

SUING A DEAD **PERSON**



SUMMARY OF CALIFORNIA LAW AND PROCEDURE IN SUING A DECEASED DEFENDANT IN CALIFORNIA

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1. “SUING A DEAD PERSON” - OVERVIEW

The first thing a Plaintiff should do when he or she finds out a defendant is dead is determine whether he or she is seeking damages within the decedent’s insurance policy limits. Probate Code sections 550 through 554 governs claims against a decedent within insurance policy limits whereas California Code of Civil Procedure §§336.2, 337.40 through 377.42, and Probate Code §9390 governs claims for damages in excess of a decedent’s insurance policy.

If a Plaintiff is limiting his or her cause of action to the insurance policy limits, then a complaint may be filed within one year after the expiration of the applicable limitations period so long as the defendant/decedent died within the applicable limitation period. Prob. Code. §550, 551. For example, if John Doe gets hit by a vehicle on Jan. 1, 2010 and the driver dies in September 2011, John Doe has until Jan. 1, 2013 (3 years) to file a tort action against the decedent to recover damages within the decedent’s insurance policy limits.

Probate Code 550 et seq. intends to protect plaintiffs who are seeking damages that are covered by the decedent’s insurance policy and the plaintiff may not know at the time he or she files an action that the defendant was deceased, thus providing them with a one year “grace period” to file a lawsuit under this statutory scheme. This limitation is further set out in Probate Code §554 which states that “either the damages sought in an action under this chapter shall be within the limits and coverage of the insurance, or recovery of damages outside the limits or coverage of the insurance shall be waived. A judgement in favor of the Plaintiff in this action is enforceable only from the insurance coverage and not against property in the estate.” Prob. Code. §554.

However, if the Plaintiff wants to sue the decedent for damages beyond the decedent’s insurance policy limits, then the Plaintiff has only one year from the time of the decedent’s death to bring an action or the claims are forever barred. Code Civ. Proc. §336.2. This harsh rule does not consider the limitations period of the underlying action or whether the Plaintiff knew the defendant was dead.

Using the example above, Plaintiff John Doe would only have until September 2012 (one year from the defendant’s death) to bring his tort claim against the driver or his action would be barred. This is true even though the applicable tort limitations period (two years) would otherwise allow him to bring an action until January 2012. The purpose of the one-year limitations period applicable to claims of creditors against a decedent's estate is to protect decedents' estates from creditors' stale claims. See *Stoltenberg v. Newman* (App. 2 Dist. 2009) 179 Cal.App.4th 287, rehearing denied, review denied, on subsequent appeal 215 Cal.App.4th 1225. Thus, it rightfully promotes finality in legal affairs associated with death.

It must also be noted that when you sue a decedent to recover damages in excess of the policy limit, the Plaintiff must comply with specific creditor claim procedures prior to filing the lawsuit. See Code Civ. Proc. §377.40 et seq; Prob. Code §9351, 552, 9390(c).

Plaintiffs must file a creditor's claim against the decedent's estate in probate court within either four months from the date that the letters of administration are first issued to a personal representative or 60 days after notice of administration is given to the creditor—whichever is later. Prob. Code sections 9100 et seq., The personal representative of the decedent's estate has 30 days to accept to pay or reject the claim. Prob. Code §9256. If 30 days goes by without any response from the estate's personal representative, the creditor's claim is deemed rejected. Ibid. Once the claim is rejected, the Plaintiff must file the lawsuit within three months of the rejection or the suit will be time barred. Prob. Code §§9352, 9353, 9371.

It is important to note that once the creditor's claim is filed, the one-year time bar pursuant to Code of Civil Procedure §336.2 is tolled. Nevertheless, the creditor's claim must be filed within one year of the decedent's death or the claim is barred entirely.

If probate for the decedent's estate has not been opened, the Plaintiff may open probate on his or her own behalf as a creditor with the intent to reject his or her own creditor's claim. See Prob. Code §800 (allowing any interested person to commence probate proceedings for administration); Prob. Code §48 (including a creditor in the definition of "interested person"). From there, there are additional procedural hurdles the plaintiff must go through to be able to attach or marshal the decedent's assets to satisfy the creditor's claim, including filing a petition to be appointed special or general administrator of the decedent's estate and filing several unfamiliar judicial council forms.

Although this procedure may seem daunting, especially for plaintiff attorneys unfamiliar with probate, if done correctly a plaintiff will still get his day in court. In sum, it is paramount that Plaintiffs' counsel be familiar with these rules or he or she risks forfeiting his client's otherwise valid cause of action.

2. INSURER IS THE “PARTY” UNDER PROBATE CODE SECTIONS 550, ETC. AND CAN BE HELD LIABLE FOR REFUSING A CCP 998 OFFER

Even though Hotlen's estate was the named defendant in the action, the estate was not really a party because it is not a legal entity. “The ‘estate’ of a decedent is not an entity known to the law. It is neither a natural nor an artificial person. It is merely a name to indicate the sum total of the assets *625 and liabilities of a decedent [Citation.] In order for a civil action to be prosecuted, there must be some existing entity aimed at by the processes of the law, and against whom the court's judgment will operate.” (*Tanner v. Estate of Best* (1940) 40 Cal.App.2d 442, 445, 104 P.2d 1084.) In this case, Hotlen left no assets, so there was actually no “estate” for Meleski to sue. Although the attorney representing the defense in this case purported to represent the estate of Hotlen, the summons, complaint, and offer to compromise were all served on Allstate's agent for service of process. Allstate provided the defense to the estate. As there was no estate representative named, Allstate was in complete control of the litigation, and was the only litigant for the defense. *Meleski v. Estate of Albert Hotlen*, 240 Cal.Rptr.3d 552, 557, 29 Cal.App.5th 616, 624–25 (Cal.App. 3 Dist., 2018).

We consider Allstate a party for purposes of section 998 because, “[a] person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.” (Rest.2d Judgments, § 39.) Not only did Allstate have complete control of the litigation of this matter, it also was the only entity opposing Meleski that risked losing money in the litigation. The named party, the estate, was not at risk for payment of damages, which were limited to the Allstate policy. (Prob. Code, § 554.) “Unless the personal representative is joined as a party, a judgment in the action under this chapter ... does not adjudicate rights by or against the estate.” (Prob. Code, § 553.) It is a legal fiction that the estate is the party. In actuality, Allstate is the party litigating the case, inasmuch as it alone is at risk of loss and it alone controls the litigation. *Meleski v. Estate of Albert Hotlen*, 240 Cal.Rptr.3d 552, 557, 29 Cal.App.5th 616, 625 (Cal.App. 3 Dist., 2018).

Probate Code Section 554 Does Not Limit Recovery of Costs from Insurer

Probate Code section 554, subdivision (a) provides in pertinent part: “[E]ither the damages sought in an action under this chapter shall be within the limits and coverage of the insurance, or recovery of damages outside the limits or coverage of the insurance shall be waived. A judgment in favor of the plaintiff in the action is enforceable only from the insurance coverage and not against property in the estate.” Defendant argues this section means that the judgment is limited to the policy limits. We disagree.

Probate Code section 554 limits the amount of *damages* that can be recovered to the policy limits. It further provides that none of the judgment *627 can be recovered *from the property of*

the estate. It does not provide that a plaintiff may not recover costs in excess of the policy limits **559 from the insurer for failure to accept a reasonable offer of compromise.

Probate Code section 554 limits damages to the amount of the policy limit. But, costs are not damages. “It is established that the right to costs is statutory and that costs ‘are allowed solely as an incident of the judgment given upon the issues in the action. [Citation.] ... They constitute no part of a judgment at the moment of its rendition’ [Citations.]” (*Folsom v. Butte County Assn. of Governments, supra*, 32 Cal.3d at p. 677, 186 Cal.Rptr. 589, 652 P.2d 437.)

Costs recoverable under section 998 are set forth in section 1033.5. They include, inter alia, filing, motion, service, ordinary witness and jury fees. These costs are recoverable by a prevailing party “as a matter of right” unless “otherwise expressly provided by statute.” (§ 1032, subd. (b).)

“Thus, the requirements for recovery of costs and fees under section 998 must be read in conjunction with section 1032[, subdivision] (b), including the requirement that section 998 costs and fees are available to the prevailing party ‘[e]xcept as otherwise *expressly* provided by statute.’ (§ 1032[, subd.] (b), italics added.)” (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 1000, 73 Cal.Rptr.2d 682, 953 P.2d 858.) Probate Code sections 550 through 555 do not expressly provide that a prevailing plaintiff is not entitled to recover costs.

In addition, section 998 provides the court may require a defendant who fails to obtain a more favorable judgment to pay postoffer costs of the services of expert witnesses. (§ 998, subd. (d).)

Consequently, Meleski is entitled to these amounts in addition to damages as the plaintiff whose offer was not accepted by the opposition that failed to obtain a more favorable judgment. (§ 998, subd. (d).) *Meleski v. Estate of Albert Hotlen*, 240 Cal.Rptr.3d 552, 558–59, 29 Cal.App.5th 616, 626–27 (Cal.App. 3 Dist., 2018) [Insurer of insured driver was a party, for purposes of statute authorizing award of costs against party who refuses reasonable offer of compromise, in injured driver's action against estate of insured driver, where estate contained nothing other than insurance policy covering accident, and insurer was entity controlling litigation and incurred risk of loss as de facto party by declining injured driver's offer of compromise.]

3. STATUTE OF LIMITATIONS

The applicable statute of limitations is confusing and depends on several issues.

1. CCP 366.2 provides there's a one year statute of limitations from the death of the tortfeasor/decendent for claims against the tortfeasor/decendent.
2. However, this limitation does not apply when the decedent/tortfeasor was insured. Under Probate Code sections 550, etc. ***Section 551 extends the statute of limitations to one year after the original two years!!***

“The Legislature has also enacted specific exceptions to section 366.2. ***The statute does not apply to actions on insured claims.*** (Prob.Code, §§ 550–555.) Probate Code section 551 provides: “Notwithstanding Section 366.2 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.” *Bradley v. Breen*, 73 Cal.App.4th 798, 803, 86 Cal.Rptr.2d 726, 730 (Cal.App. 1 Dist.,1999)

It is in fact well established that no claim against an estate need be filed where a plaintiff limits the potential recovery to insurance policy limits, (2) the statute of limitations governing the plaintiff's causes of action was extended one year by virtue of Probate Code § 551, and (3) because the otherwise applicable statute of limitations was the two-year statute at CCP § 335.1, the one-year extension afforded the plaintiff a total of three years in which to commence their lawsuit.

In 2009, for example, the Third Appellate District published its decision in *Prindle v. Harris* (2009) 173 Cal.App.4th 119, and observed:

“After *Satterfield* was decided, the Legislature enacted former Probate Code section 721 providing that a probate claim was not required to maintain a civil action for an obligation of the decedent to the extent it is covered by the decedent's liability insurance. (Stats. 1971, ch. 1638, § 4, pp. 3533-3534.)

The provisions of that section were later moved to another part of the present Probate Code (Prob. Code, §§ 550 et seq., 9390), but the effect is still the same.” [Citation omitted.]

Likewise the First Appellate District stated that Probate Code § 551 creates an exception to CCP §366.2. (See *Bradley v. Breen* (1999) 73 Cal.App.4th 798, 803 [“The Legislature has also enacted specific exceptions to section 366.2... [t]he statute does not apply to actions on insured claims. (Prob. Code, §-555)].)

4. AN ESTATE IS NOT AN ENTITY AND CANNOT BE SUED [EXCEPT...]

The ‘Estate’ of a decedent is not an entity known to the law. (*Tanner v. Best*, 40 Cal.App.2d 442, 104 P.2d 1084.) In *Estate of Bright v. Western Air Lines*, 104 Cal.App.2d 827, 828–829, 232 P.2d 523, 524, it was said: ‘An ‘estate’ is not a legal entity and is neither a natural nor artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, or of an incompetent, or of a bankrupt. [Citations.] An ‘estate’ can neither sue nor be sued.’ *Lazar v. Lazar's Estate*, 25 Cal.Rptr. 354, 357, 208 Cal.App.2d 554, 557 (Cal.App. 1962).

First, “a trust estate is not a legal entity; it is simply a collection of assets and liabilities. As such, it has no capacity to sue or be sued, or to defend an action. Any litigation must be maintained by, or against, the executor or administrator of the estate.” (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1344; see also, *Portico Management Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 473, holding that judgment confirming arbitration award against a trust was meaningless because a trust is not an entity distinct from its trustees and is merely a fiduciary relationship with respect to property.)

In *Estate of Bright v. Western Air Lines* (1951) 104 C.A.2d 827, 232 P.2d 523, decedent was killed by the alleged negligence of defendant, but apparently there were no heirs suffering pecuniary damage. In an attempt to get some recovery (e.g., for creditors and legatees), the personal representatives brought an action for wrongful death in the name of the estate as plaintiff. *Held*, (a) procedurally, an estate cannot sue or be sued; (b) substantively, the personal representative is only a statutory trustee without beneficial interest in the cause of action for wrongful death (see *infra*, § 145). (104 C.A.2d 828.) 3. [§ 69]Party Must Be an Entity., 4 Witkin, Cal. Proc. 5th Plead § 69 (2020).

However, see Probate Code sections 550, et. Seq.

5. PROBATE CODE SECTION 550, ET. SEQ., LIMIT TO INSURANCE POLICY

Under Probate Code section 550, a plaintiff can continue litigation against a defendant who passes away without joining as a party the decedent's personal representative or successor in interest. In doing so, plaintiff must name as a defendant the estate of the deceased person and then serve the summons and complaint on the decedent's insurer. (Probate Code section 552.) Any recovery is limited to the decedent's available insurance policy limits. (Probate Code section 554.)

§550(a): “Subject to the provisions of this chapter, an action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued against the decedent's estate without the need to join as a party the decedent's personal representative or successor in interest....”.

Plaintiff's only option other than proceeding under Probate Code section 550 would be a suit against the representative or administrator of decedent's estate. (*In re Estate of Prindle* (2009) 173 Cal.App.4th 119, 132. The court cannot enter any judgment against a deceased defendant. (*Herring v. Peterson* (1981) 116 Cal.App.3d 608, 612. A decedent's death terminates the court's jurisdiction. (*Id.*)

Code Sections 550 and 552 provide that an action against a deceased person, where the plaintiff seeks recovery of insurance proceeds only, may be filed against “the Estate of [Decedent].” Summons shall then be served on the insurer, not any estate representative. In fact, this means of filing suit may be utilized even if there was no estate ever established for the decedent at all. In truth, the action is then pursued against the insurance carrier. The statute states that the litigation shall then “be conducted in the same manner as if the action were against the personal representative.”

Probate Code Section 551 provides that, 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. That statute thus protects the plaintiff who did not know at the time the action was filed that the defendant was deceased. In that circumstance, the plaintiff has a one year “grace period” to file suit under this statutory scheme.

Probate Code Section 553 provides that the insurer may deny or otherwise contest its liability in an action under this chapter, or by an independent action; and that the outcome of the action does not adjudicate the rights of the estate, unless it is joined as a party.

The significant limitation, from the plaintiff's perspective, of utilizing these Probate Code section to proceed with his or her personal injury claim is set out in Probate Code Section 554, which requires that: "either the damages sought in an action under this chapter shall be within the limits and coverage of the insurance, or recovery of damages outside the limits or coverage of the insurance shall be waived. A judgment in favor of the plaintiff in the action is enforceable only from the insurance coverage and not against property in the estate." So proceeding solely under these statutes will, in some circumstances, be insufficient by itself.

**6. STIPULATION TO PROCEED PURSUANT TO PROBATE CODE
SECTIONS 550, ET. SEQ.**

[Put on pleading paper]

IT IS HEREBY STIPULATED by the parties, between their respective counsel, as follows:
PROBATE CODE STIPULATION INSURANCE POLICY LIMITS

1. That Plaintiffs, and , have agreed to proceed in this action as to all claims in this action pursuant to California Probate Code Section 500, et. Seq., proceeding solely against the policy of liability insurance issued by _____ Insurance Company, policy number _____ to _____ [“Decedent”] which has \$100,000/\$300,000 policy limits for said Plaintiffs’ bodily injury claim.
2. Probate Code Section 554 requires that any claims outside of the limits of coverage are waived by said Plaintiffs. Plaintiffs, _____, agree that in this case Plaintiffs’ recovery is limited to the policy limits.
3. Plaintiffs, , hereby agree that \$ _____ each is their maximum coverage against the _____, Decedent in the above-entitled action.

IT IS HEREBY FURTHER STIPULATED by and between the parties hereto, by their respective attorneys of records as follows:

1. Plaintiffs agree to proceed pursuant to Probate Code Sections 552, 553, and 554.
2. Plaintiffs agree to waive all recovery above the insurance limits set forth above.
3. No deposition of Defendant will be taken.
4. Counsel to meet and confer prior to the propounding of any discovery, if any, to the “Estate of _____”.
5. Discovery to Plaintiff may continue pursuant to Code.
6. This stipulation may be filed/used for all purposes with faxed/photocopied signatures.

DATED: _____

ATTORNEYS FOR

DATED: _____

ATTORNEYS FOR

7. DISCOVERY AFTER PROBATE CODE §§550, ET. SEQ. STIPULATION

An action may be brought against a decedent's estate "... to establish the decedent's liability for which the decedent was protected by insurance ... without the need to join as a party the decedent's personal representative ..." (*Probate Code section 550(a)*) and without first filing a claim in the probate proceedings. (*Probate Code section 9390(a)*.)

The estate shall be named as the defendant in such an action, and the summons is to be served on the decedent's insurance company. (*Probate Code section 552(a)*.)

The statute does not, however, authorize service of any other pleading or document on a decedent's insurance carrier. Instead, "[f]urther proceedings shall be in the name of the estate, but otherwise shall be *conducted in the same manner as if the action were against the personal representative.*" (*Ibid.* (Emphasis added.))

Accordingly, the discovery propounded by Plaintiff should have been served on the personal representative of the Estate, who is named as a defendant herein (and thus need not be substituted in under *Probate Code section 552(b)*). (See, *Code of Civil Procedure sections 2030.010, 2031.010, 2033.010* (interrogatories, demands for inspection and request for admissions to be served on parties).)

Probate Code §552:

- (a) An action under this chapter shall name as the defendant, "Estate of (name of decedent), Deceased." Summons shall be served on a person designated in writing by the insurer or, if none, on the insurer. Further proceedings shall be in the name of the estate, but otherwise shall be conducted in the same manner as if the action were against the personal representative.
- (b) On motion of an interested person, or on its own motion, the court in which the action is pending may, for good cause, order the appointment and substitution of a personal representative as the defendant.
- (c) An action against the estate of the decedent under this chapter may be consolidated with an action against the personal representative.

If there was no effective service of the discovery, there was no waiver of objections for failure to timely respond under *Code of Civil Procedure sections 2030.290(a), 2031.300(a)* or *2033.280(a)*.

By serving the agent for service of process of the Estate's insurance company, rather than the Estate's counsel, Plaintiff used discovery methods "... in a manner that does not comply with [their] specified procedures." (*Code of Civil Procedure section 2023.010(b)*). Sanctions as against Plaintiff's counsel are mandatory.

8. APPOINTMENT OF PERSONAL REPRESENTATIVE

The plaintiff is an *interested person* and thus has standing to petition the probate court for the appointment of a *personal representative*. [Probate Code § 48 (Interested person)] A *personal representative* means an executor or administrator. [Probate Code § 58].

Any time after the decedent's death, an *interested person* may petition for an order determining the date and place of death and for the appointment of a *personal representative*. [Probate Code § 8000; 14 Witkin, Summary (10th Ed. 2005) WILLS § 583].

Contents of petition to appoint personal representative: The contents of the petition is set forth in Probate Code § 8002. See 14 Witkin, Summary (10th Ed. 2005) WILLS § 584.

Service of notice: See Probate Code §8110; 14 Witkin, Summary (10th Ed. 2005) WILLS § 588.

Hearing: The petition is set for hearing and notice of hearing is served and published. [Probate Code § 8004; 14 Witkin, Summary (10th Ed. 2005) WILLS § 445] The petition *not the court clerk* has a duty to give notice. [14 Witkin, Summary (10th Ed. 2005), WILLS § 587; FORM: Judicial Council FORM NO. DE-121].

Publication of notice of hearing: In addition to service of notice under Probate Code §§ 8110 et seq., notice of the hearing of a petition to administer the estate must be published in accordance with Probate Code § 8120. A petition cannot be heard unless an affidavit showing due publication has been filed. [Probate Code § 8124; 14 Witkin, Summary (10th Ed. 2005), WILLS § 589].

Time for publication: See Probate Code § 8121(a).

Claims presentation to estate: After appointment by the court of a *personal representative* the plaintiff must file a *creditor's claim*. The claim must thereafter be accepted or rejected in whole or in part before plaintiff may commence the action for damages. [Probate Code § 9351].

9. SUIT AGAINST THE PERSONAL REPRESENTATIVE

If the third party plaintiff has a claim for injuries exceeding the policy limits of any policy insuring the decedent for such accident or occurrence, the suit filed may be against both the personal representative and the estate. In this circumstance, a CLAIM must be filed against the estate.

Defendant dies at a time when no known estate exists; procedures to follow before ling suit.

[Probate Code § 9100] A claim that is filed before expiration of the time for filing a claim (generally four months) is timely even if acted on by the personal representative or by the court after expiration of the time period. [Probate Code § 9102, *Late Claims*] With regards to a claim that is late, a prompt petition by a creditor or the personal representative, a court may allow a claim to be filed after expiration of the time for filing a claim provided in § 9100 if the conditions in Probate Code § 9103 apply. Probate Code § 9250 controls with regards to the allowance or rejection in whole or in part of a claim. This section also sets forth the form and content of the claim.

Refusal or neglect to act by the personal representative; claim 'deemed' rejected

If within 30 days after claim is file the personal representative or the court or judge has refused or neglected to act on the claim, the refusal or neglect may, at the option of the creditor, be deemed equivalent to giving a notice of rejection on the 30th day. [Probate Code § 9256]

An action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is *first filed* as provided in this part, and the claim is rejected in whole or in part. [Probate Code § 9351]

Commencement of an action on a claim

Regardless of whether the statute of limitations is otherwise applicable to a claim will expire before or after the following times, a claim rejected in whole or in part is *barred* as to the part rejected UNLESS within the following times, the creditor commences an action on the claim or the matter is referred to a referee or to arbitration:

- (1) if the claim is due at the time the notice of rejection is given, THREE MONTHS after the notice is given. [Probate Code § 9353(a)]
- (2) if the claim is not due at the time the notice of rejection is given, THREE MONTHS after the claim becomes due. [Probate Code § 9353(a)(2)]
 - (a) ...
 - (b) the time during which there is a vacancy in the office of the personal representative shall be excluded from the period determined under subdivision (a).

Death of the insured after a suit is filed; claim MUST be filed within 4 months

An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless all of the following conditions are satisfied:

- (1) a claim is first filed as provided in this part [four months; Probate Code § 9100, supra],
- (2) the claim is rejected in whole or in part,
- (3) within THREE MONTHS after the notice of rejection is given, the plaintiff applies to the court within which the action or proceeding is pending for an order to substitute the personal representative in the action or proceeding. This paragraph applies only if the notice of rejection contains a statement that the plaintiff has THREE MONTHS within which to apply for an order for substitution. [Probate code § 9353]

NOTES