

First Supplement to Memorandum 89-39

Subject: Study L-1025 - AB 156--Probate Urgency Bill (Notice to  
Creditors--one-year statute of limitations)

We have received the letter attached to this memorandum from Garrett Elmore. Mr. Elmore is concerned about the proposed general statute of limitations of one year from date of death as to all causes of action against the decedent. The issues that Mr. Elmore raises are ones that have also concerned the staff, and that the staff has raised with the Commission in the past. However, the Commission in the past has concluded that the one-year statute of limitations is appropriate. The Commission may wish to reconsider this decision in light of Mr. Elmore's letter.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

APR 06 1989

GARRETT H. ELMORE  
Attorney At Law  
P. O. Box 2000-155  
So. Lake Tahoe, CA

RECEIVED  
Tel. 702-883-9285  
(Nv.)

March 31, 1989

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

Re: A. B. 156 (am. form of 2-17-89)-Committee Bill, Member Friedman  
Dear Chair Plant and Members,

This letter is directed a practical problem I have as to your proposals in Sec. 1 and elsewhere for a so called "absolute statute of limitations" of one year from death on "all types of actions" when an obligor or potential defendant has died.

A. B. 156 is on "consent" in the second house. In the legislative protocol and also the internal protocol of your body, I am out of time, and must rely upon appeal for a veto (useless) or upon vague hope of your future possible further study, should a problem develop from the delayed probate permitted by your bill and frankly pointed out in your Report (Tentative Recommendation, p. 3).

There are serious problems, concept and draftsmanship, in your CCP 353 (Sec. 1 of Bill) and proposed Official Comments. I believe A. B. 156 should be stopped from being law and narrower and less controversial changes as to a "statute of repose" (not of limitations) should be made before the bill goes to the Governor.

It would have been the easier course to accept being out of time; however, the more I study the proposal, particularly as applied to the billions in contractual undertakings not in default at date of death and actions such as quiet title actions, the more I am convinced of the need for a slow down, and a longer period of repose-say two or three years, and for a penalty if those beneficially interested do not open probate within a reasonable time, such as 120 days.

Enclosed is a Statement of Opposition To Sec. 1. A copy of this letter and such Statement is being circulated by me to others, including, of course, Mr. Friedman.

Yours truly,

*Garrett H. Elmore*  
Garrett H. Elmore

STATEMENT OF OPPOSITION TO SEC. 1  
OF A. B. 156 (COMMITTEE BILL, BY  
MEMBER FRIEDMAN) AND OTHER CHANGES  
IMPOSING TIME CUT-OFF BASED ON DATE  
OF DEATH OF OBLIGOR OR POTENTIAL DE-  
PENDANT(C. C. P. 353 et al.)

By

GARRETT H. KLMORE, MEMBER CALIFORNIA  
STATE BAR, P.O. BOX 2100-155, SO.LAKE  
PAHOE, CA. 95705 (TEL702- 883-9582 Nv,)

Reason For This Opposition

The proposal of the California Law Revision Commission as set forth in Sec. 1 (amending C. C. P. 353 (statute of limitations))and with two related changes imposing the same time limit upon two relief provisions, seeks to impose a "due on death" provision in all contracts made by an individual during lifetime.

The need for doing this is said to be to promote expedition in estates processing and to provide for a "secure" title to the assets left by lack of will or by will to heirs or beneficiaries. That is, there will be "time cut-offs" of a standard nature as to (1) suits that may be brought against the personal representative, heirs and will beneficiaries who take over or occupy claimed assets of the decedent without bothering to probate the estate and notify creditors; (2) certain remedies offered the non notified creditor or the creditor (also non notified) who is unaware of death and probate administration or accrual of his or her cause of action.

The remedies that normally would come into play are said to be

Note. Based on A. B. 156 as amended Feb. 17, 1989. It is recognized this Opposition is or may be academic. A. B. 156 is on consent in the second house as of March 31, 1989.

prohibited to court order if the magic time limit "One year from date of death" has expired.

As to the reason for compelling civil suits of "every type" to be brought generally within one year after death, it is observed that this appears an appropriate period to afford repose and provide a reasonable time for claims that soon would become stale. See Tentative Recommendation, p.3 and fn.10 therein.

The proposal does not deal with the fact that normally a statute of limitations comes into play after a cause of action has accrued. Though it is not clear the seeming intent is to declare or encourage an court interprétation that this short statute of limitation is strictly one of "repose" that starts with an event, i. e., death and runs for one year. It is unclear whether or how it could be extended by conduct, acknowledgement and soon (as in the case of an "ordinary" (not "repose") statute of limitations).

It would be a mistake to think that the comparatively brief proposal and the important proposed Official Comments (See Commission's Tentative Recommendation, Notice to Creditors, October 1988) affects only a few isolated cases.

The creditor's remedy, in practical settings, ultimately may require access to the substantial assets in a lifetime trust; the assets left subject to probate in planning are often moderate or small.

Finally, there seems to be a large misconception about "creditor" and "creditor" claims. Sec. 1 of A. B. 156 entirely overlooks that prior Commission work in this field has related to what are strictly "creditor claims." Now, A. B. 156 proposed

C. C. P. 353 amendments( Sec. 1) carry the proposed Official Comment that sub. (b) imposes a new statute of limitations on "all actions against a decedent"- not just against the personal representative or another person such as a distributee. How will this apply to actions to recover personal property of plaintiff left in the possession of the decedent, to actions to declare a decedent in possession of property (under or without claim of ownership) a trespasser and to oust the successors, to actions to deliver stock under stock option contract, to automobile purchase contracts which are liens or have reserved title.

#### Grounds of Opposition

1. The C. C. P. amendments, if intended to apply broadly to to "all actions" violates the double subject rule. Though adjustments in C. C. P. 353 may be appropriate to reflect changes in the Probate Code itself as to a "creditor claim," as an incidental or conforming change, a bill relating to a new statute of limitations cutting across the whole sweep of statutes of limitations (most based upon accrual of a cause of action) and intended to be a statute of "repose" for decedent and his/her heirs, beneficiaries, requires a separate bill. A self executing statute should not be in a probate bill.
2. A short statute of repose, such a one year from death, denies a creditor having an oral or written contract claim not in default at date of death due process of law, when no vehicle is provided for an executor or administrator (other than the creditor to obtain appointment). Though one-year was mentioned in the Tulsa case, the actual examples in the court's opinion for a non probate fact situation were 3 to 5 years. It must be judicially noticed that creditors often have a difficult time in obtaining information from the debtor's heirs/beneficiaries, locating assets, determining venue. If a creditor must obtain a personal representative, more problems arise under current law, with onerous duties now imposed.
3. The proposed statute violates due process of law because it arbitrarily denies a contract creditor of meaningful

access to the court and of an opportunity to have the claim or cause of action heard on the merits.

A subsidiary point: If, as the proposal contemplates, a creditor must apply for letters under the next to last rank given the creditor, when the heirs/beneficiaries have not probated the estate promptly, a conflict of interest situation is created. Under present statutes, assuming the court would make the appointment, the creditor's claim would go a special route, i. e., to the judge who would decide; if the creditor desires to sue on a rejected claim, the judge would appoint an attorney to defend the suit; if the creditor lost the suit, special provisions for this situation could make the creditor liable for an award of litigation expense (broadly defined). This arises when a creditor to protect against the statute of repose is forced to apply for administration. It should permit a longer period.

4. The proposal is unconstitutional because it denies a contract creditor having an unmatured claim the same remedy afforded other creditors when probate has been promptly commenced by the heirs/beneficiaries, it being assumed no probate was promptly commenced by others in the case of such aggrieved creditors; difference in remedies is not justified by any valid state interest when the short time span, one year from death, is involved. (denial of equal protection of the law).
5. The proposal is unconstitutional because it arbitrarily forbids the court to grant relief on a late claim simply because of an arbitrary period of time and regardless of the time of starting and status of the estate.
6. The proposal is unconstitutional in that it contains an arbitrary limitation upon the right to ~~the~~ <sup>the</sup> distribute ~~the~~ <sup>the</sup> assets (time lapse not related to distribution).

7. The proposed Official Comments should be revised to reflect that the superior court in which the action is pending has inherent power and that courts in other states have recognized the court's authority to grant extensions and to relieve from default for good cause; moreover, it appears unsettled in California whether the statute of limitations (ordinary) or (repose) can run when there is no personal representative and no one to sue,
8. Sec. 1 is unreasonable in that it permits the heirs/beneficiaries to refrain from opening a probate for 10 months, for example, and thereby gain a defense to outstanding obligations if the C. C. P. special "statute of limitations" is effective. The "late claim" relief would be inoperative, practically, likewise the new statutory right of action against distributees would be academic, as no distribution would be made before the lapse of one year from death.
9. Requiring a contract creditor to take the steps outlined in the Commission Recommendation involves advances or contractual arrangements by the creditor for which the creditor will probably not have reimbursement; no additional allowance on his claim is authorized. The Commission's Official Comment relying on this remedy should be drastically revised to reflect the facts of life. The right to administer may be offered as a legal reason for the form of law now going through the legislature but it is not an alternative most persons will be comfortable with. A longer time than 1 year is needed.

Grounds of opposition (continued) Form

10. Effectiveness of Sub. (b), Sec. 353, changes.

The use of CCP 353 to accomplish an "across the board" "repose" type of statute applicable to all persons dying is unusual. Generally law revisors place repose or statute of limitations changes in the title, or division, where it most logically fits. Then generally there is a "flag" section to direct the reader to the "exception" although this may not be needed.

The text of sub. (b) can be construed merely as an "extension" statute; that is, one year after the date of death may in fact be an extension in the case of one year after accrual causes of action.

The proposed amendments themselves do not declare what is being provided for; rather, by a process of explanation, the proposed Official Comment amplifies the statutory change. However, in a cryptic, drafter style wording.

Reliance upon Official Comments can be dangerous; moreover, this particular set of amendments covers a very important change without providing any procedural detail of straight forward statement of intended scope.

Seemingly, an appellate court could hold that the wording is insufficient to accomplish what the Commission thinks it is accomplishing.

11. Vagueness of statutory wording. The death is of a person "against whom an action may be brought." What type of action? Literally any type of action including a special proceeding? Reading literally as "every type" leads to absurd legislation.

Statutes of limitation should be drawn with reasonable precision. The present proposed amendments do not meet that test. Unless clarified by authoritative court decision (such as a California Supreme Court decision) the present CCP 353 amendments and proposed Official Comment will remain as a "mountain of uncertainties" that will be used in the future on many occasions to deny just causes of action and claims.

At the minimum, the proposed Official Comment should be cleaned up and the statutory period that runs from death should be made two years unless the heirs/beneficiaries or other persons commence probate within 120 days of death.

---  
In the interests of due and proper administration of justice, it is submitted that no cause or pressure or wishful thinking by estate planners, consumer, senior citizen advocates, or haste to get a law revision project over with, or other reason should prevent the Legislature from insisting that legislative changes be placed in proper place and form, and that they be reasonably fair and consistent with due process.

I would ask the Judiciary Committee Leaders, Chair Plant of the Commission, among others, to monitor the changes if A. B. 156 becomes law and lend their influence to its "clean up."

Respectfully submitted,

*Garrett H. Elmore*  
Garrett H. Elmore

March 31, 1989