

First Supplement to Memorandum 90-28

Subject: Study L-3018 - Litigation Involving Decedent (Reimbursement of Insurance Defense Costs)

Where the decedent's liability to a third person is covered by insurance, the third person may proceed directly against the insurance company without filing a claim in probate. Prob. Code § 9390(a). In such a case, the insurance company may be entitled to reimbursement from the decedent under the terms of the insurance contract for such items as deductible amounts and defense costs. In order for the insurance company to recover reimbursement, the insurance company is not entitled to an offset from the liability to the third person; it must file a claim in probate, just as any other creditor of the estate. Prob. Code § 9390(c).

This statutory scheme is set out at Probate Code Section 9390:

9390. (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.

We have received a letter from Steven W. Murray of Encino (Exhibit 1) concerned that subdivision (c) implies that an insurance company is entitled to reimbursement of its costs of defense and attorney's fees even though not provided in the insurance contract. As Mr. Murray points out, this would be a major change in California law, since the

contract means the duty to defend at the insurance company's expense, absent a governing provision in the insurance contract. See, e.g., 6 B. Witkin, Summary of California Law, Torts §§ 1135-1142 (9th ed. 1988).

The staff believes Mr. Murray's concern is undue, since the statute seems clear on its face that reimbursement is only allowed where provided in the insurance contract. Nonetheless, since we are amending Section 9390 anyway in connection with an overhaul of statutes governing litigation involving a decedent, we could add a few words to reemphasize the intent of subdivision (c):

(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 for which the decedent is liable under the contract, 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. Subdivision (c) of Section 9390 is amended to make clear that the subdivision is not an independent authorization for reimbursement of the insurer's costs and attorney's fees, but only a procedure for recovering those costs and attorney's fees for which the decedent is liable under the contract. This amendment is a clarification of, and not a change in, existing law.

Mr. Murray offers an alternate suggestion--simply repeal subdivision (c), since it merely restates the general rule that a creditor seeking to recover from the decedent's estate must file a claim. The staff does not believe this is the best approach for two reasons. (1) The provision serves a useful purpose in making clear that reimbursement is to be taken out of the decedent's estate rather than out of the insurance recovery of the third party. (2) Repeal of the provision might be construed to imply that the insurance company is not entitled to any reimbursement from the estate.

The staff would include the clarification of subdivision (c) for comment as part of the tentative recommendation on litigation involving a decedent.

Respectfully submitted,

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April 3, 1990

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Attn: Nathaniel Sterling, Esq.

Re: Probate Code Section 9390(c)

Der Mr. Sterling:

As you will recall, I called you last week to inquire about the origin of subdivision (c) of Probate Code Section 9390. I specialize in insurance coverage litigation, but my original background was in probate. I was doing some research regarding actions against decedents having liability coverage, and noticed that subdivision (c) had been enacted in 1988, operative July 1, 1989.

My interest in this subject arises out of the fact that in California, insurers who defend insureds are not entitled to reimbursement of the cost of such defense. See Gray v. Zurich Ins. Co. (1966) 65 Cal.2d 263, 268 (liability policies promise to defend is a primary promise). Thus, breach of such duty requires the insurer to bear the cost of such defense. Id. at 278. (If insured is required to finance his own defense and then sue his insurer in a second suit, the basic purpose of purchasing insurance is defeated). The costs, expenses and attorneys fees incurred in so defending are recoverable by the insured. Id. at 281.

The language of subdivision (c), discussing "... reimbursement under the insurance contract for any liability of the decedent, including, but not limited to ... costs and attorneys fees ..." is not a codification of any California decision, but appears to be a substantial and radical change in existing law. On the other hand, if the section was designed to speak to provisions of insurance policies themselves - such as deductibles, or self-insured retentions, or co-insurance - that is a different story.

Since Section 9351 appears to apply to situations where the estate and its property may be liable for any cause of action, I suggest that it alone sufficiently apprises an insurer of the requirements to enforce a personal obligation of the decedent against the estate. No reason would thus exist for the existence of subdivision (c), because subdivisions (a) and (b) of Section 9390 govern actions by third party claimants against both the decedent's estate and his liability insurer.

Nathaniel Sterling, Esq.
April 3, 1990
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It thus appears that subdivision (c) is an anomaly, because it concerns claims by the insurer in statutes intended to regulate claims by third parties against a decedent and his insurer. Since the insurer who has claims against the decedent is no different from any other creditor of the decedent, it is my opinion that subdivision (c) is not representative of any existing element of California law, and that it misleadingly duplicates the other laws regulating parties who have claims against decedents (other than injured tort claimants).

Accordingly, whether it is for payment of a deductible, for an uninsured portion of co-insurance, or for a self-insured retention, insurers who have contract claims against insured decedents should be treated no differently from any other contractual creditor.

I suggest the Law Revision Commission reconsider the propriety and need for subdivision (c), and that it be deleted when the Probate Code is re-enacted.

If you have any questions, or comments, please contact me.

Very truly yours,

STEVEN W. HARRIS

SWM:msb