go without statutory guidance in other respects. Its contract provisions are not generally available and may vary. The insurer has dual interests, including contribution claims, and "defending" its "duty

Sec. 9357 (proposed)

See also supra

It may be frankly conceded that this section will be seen as "too radical" and needs study. However, it is basically simple to understand. It represents a modest attempt to break the stranglehold that following ancient statements blindly could produce. Not only is paperwork reduced but the filing of a claim in (1) and (2) puts the creditor in what may be called the "endangered litigant" class without any real reason.

Sec. 9358 (Proposed)

This section is a new version of present Prob. C. Sec. 720. In the famous Hurliman case, involving an injury not discovered until after the claims period, an appellate court held the claim "bar" in its then form constitutional, without much discussion. Some comment has been made that Sec. 720 was enacted to change the Hurliman rule. As in the case of Learjet (Florida) cited above, it does not appeal to one's sense of fairness to bar a claim that could not reasonably be known and that had not "accrued" at decedent's death. The new version omits the cut off of one year after "accrual" and proposes a 180 days after decedent's death cut off. Procedure after the "notice" could be worked in or is not included.

Sec. 9370. am.

The amended form proposed by the Commission and included in the April text does not state existing law. In addition it includes a new creditor requirement, i. e., that application be made for substitution of the personal representative within 90 days after rejection of claim. The last was added by the Commission at its March meeting which considered and did not take affirmative action on any of the Elmore proposed legislative changes, save a minor one.

The substitution requirement is an arbitrary one and intervenes in what are civil procedure matters. The matter is one for estate administration not for a claim "bar." The "condition" wording is contrary to California cases. These treat non claim in a pending action as ground for a special defense of temporary abatement that is waived unless promptly made. See page 5 of attached draft amendments, for present