

Second Supplement to Memorandum 2008-3

Revision of No Contest Clause Statute (Public Comment)

The Commission has received three comments on the issues raised in Memorandum 2008-3. They are set out in the Exhibit as follows:

Exhibit p.

- Neil F. Horton, Executive Committee, Trusts and Estates Section of the State Bar (1/13/08)1
- Adam F. Streisand, Loeb & Loeb LLP, Los Angeles (1/13/08)2
- David C. Nelson, Loeb & Loeb LLP, Los Angeles (1/14/08)3

The staff has not had time to analyze the positions taken in these comments. They will be discussed orally at the meeting.

Respectfully submitted,

Brian Hebert
Executive Secretary

**EMAIL FROM NEIL F. HORTON, EXECUTIVE COMMITTEE OF THE
TRUSTS AND ESTATES SECTION OF THE STATE BAR
(JANUARY 13, 2008)**

To: "Brian Hebert"

Cc: [Texcom]

Subject: Texcom Meeting

Brian,

Texcom voted by 15 to 11, with four abstentions, in favor of a motion to support §21310 and §21311 as set out in Memorandum 2008-3 at pp. 3, 7, and 8. The motion assumed that declaratory relief will be available for the community property dispute. The main arguments in favor of the motion were that, even though Texcom had earlier rejected a similar proposal, CLRC has decided to allow forced elections for property disputes; that the proposal was narrower in scope than the alternative proposal; and that, despite its opposition to community property forced elections and to the use of declaratory relief, Texcom should compromise in order to support the other reforms that the proposed bill contains.

Texcom also voted by 19 to 9 in favor of a "sense of the committee" resolution that it prefers a probable cause exception, rather than the availability of declaratory relief, for the community property dispute.

A motion to make the proposed new law operate prospectively failed for lack of a second.

Several members want to substitute the less ambiguous "disposition of property" for "transfer of property" in the first sentences of §21311(a)(2) and (3). Please also note that, because of the addition of the community property forced election, the sections for the two kinds of creditor's claims should be renumbered (4) and (5).

I plan to attend Thursday's meeting and appreciate your telling me about when CLRC will consider the no contest clause.

Thank you for your patience and courtesy.

Neil F. Horton
Horton & Roberts LLP
1901 Harrison Street, Suite 1500
Oakland, CA 94612

**EMAIL FROM ADAM F. STREISAND, LOEB & LOEB LLP, LOS ANGELES
(JANUARY 13, 2008)**

To: "Neil Horton", "Brian Hebert"

Cc: [Texcom]

Subject: RE: Texcom Meeting

Please make that 14 to 12. Because the staff recommendation is to make the law retroactive with respect to irrevocable instruments, I oppose the proposal in it's entirety.

Adam F. Streisand
Loeb & Loeb LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, California 90067

**EMAIL FROM DAVID C. NELSON, LOEB & LOEB LLP, LOS ANGELES
(JANUARY 14, 2008)**

Brian:

Following are a few comments in response to Memorandum 2008-3:

A. Creditor's Claims

I strongly oppose the proposed distinction to be drawn between "specified claims" and "unspecified claims." Instead, no such distinction should be drawn and all creditor's claims should continue to be treated as under current law. I base this view on the following reasons:

1. First and foremost is my continuing theme of freedom of testamentary disposition. The proposed distinction and corresponding differing standards for enforcement may well be desired by a transferor and could make sense in some circumstances. In other circumstances, however, it might not make sense and almost certainly would not be desired by a transferor, who instead would wish to impose the more stringent standard with respect to all claims. Current law affords this flexibility. Among other things, a transferor can choose to narrowly tailor her no contest clause to apply only to certain expressly specified claims, to exclude from the clause only certain specified types of claims, to impose different standards as to different types of claims, or to have the clause apply to all claims without exception under the same standard. This type of flexibility is desirable because it allows a no contest clause to be drafted differently on a case by case basis to meet the unique wishes and objectives of different individual transferors. The proposed law would eliminate much of this important flexibility by legislatively creating categories of claims and dictating the standards that must be applied to those categories of claims.

2. There is no rational justification for limiting transferor flexibility in this way. The supposed problem to which the proposal is directed is that a transferor might inadvertently include within the scope of a no contest clause claims that he does not intend to be governed by the clause. That admittedly is a possibility. However, it is far from clear that it is an actual problem. To my knowledge, there have been no studies and there are no statistics showing how often, if ever, this hypothetical problem actually arises. Moreover, to whatever limited extent this might be a problem, the answer is better drafting of instruments to reflect transferor intent, not depriving transferors of the flexibility to implement their intent. In short, a hypothetical problem of unknown magnitude, and for which a less intrusive solution exists to whatever extent it might be a problem, does not warrant depriving transferors of important flexibility to implement their intent.

3. Under proposed Section 21310(f)(1), a debt or liability can only be a "specified debt" if it "is expressly identified in a no contest clause . . . as being subject to the no contest clause." What about a debt that is specifically identified in another part of the instrument containing the no contest clause, but not in the no contest clause itself? The Colburn case in which I was involved provides a good example of this. There, dispositive provisions of Richard Colburn's trust specifically identified obligations he had to his minor children under a marital dissolution judgment and expressly stated Mr. Colburn's intent that gifts to the children were to be "in full satisfaction" of those obligations. The trust's no contest clause contained several paragraphs, only one of which applied to actions by the children. That provision applied to creditor's claims brought by or on behalf of the children, but did not specifically identify claims based on the marital dissolution judgment as being subject to the clause. Neither the trial court nor the court of appeal had any difficulty concluding that Mr. Colburn intended the no contest clause to apply to such claims and, correspondingly, determining that the clause therefore would be enforceable with respect to such claims. Under a strict reading of the proposed law, in contrast, such claims potentially would be viewed as "unspecified claims" because they are not specifically identified in the provision of the no contest clause applicable to the children. In that event, enforcement of the clause with respect to the claims might be subject to a "probable cause" standard that Mr. Colburn did not intend. (Like *Hearst*, *Colburn* is another case where the continued effectiveness of a no contest clause in an irrevocable instrument, along with now final orders determining the enforceability of the clause, could be called into question by retroactive application of the new law.)

4. Under proposed Section 21310(f)(2), a debt or liability can only be a "specified debt" if it "arose before the execution of the no contest clause that identifies it." As a preliminary, technical matter, one ordinarily would execute an instrument containing a no contest clause, not a no contest clause itself. But beyond that, does this preclude application to an expressly identified claim that only arose in part before execution? Or does it apply to the part that arose before execution, but not the part that arose after execution? And what about anticipated claims that have not arisen when the instrument is executed but which the transferor is able to specifically identify in his no contest clause as potentially arising in the future? Why should these types of claims be treated differently than those that fall within the proposed definition of "specified debt"?

5. Proposed Section 21311(a)(4) dictates that, with respect to "unspecified claims," "[a] no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application." It is unclear what is required for a no contest clause to "expressly provide[]" for that application." Can it do so by referencing "unspecified claims" and/or Section 21311(a)(4)? Must the clause reference "unspecified claims" and/or Section 21311(a)(4), or can the clause "expressly provide" for application in some other way? Moreover, this provision would exacerbate the problem referenced above that could arise if the new law were applied retroactively to irrevocable instruments. In that event, claims not specified in a no contest clause contained in such an instrument would be characterized under the new law as "unspecified claims." However, a no contest clause in an instrument that became irrevocable before enactment of the new law obviously could not specifically reference either "unspecified claims" or

Section 21311(a)(4). Thus, a no contest clause in such an instrument might not be enforceable at all with respect to such claims, even though the clause would have been fully enforceable against such claims both at the time the instrument was created and when it became irrevocable.

6. As illustrated by the foregoing, the proposed distinction between "specified claims" and "unspecified claims" would simply add layers of complexity and confusion to no contest clause law, the inevitable result of which will be litigation.

B. Property Disputes

1. For reasons I previously offered, I continue to believe that the language in current Section 21305(a)(2) is preferable to that of proposed Section 21311(a)(2), and that the Section 21305(a)(2) language is neither overbroad nor reasonably subject to the claimed ambiguity proffered by TEXCOM.

2. I strongly oppose any "bifurcation" of the property dispute provision both for the reasons set forth in Memorandum 2008-3 and for the additional reasons set forth above concerning creditor's claims.

3. Proposed Section 21311(a)(2) would provide that "[a] no contest clause shall be enforced under this paragraph if the no contest clause expressly provides for that application." As with proposed Section 21311(a)(4), this again raises the question of what is required to "expressly provide[]" for that application." Likewise, retroactive application of this provision to no contest clauses in irrevocable instruments could preclude application of such clauses to any and all property dispute claims because such clauses would not and could not possibly "expressly provide[]" for enforcement under Section 21311(a)(2).

C. No Retroactive Application to Irrevocable Instruments

For the reasons set forth in my Memorandum submitted under separate cover on behalf of the Hearst Trustees, and for the additional reasons set forth above, I strongly urge the Commission to include in its recommendation a provision expressly limiting application of the new law only to instruments that become irrevocable on or after the effective date of the new law. Doing so will preserve and protect the expectations of countless transferors whose instruments cannot be changed in light of the new law, promote fairness, and avoid both uncertainties and likely constitutional challenges to the new law.

Thank you for your consideration of these concerns. I look forward to seeing you on January 17.

David
David C. Nelson
Loeb & Loeb LLP