

Memorandum 89-48

Subject: Study L-1025 -- Notice to Creditors (Alternate Approaches to
Tulsa Problem)

BACKGROUND

The Commission's recommendation to cure the notice to creditors due process problem identified in *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1980), is attached to this memorandum as Exhibit 1. In brief, the recommendation continues the existing requirement that the personal representative both publish notice and give actual notice to known creditors, but does not impose any additional duty on the personal representative to search for and notify unknown but reasonably ascertainable creditors. Instead, known and reasonably ascertainable creditors who do not receive actual notice of probate are given the right to make a late claim or, if the estate has been distributed, are given the right to recover from distributees. These rights of the creditor are subject to an overriding limitation period that runs one year after the decedent's death. An unnotified creditor would also have a separate cause of action against the personal representative for a bad faith failure to give the required notice.

This recommendation was embodied in AB 156, authored by Assembly Member Friedman. The measure was approved by the Assembly but not by the Senate. The Senate Judiciary Committee, after a hearing at which the Commission's recommendation was strongly supported by the State Bar, removed the recommendation from AB 156 for further study at the request of Senator Stirling. Senator Stirling's primary concern is the one year statute of limitations running from the death of the decedent. He believes one year is simply too short and three years would be a more appropriate period. The Committee did not appear to

want to prefer beneficiaries over creditors. Nor did the Committee appear concerned that a longer limitation period might add delay and complexity to probate proceedings.

The Committee left open the possibility that AB 156 could be put into a conference committee before the bill goes to the Governor, if a satisfactory accommodation can be reached with Senator Stirling. The Commission's staff has informed Assembly Member Friedman that the Commission's recommendation is an integrated whole that is not susceptible to easy modification, and that the Commission will not be able to consider this matter again before its July meeting. Accordingly, we have advised Assembly Member Friedman not to hold up progress on AB 156 at this time, and have deleted the interrelated conforming changes that were in AB 158. If the Commission is able to develop an acceptable alternate proposal this session, it could be amended into AB 158.

ALTERNATE APPROACHES

The Commission's staff has given some thought to alternate approaches to the Tulsa problem. We see a number of different approaches that appear feasible. These are (1) resubmit the same recommendation, (2) resubmit the same recommendation but with a longer statute of limitations, (3) resubmit the same recommendation but make it applicable only to liabilities incurred after its operative date, (4) impose a search and notify duty on the personal representative, (5) do nothing, and (6) do a combination of the foregoing. Each approach has variations that could be considered. The approaches, their variations, and their advantages and disadvantages are summarized below.

Resubmit the Same Recommendation

The existing recommendation follows the reasoning in Tulsa that known and reasonably ascertainable creditors may not be cut off by a short-term claim requirement without having received actual notice. If known and reasonably ascertainable creditors cannot be cut off by a short-term claim period without having received actual notice, what can they be cut off by? The court suggests that a long-term self-executing

statute of limitations would be permissible, and notes that some states have such statutes running from one to five years after the decedent's death.

The advantage of the self-executing one-year statute of limitations is it does not disrupt the ordinary probate process. The personal representative learns of creditors in the ordinary course of administration and pays them. In the rare case where a creditor is somehow missed, the creditor has a limited remedy against the estate or distributees (or against a bad faith personal representative). But this remedy would not cause probate proceedings to be held open or prolonged.

Senator Stirling feels that one year is too short. However, it was explained at the hearing that even though the remedy against the estate or distributees would be lost after one year, other remedies could be available to the creditor. If the personal representative's failure to give notice is in bad faith, for example, the creditor would have a remedy against the personal representative. And whether or not the creditor has a remedy against the personal representative, the creditor may have a fund available to pay the debt in cases where the debt is secured or in cases where the decedent's liability is covered by insurance. The creditor's remedy would not be limited by the one-year statute in either of these cases.

Can an additional fund somehow be made available for omitted creditors? An obvious source is the bond of the personal representative, which remains available until four years after discharge of the personal representative. What would be the impact on bond premiums if the bond were to be an available source for omitted creditors? The bar representatives have informed us that it is the extraordinarily rare case where a legitimate creditor is omitted; lawyers with 20 or 30 years practice experience have informed us that they've only encountered one or two such cases in their careers. If that is the situation, then claims on the bond should be quite few, and the increase in premiums would be marginal. Of course, if this were to be the creditor's remedy, a bond would be required in every case

notwithstanding the testator's attempt to waive bond, and the general expense of probate would be increased. In addition, this would not be a solution in an unprobated estate.

An alternative approach to creating additional remedies for a creditor is to focus on the adequacy of the one-year statute for most creditors. After all, the Judiciary Committee's concern ultimately is that this issue should get further study. The Commission can come back with a more detailed report examining each type of claim that could be affected by the one year statute of limitations and show that one year is basically a sound period. After all, most statutes will already have been running for some length of time at the decedent's death, and for many claims the one year period will represent an extension rather than a reduction.

There are major exceptions to this generalization, however. Tort causes of action, for example, may start to run at the moment of the decedent's death in cases where the decedent was involved in an accident that resulted in both the decedent's death and injury to the claimant. This will nor ordinarily be a problem, though, since the general statute of limitations is one year, and in addition there will also be insurance coverage for the liability in the ordinary case.

The staff does not believe it will be a fruitful task to attempt to show that one year would be fair in every case. There are innumerable causes of action that would have to be analyzed, and whether one year is adequate in each case is a question of judgment. The Commission has taken the position that one year is an adequate length of time for a person to discover the decedent's death and make a claim, but others may not feel the same. The specific point that doomed the Commission's recommendation in the Senate Committee, for example, is treatment of professional negligence claims. Some members of the committee were skeptical that one year is sufficient time, and viewed this recommendation as simply a case of lawyers feathering their own nests. Other committee members were satisfied that the insurance fund would take care of most problems, but were concerned about uninsured liability. And yet other committee members had the opposite concern, that insurance rates for professional negligence are already too high, and longer statutes of limitation against insurance funds

should not be encouraged. With this sort of diversity of views, it appears to the staff hopeless to attempt to convince the committee that one year is a satisfactory period for all causes of action.

In addition, the staff has more serious concerns that were not raised at the committee hearing. The staff has raised these before with the Commission, and Mr. Elmore has also written to the Commission about them. One concern is that one year is not adequate where the creditor is not even aware of the existence of the claim during the one year period. In the professional negligence situation, for example, a doctor's or lawyer's malpractice may not come to light until several years after the doctor or lawyer has performed services. That is why the statutes of limitations for doctors and lawyers are extended to three and four years after the date the wrongful act or omission occurs. This criticism can be met with the response that in life not every injury is compensated, and that one year after death will generally leave the injured person in a better position than four months after publication of notice, as in existing law. But then, existing law is unconstitutional.

Perhaps the most serious concern of the staff (as well as of Mr. Elmore) is that the one year limitation period of necessity applies across the board to all claims against the decedent, whether or not a probate proceeding is commenced within the one year period. This leaves open the increasingly common situation that all or substantially all of the decedent's assets pass outside of probate, in a trust or other nonprobate transfer, and no notice of death is ever published or actual notice is ever given to a creditor by the trustee or other nonprobate beneficiary. The creditor itself could start a probate within the year, if the creditor learns of the decedent's death, but this is a real burden to place on a person who simply wants the just debts paid. Of course many nonprobate transfers pass free of creditor claims anyway (e.g., joint tenancy, insurance proceeds). This is not true for inter vivos trusts, however, which offer a real potential for creditor avoidance under the one year scheme.

There is a need for an overall approach to creditor claims against nonprobate assets, a project the Commission has been interested in for some time. The Commission deferred work on this project while a

special State Bar committee was active on it. The Bar committee produced a claim statute for trusts that parallels the probate claim statute, but legislation was not enacted because of unrelated political problems involving the legislator who happened to be selected to carry that legislation. Apparently the Bar committee has suspended further work on this matter in anticipation of enactment of the one year statute of limitations, which would have taken care of the problem for trusts.

Resubmit the Same Recommendation with a Longer Statute of Limitations

Would it be feasible to modify the basic recommendation of the Commission to provide a three-year, rather than a one-year, statute of limitations as suggested by Senator Stirling? The main concern that has been expressed to the Commission is that this would cause estates to be held open for three years or, alternatively, that a contingency fund would have to be established in case of late arriving claims. The staff is not convinced that this would be the result if a clear immunity were provided for the personal representative on distribution and discharge, and the creditor were limited to a remedy against distributees.

Would it be unfair to distributees to subject them to potential claims for up to three years? The argument is that they have received a windfall from the death of the decedent, whereas the creditor has a just debt, and the equities favor the creditor. Distributees would have to be warned that they are potentially liable for the full value of property distributed to them for up to three years, and they should act accordingly. Would this cause undue hardship to distributees? What about the person who spends the money and then is impoverished by a large judgment on a liability of the decedent?

In some cases it is arguable that the distribution is not a windfall, but rightful support of surviving spouse and minor children who were dependent on the decedent. A possible scenario in this situation is that the estate would be kept open for three years for the purpose of paying a family allowance to the dependents and allowing the dependents to consume exempt assets, and once the three year period has elapsed, distribution would be made outright.

Resubmit the Same Recommendation But Make it Prospective Only

Part of the unfairness of a cutoff of creditors one year after the decedent's death is that creditors are not necessarily alerted to the fact that their debts are now subject to the new requirement and if they want to be safe they should check up on their debtor's health periodically and should only become creditors if they recognize that there are limits on recovering from a deceased debtor. This concern could be addressed by making the one-year statute of limitations apply only to liabilities incurred after the operative date of the statute. Then there would be time for creditors to become aware of the limitations on recovery, and they would be able to act in full knowledge of the consequences.

Whether this logic would satisfy the concerned members of the Senate Judiciary Committee is debatable.

Impose a Search and Notify Duty on Personal Representative

An approach that the Commission has considered before and rejected should also be reviewed in light of the legislative action on the Commission's recommendation. That is to keep the existing probate scheme of publishing notice and notifying known creditors, with a four-month claim period, but to make the existing scheme consistent with Tulsa by also requiring the personal representative to search for and notify reasonably ascertainable creditors.

The argument against this scheme is that a personal representative will never be sure of the exact scope of the required search, and will never be free of potential liability to undiscovered creditors who claim that they were "reasonably ascertainable". The concern is that because of the potential liability exposure it will be difficult to get persons to serve as personal representatives. Moreover, those who are willing to serve will, for their own protection, have to make extended and costly searches that will simply add to the expense and delay of probate without real advantage in all but the unusual case. Presumably every personal representative would want to be bonded, and bonding costs would also rise, although as discussed above this may not be overly significant.

Is there any way to limit the potential problems a search requirement could create? The Tulsa court itself expressly disavowed any intent to require "impracticable and extended searches in the name of due process....All that the executor or executrix need do is make 'reasonably diligent efforts' to uncover the identities of creditors....Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in Mullane, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims." 108 S. Ct. at 1347 (citations omitted).

One obvious statutory response is to define the search requirement, e.g.: "The personal representative shall make a search of the books and records found in the decedent's home, office, and safe deposit box, and shall make inquiry of those relatives, acquaintances, business associates, and professional advisers most likely to be familiar with the decedent's affairs." The problem with this approach is its lack of flexibility--some cases may call for a thorough search, other cases for a minimal search, depending on the circumstances of the decedent and the relation of the personal representative to the decedent. Also, there is no guarantee that the definition would be constitutional, although the staff suspects it would be, under the language of the Tulsa case.

A more flexible approach to limit the problems that a search requirement could create would be to have the personal representative report to the court the actions taken and the court in its approval of the final account would make a finding that, based on the factual representations of the personal representative, all reasonably ascertainable creditors have been found. This could be a fairly routine process that could give protection to the personal representative against open-ended liability exposure.

This scheme has been advocated to the Commission by the Beverly Hills Bar Association, which states:

1. Concepts of fairness suggest that a search should be made for reasonably ascertainable creditors. This procedure is thus more likely to meet due process requirements.

2. The facts of the search can serve as the basis for a finding by the Court that all reasonably ascertainable creditors had been found. Based upon that finding, the Court could order the personal representative released from personal liability.

A similar scheme, for example, makes probate proceedings binding on unlocated heirs-at-law. Unlocated heirs-at-law need not be given actual notice. Pursuant to PC Section 1220, notice is mailed care of the county clerk.

Under CCP Section 473, a non-noticed creditor could still move to set aside the order upon a showing of excusable neglect, mistake or fraud.

3. As set forth in the Tulsa case, the statute should state that notice need not be given, "to those with mere 'conjectural' claims."

The Beverly Hills Bar Association also notes anecdotally that, during this period when there is no statutory solution to Tulsa, good practice has required lawyers to instruct personal representatives to conduct a reasonable search to determine all reasonably ascertainable creditors. It will thus be the case that, by the time any legislation is enacted on this subject, careful practitioners will have already instituted a system to determine reasonably ascertainable creditors, in order to protect themselves under the holding of the Tulsa case. "A legislative scheme, as we suggest, would be consistent with current prudent practice."

A variation on this theme would be not to statutorily require a search for creditors, but simply to advise the personal representative in the Statement of Duties and Liabilities (Probate Code § 8404) that a search should be made for reasonably ascertainable creditors, for the personal representative's own protection. This would encourage the practice of making the search without imposing an undefined duty on the personal representative that could result in a personal liability.

Do Nothing

Suppose we were to do nothing further in response to the Tulsa case. The statutory law would then be that notice is published and the personal representative is required to notify known creditors. All creditors would then have to file claims within the four month claim period. Assuming an unnotified creditor would not qualify for late claim treatment under Probate Code Section 9103, what are the creditor's remedies? To have a Tulsa claim the creditor would need to make a showing that the claim was reasonably ascertainable and not merely conjectural. Presumably, if that requirement were satisfied, a court would permit the creditor to make a late claim in the probate

proceeding. If distribution had already been made and the personal representative discharged, what would be the remedy? Section 11429 protects other creditors and distributees from having to make contribution, but this does not preclude "recovery against the personal representative personally or on the bond, if any." However, an order settling the personal representative's accounts "is conclusive against all interested persons." Section 11006. And at close of administration the court makes "an order discharging the personal representative from all liability incurred thereafter." Section 12250. The statutes appear to provide good protection, so the court would have to create a constitutional remedy of some sort. Probably the remedy would be against distributees, but this is not necessarily the case. It should be noted that the statute of limitations for liability on a personal representative's bond is four years after discharge. Section 8488. However, it would be hard to argue that there should be liability on the bond since the personal representative will have faithfully executed the duties of the office according to law.

The argument in favor of doing nothing with existing statutes is that it is an extremely rare case where the creditor does not get paid, and it makes little sense to mess up the whole probate system to accommodate the rare case. If the courts are going to give creditors nonstatutory rights, let the courts devise remedies to go along with those rights for the unusual situation where the rights need enforcement. If it is true that an unpaid creditor almost never shows up, then practice will be largely unaffected; probably the personal representative, when making distribution, will attach a note that there is a remote possibility that the "final" distribution is not necessarily final and that the distributee may be called back to make a refund in an unusual case where there was an unknown but reasonably ascertainable creditor whose claim was not merely conjectural.

Close to doing nothing, but possibly somewhat more acceptable, would be to do the minimum that a court would do. The late claim statute would be amended to permit late claims by an unknown but reasonably ascertainable creditor whose claim was not merely

conjectural, and to provide that distributees are liable to such creditors if the statute of limitations applicable to the creditor's claim has not yet expired.

Combination of Approaches

Finally, a combination of features from these different approaches could be used. For example, a minimalist combination could consist of advice to the personal representative that a search should be made, together with a warning to the distributees about potential liability. A maximalist approach could combine distributee liability for three years with liability on the bond of the personal representative, together with a claim procedure for trusts.

CONCLUSION

To summarize the alternatives outlined in this memorandum, the following options appear feasible. Each has its advantages and disadvantages.

(1) The Commission could resubmit the same recommendation to the legislature. This could be supplemented by a provision that the bond of the personal representative would be a fund against which unnotified creditors could recover. It could also be supplemented by a trust claim procedure to cover the typical unprobated estate situation.

(2) The basic recommendation could be resubmitted with a three-year, rather than a one-year, statute of limitations. This could be supplemented by a provision that any recovery by omitted creditors is against distributees and not against the personal representative, and a warning to distributees that they may be liable for the value of the property for up to three years.

(3) The basic recommendation could be resubmitted but made prospective only, as to liabilities incurred after the operative date of the statute.

(4) A duty could be imposed on the creditor to make a reasonably diligent search and notify any creditors whose claims appear more than merely conjectural. The statute could define the scope of the search required, or the court could make a finding that a reasonably diligent

search has been made. A much softer approach would be simply to advise the personal representative that a search should be made, without imposing a duty.

(5) The Commission could do nothing, on the basis of assertions by bar representatives that the omitted creditor is a rare creature. The court would have to devise remedies for a reasonably ascertainable creditor whose claim is more than conjectural, where the estate is distributed without the creditor getting paid. A variation on this approach would be to codify the result a court would most likely devise, thus saving the need to litigate the matter--the creditor would be required to prove reasonable ascertainability and more than mere conjecturality, and on so doing would be able to make a late claim or sue distributees, subject to whatever statute of limitations applies to the creditor; distributees probably also should be warned about the potential liability.

(6) A combination of some of the above approaches could be used, with either more or less drastic effect depending on the Commission's sense of the magnitude of the problem.

What is the staff's recommendation? The staff's recommendation now, as in the past, is number (4)--to require the personal representative to make a search for and notify reasonably ascertainable creditors. The staff believes this approach is the fairest, besides being the most clearly constitutional. The staff believes it will have a minimal impact on standard probate processes, and if combined with a court finding that a reasonable search has been made, would not result in any undue burdens on personal representatives. The staff also believes that the general problem of creditor rights in nonprobate assets needs study, but would not attempt to make this part of the Tulsa solution.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

NOTICE TO CREDITORS

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STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Notice to Creditors
in Probate Proceedings**

January 1989

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Notice to Creditors in Probate Proceedings*, 20 Cal. L. Revision Comm'n Reports XXXX (1990)

NOTICE TO CREDITORS

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STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

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January 12, 1989

To: The Honorable George Deukmejian
Governor of California
and
The Legislature of California

This recommendation deals with due process issues raised in the United States Supreme Court case of *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988). It provides creditors who did not receive actual notice of probate within the claim-filing period an opportunity to file a late claim or, if the estate has already been distributed, a right to recover from distributees. These rights of the creditor are subject to an overriding statute of limitations that runs one year from the date of the decedent's death.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Forrest A. Plant
Chairperson

RECOMMENDATION

Effective July 1, 1988, California law requires a personal representative in decedent estate administration proceedings to mail actual notice of administration to known creditors of the decedent,¹ in addition to publication of notice to unknown creditors.² All creditors, known and unknown, thereupon have four months in which to file a claim against the estate.³

The requirement of actual notice to known creditors was enacted on recommendation of the Law Revision Commission.⁴ The former law was inequitable and of questionable constitutionality. Developments in the United States Supreme Court and in state courts had raised the likelihood that the former scheme violated due process of law.⁵

The United States Supreme Court has now ruled on this issue in the case of *Tulsa Professional Collection Services, Inc. v. Pope*.⁶ That case holds that a state cannot impose a two-month claim filing requirement on known or reasonably ascertainable creditors merely by publication of notice. Actual notice is required for a short-term claim filing requirement.

The Supreme Court cites the new California statute in support of the proposition that a few states already provide for actual notice in connection with short nonclaim statutes. However, it is clear from the rationale of the opinion that the new California statute does not

1. Prob. Code §§ 9050-9054; enacted by 1987 Cal. Stat. ch. 923, § 93.

2. Prob. Code § 333.

3. Probate Code Section 9100 requires a creditor to file a claim within the later of four months after issuance of letters to a general personal representative or, if notice is mailed as required, within 30 days after the notice is given.

4. *Recommendation Relating to Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988).

5. 19 Cal. L. Revision Comm'n Reports at 303.

6. 108 S. Ct. 1340 (1988).

satisfy the announced constitutional standards in that it purports to cut off unnotified but "reasonably ascertainable" creditors with a short claim filing requirement.

To bring the California statute into conformity with constitutional requirements, the Law Revision Commission further recommends that, notwithstanding the four-month claim filing requirement, a known or reasonably ascertainable creditor who does not have actual knowledge of the administration of the estate during the four-month claim period should be permitted to petition for leave to file a late claim.⁷ If the estate has already been distributed when the known or reasonably ascertainable creditor acquires actual knowledge of the administration proceeding, the creditor would have recourse against distributees of the estate.⁸ The personal representative would be protected from liability for the claim unless the personal representative acts in bad faith in failing to notify known creditors.⁹

Although known or reasonably ascertainable creditors who have no knowledge of administration would be given remedies beyond the four month claim period, these remedies must be exercised within one year after the decedent's death. The Commission believes that a new long term statute of limitations of one year

7. Existing California law already authorizes such a late claim petition, but only for a creditor who was out of the state during the four month claim period and whose claim is on a nonbusiness debt. Prob. Code § 9103. Legislation enacted in the 1988 legislative session removes the out-of-state limitation effective July 1, 1989. See 1988 Cal. Stat. ch. 1199, § 84.5. The present recommendation would remove the business claim limitation.

8. This would be a limited exception to the general rule that an omitted creditor has no right to require contribution from creditors who are paid or from distributees. Prob. Code § 11429. Under the Commission's proposal, the liability of a distributee would be joint and several with other distributees, and liability would be based on abatement principles. See Prob. Code §§ 21400-21406 (abatement) [1988 Cal. Stat. ch. 1199, § 108].

9. Cf. Prob. Code § 9053 (immunity of personal representative).

commencing with the decedent's death¹⁰ will best effectuate the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor. While the Supreme Court declined to rule on the validity of long term statutes of limitation that run from one to five years from the date of death, a one-year statute is believed to be constitutional since it is self-executing, it allows a reasonable time for the creditor to discover the decedent's death, and it is an appropriate period to afford repose and provide a reasonable cutoff for claims that soon would become stale.¹¹

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure.

An act to amend Section 353 of the Code of Civil Procedure, and to amend Sections 551, 9053, 9103, 9201, and 11429 of, and add Section 9392 to, the Probate Code, relating to creditors of a decedent, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Code of Civil Procedure § 353 (amended). Statute of limitations

SECTION 1. Section 353 of the Code of Civil Procedure, as amended by Chapter 1199 of the Statutes of 1988, is amended to read:

10. It should be noted that such an absolute one-year statute of limitations creates the potential for the decedent's beneficiaries to wait for one year after death in order to bar creditor claims, and then proceed to probate the estate and distribute assets with impunity. However, if the creditor is concerned that the decedent's beneficiaries may fail to commence probate within the one-year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment).

11. See, e.g., Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. Rev. 659, 673-77 (1985).

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 person's death.

(b) Except as provided in ~~subdivision (c)~~ subdivisions (c) and (d), 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, *and the time otherwise limited for the commencement of the action does not apply.*

(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.

(d) If a person against whom an action may be brought died on or after July 1, 1988, and before the operative date of the 1989 amendment of this section, 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 within one year after the operative date of the 1989 amendment of this section, and the time otherwise limited for the commencement of the action does not apply.

Comment. Subdivision (b) of Section 353 is amended to impose a new statute of limitations on all actions against a decedent on which the statute of limitations otherwise applicable has not run at the time of death. The new statute is one year after the death of the decedent, regardless of whether the statute otherwise applicable would have expired before or after the one year period.

If a general personal representative is appointed during the one year period, the personal representative must notify known creditors, and the filing of a claim tolls the statute. Prob. Code §§ 9050 (notice required), 9352 (tolling of statute of limitations). If the creditor is concerned that the decedent's beneficiaries may not have a general personal representative appointed during the one year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment); see also Prob. Code § 48 ("interested person" defined).

The reference to the decedent's "representatives" is also deleted from subdivision (b). The reference could be read to imply that the one year limitation is only applicable in actions against the decedent's personal representative. However, the one year statute of limitations is intended to apply in any action on a debt of the decedent, whether against the personal representative under Probate Code Sections 9350 to 9354 (claim on cause of action), or against another person, such as a distributee under Probate Code Section 9392 (liability of distributee), a person who takes the decedent's property and is liable for the decedent's debts under Sections 13109 (affidavit procedure for collection or transfer of personal property), 13156 (court order determining succession to real property), 13204 (affidavit procedure for real property of small value), and 13554 (passage of property to surviving spouse without administration), or a trustee.

Probate Code § 551 (amended). Statute of limitations

SEC. 2. Section 551 of the Probate Code, as added by Chapter 1199 of the Statutes of 1988, is amended to read:

551. *Notwithstanding Section 353 of the Code of Civil Procedure, 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 is amended to make clear that the general one-year limitation period for commencement of an action on a cause of action against a decedent under Code of Civil Procedure Section 353 does not apply to an action under this chapter.

Probate Code § 9053 (amended). Immunity of personal representative

SEC. 3. Section 9053 of the Probate Code is amended to read:

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

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

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

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

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

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

Probate Code § 9103 (amended). Late claims

SEC. 4. Section 9103 of the Probate Code, as amended by Chapter 1199 of the Statutes of 1988, 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 the creditor establishes that either of the following conditions ~~are~~ *is* satisfied:

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate ~~within more than~~ 15 days before expiration of the time provided in Section 9100, and the *creditor's* petition was filed within 30 days after either the creditor or the creditor's attorney had actual knowledge of the administration whichever occurred first.

(2) Neither the creditor nor the attorney representing the creditor in the matter had knowledge of the existence of the claim ~~within more than~~ 15 days before expiration of the time provided in Section 9100, and the *creditor's* petition was filed within 30 days after either the creditor or the creditor's attorney had knowledge of the existence of the claim whichever occurred first.

~~(b) This section applies only to a claim that 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.~~

(e) (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 ~~time letters are first issued to a general personal representative~~ *date of the decedent's death.*

~~(d)~~ (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 *creditor's* 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.

(e) (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. *The Except to the extent provided in Section 9392 and subject to Section 9053, the personal representative, designee distributee, or payee is not liable on account of the prior distribution or payment.*

Comment. Former subdivision (b) of Section 9103, limiting the types of claims eligible for late claim treatment, is deleted. It should be noted that a creditor who is omitted because the creditor had no knowledge of the administration is not limited to the remedy provided in this section. If assets have been distributed, a remedy may be available against distributees under Section 9392 (liability of distributee). If the creditor can establish that the lack of knowledge is a result of the personal representative's bad

faith failure to notify known creditors under Chapter 2 (commencing with Section 9050) (notice to creditors), recovery may be available against the personal representative personally or on the bond, if any. See Section 11429 (unpaid creditor). See also Section 9053 (immunity of personal representative).

Paragraph (b)(2) is revised to make clear that a late claim should not be permitted if the statute of limitations has run on the claim. This is the consequence of the rule stated in Section 9253 that a claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge. Under Code of Civil Procedure Section 353, the statute of limitations runs one year after the decedent's death.

Probate Code § 9201 (amended). Claims governed by special statutes

SEC. 5. Section 9201 of the Probate Code is amended to read:

9201. (a) Notwithstanding any other ~~provision of this part statute~~, if a claim of a public entity arises under a law, act, or code listed in subdivision (b):

(1) The public entity may use a form as is necessary to effectively administer the law, act, or code. Where appropriate, the form may require the decedent's social security number, if known.

(2) The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code.

(b)

Law, Act, or Code
Sales and Use Tax Law
(commencing with Section
6001 of the Revenue
and Taxation Code)

Applicable Section
Section 6487.1 of the
Revenue and
Taxation Code

Bradley-Burns Uniform Local Sales and Use Tax Law (commencing with Section 7200 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Transactions and Use Tax Law (commencing with Section 7251 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Motor Vehicle Fuel License Tax Law (commencing with Section 7301 of the Revenue and Taxation Code)	Section 7675.1 of the Revenue and Taxation Code
Use Fuel Tax Law (commencing with Section 8601 of the Revenue and Taxation Code)	Section 8782.1 of the Revenue and Taxation Code
Personal Income Tax Law (commencing with Section 17001 of the Revenue and Taxation Code)	Section 19266 of the Revenue and Taxation Code
Cigarette Tax Law (commencing with Section 30001 of the Revenue and Taxation Code)	Section 30207.1 of the Revenue and Taxation Code
Alcoholic Beverage Tax Law (commencing with Section 32001 of the Revenue and Taxation Code)	Section 32272.1 of the Revenue and Taxation Code

Unemployment Insurance Code	Section 1090 of the Unemployment Insurance Code
State Hospitals for the Mentally Disordered (commencing with Section 7200 of the Welfare and Institutions Code)	Section 7277.1 of the Welfare and Institutions Code
Medi-Cal Act (commencing with Section 14000 of the Welfare and Institutions Code)	Section 9202 of the Probate Code
Waxman-Duffy Prepaid Health Plan Act (commencing with Section 14200 of the Welfare and Institutions Code)	Section 9202 of the Probate Code

Comment. Subdivision (a) of Section 9201 is amended to make clear that it applies notwithstanding statutes located in places other than this part. Specifically, Section 9201 applies notwithstanding Code of Civil Procedure Section 353 (general statute of limitations running one year from the decedent's death).

Probate Code § 9392 (added). Liability of distributee

SEC. 6. Section 9392 is added to the Probate Code, to read:

9392. (a) Subject to subdivision (b), a person to whom property is distributed is personally liable for the claim of a creditor, without a claim first having been filed, if all of the following conditions are satisfied:

(1) The identity of the creditor was known to, or reasonably ascertainable by, a general personal representative within four months after the date letters were first issued to the personal representative, and the claim of the creditor was not merely conjectural.

(2) Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for final distribution of the property.

(3) The statute of limitations applicable to the claim under Section 353 of the Code of Civil Procedure has not expired at the time of commencement of an action under this section.

(b) Personal liability under this section is applicable only to the extent the claim of the creditor cannot be satisfied out of the estate of the decedent and is limited to the extent of the fair market value of the property on the date of the order for distribution, less the amount of any liens and encumbrances on the property at that time. Personal liability under this section is joint and several, based on the principles stated in Part 4 (commencing with Section 21400) of Division 11 (abatement) [1988 Cal. Stat. ch. 1199, § 108].

(c) Nothing in this section affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.

Comment. Section 9392 is new. It implements the rule of *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988), that the claim of a known or reasonably ascertainable creditor whose claim is not merely conjectural but who is not given actual notice of administration may not be cut off by a short claim

filing requirement. Section 9392 is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors.

A creditor who has knowledge of estate administration must file a claim or, if the claim filing period has expired, must petition for leave to file a late claim. See Sections 9100 (time for filing claims) and 9103 (late claims). This rule applies whether the creditor's knowledge is acquired through notification under Section 9050 (notice required), by virtue of publication under Section 8120 (publication required), or otherwise.

Under Section 9392, a creditor who has no knowledge of estate administration before an order is made for distribution of property has a remedy against distributees to the extent payment cannot be obtained from the estate. There is a one year statute of limitations, commencing with the date of the decedent's death, for an action under this section by the creditor. Code Civ. Proc. § 353. Since liability of distributees under this section is joint and several, a distributee may join, or seek contribution from, other distributees. Subdivision (c) is a specific application of the general purpose of this section to subject a distributee to personal liability but not to require rescission of a distribution already made.

An omitted creditor may also have a cause of action against a personal representative who in bad faith fails to give notice to a known creditor. See Sections 9053 (immunity of personal representative) and Section 11429 (unpaid creditor).

Probate Code § 11429 (amended). Unpaid creditor

SEC. 7. Section 11429 of the Probate Code is amended to read:

11429. (a) Where the accounts of the personal representative have been settled and an order made for the payment of debts and distribution of the estate, a creditor who is not paid, whether or not included in the order for payment, has no right to require contribution from creditors who are paid or from distributees, *except to the extent provided in Section 9392.*

(b) Nothing in this section precludes recovery against the personal representative personally or on the bond, if any, by a creditor who is not paid, *subject to Section 9053.*

Comment. Subdivision (a) of Section 11429 is amended to recognize the liability of distributees provided by Section 9392 (liability of distributee).

Subdivision (b) is amended to make specific reference to the statutory immunity of the personal representative for actions and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The reference to the specific immunity provided in Section 9053 should not be construed to limit the availability of any other applicable defenses of the personal representative.

Urgency Clause

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The existing California statute governing creditor claims in probate does not satisfy constitutional standards announced by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988). This act revises the California statute consistent with the standards announced by the court. In order to resolve the present confusion among lawyers, courts, personal representatives, creditors, and others involved in the probate process who must work with the existing unconstitutional statute, it is necessary that this act take effect immediately.