

LOS ANGELES

# Daily Journal

www.dailyjournal.com

VOL. 124 NO. 137

MONDAY, JULY 18, 2011

## Navigating the Death of a Party

By Darren O. Aitken and  
Atticus N. Wegman

**L**awyers oftentimes specialize in one area of the law. When it comes to probate law, however, tort lawyers should take heed. Though tort lawyers generally do not encounter probate law issues, they should be aware of how probate law can affect their client's case when their client or a potential defendant dies.

*Code of Civil Procedure Section 366.2* establishes that no suit can proceed on a cause of action surviving the deceased person's death unless the action is commenced *within one year of death*. This places the onus on the plaintiff to determine whether the potential defendant is deceased before filing a lawsuit.

However, if the lawsuit is seeking damages wholly covered by an insurance policy (or if the plaintiff is willing to limit his or her recovery to insurance proceeds), the one-year statute of limitations is inapplicable. *Probate Code Section 550*. The applicable limitations period is extended to one year beyond the expiration of the limitations period otherwise applicable. *Probate Code Section 551*. The applicable statute of limitations period for a personal injury action in California is two years. *Code of Civil Procedure Section 335.1*. As such, if the plaintiff is certain that the value of his client's case is within the deceased person's insurance policy limits (or if the plaintiff is willing to limit his or her recovery to insurance proceeds), the lawyer will have three years from the date of the injury to bring a lawsuit against the deceased person's insurance company.

Procedurally, the plaintiff may sue a deceased person's insurance company directly by naming the "Estate of (deceased person's name), Deceased" in the complaint and serving on a person designated in writing by the insurer or if none, on the insurer. *Probate Code Section 552*. The personal representative does not need to be joined as a party in the direct lawsuit against the deceased person's insurance company. Such a lawsuit will not adjudicate the rights by or against the estate. *Probate Code Section 553*.

If recovery beyond insurance policy limits is sought, the plaintiff may proceed against the deceased person's insurance company and the deceased person's estate concurrently. A one-year statute of limitations will apply to the claim against the deceased person's estate. *Code of Civil Procedure Section 366.2*.

The mechanics of pursuing an action beyond the deceased person's insurance policy limits is affected by whether the deceased person's assets are held in a trust or fell into probate.

If the deceased person's estate is administered via probate and a personal representative is appointed, the plaintiff will now be defined as a creditor and will

therefore have to bring a claim as a claimant against the estate and comply with the appropriate deadline. *Probate Code Section 48*; *Probate Code Section 9100 et. seq.* After the claim is filed, the personal representative will either accept, reject or do nothing with the claim. If the claim is rejected, the claimant (plaintiff) will have 90 days after notice of rejection to bring a civil suit. *Probate Code Section 9353(a)*. If the personal representative does nothing, after 30 days a civil suit may be filed. *Probate Code Section 9256*.

If the deceased person's assets are held in trust, the plaintiff will largely follow the same rules as in probate, but with a trust and a trustee. A trust removes the distribution of the deceased person's assets out of the supervision of the court. As such, there is no mandatory duty for a trustee to provide notice to creditors of any potential claims. *Probate Code Sections 19003 and 19010*. Moreover, there is little law regarding the process by which a plaintiff can use to file their claim if the trustee does not provide a notice to creditors. See *Wagner v. Wagner*, (2008) 162 Cal.App.4th 249, 256-257.

Unlike probate, where a creditor can initiate probate proceedings, only trustees and trust beneficiaries can initiate trust creditor claims proceedings. *Probate Code Sections 17200 and 19003(a)*. Therefore, if the plaintiff is presented with this situation, one option to protect his or her rights would seem to include the filing of a formal, written claim with the trustee, just as if notice had been provided by the trustee. Keep in mind, there is a one-year statute of limitations applicable to the filing of this claim. *Code of Civil Procedure Section 366.2*; *Levine v. Levine*, (2002) 102 Cal.App.4th 1256, 1265.

As a safety net, if there is no probate proceeding to administer the deceased person's estate and the trustee elects not to file a proposed notice to creditors pursuant to the optional trust claims procedure, the beneficiary to whom property is distributed can be personally liable for any unsatisfied judgment obtained by a creditor against the decedent settlor's estate.

Probate Code Section 19400 et seq.; *Arluk Medical Center Industrial Group Inc. v. Dobler*, (2004) 116 Cal. App. 4th 1324, 1334.

Representing a plaintiff that passes away after an attorney-client relationship is formed can change the course of litigation. If the plaintiff passes away, non-economic damages, such as for pain and suffering, will no longer be recoverable. Code of Civil Procedure Section 377.11. Procedurally, the cause of action can only be carried out on behalf of the deceased person's estate. As such, you will still be able to bring a survival cause of action but only through the deceased person's successor in interest or personal representative. The deceased person's successor in interest can carry out the survival cause of action on behalf of the deceased but only if a probate proceeding and a personal representative has not been appointed. Code of Civil Procedure Section 377.30.

If a personal representative has been appointed, it is his or her option to pursue the survival cause of action. Code of Civil Procedure Section 377.31. If not, an additional procedural step must be taken. This step includes bringing a motion with an attached declaration of the deceased person's successor in interest and, among other things, a certified copy of the deceased person's death certificate. Code of Civil Procedure Section 377.32. Once completed, the survival cause of action can proceed for the recovery of economic damages only, which includes claims for punitive damages where applicable. Note that even though an attorney-client relationship was formed with the deceased before his or her death, your retention as counsel will be left up to the successor in interest.

If the plaintiff's death was a result of the injuries sustained in the underlying action, a separate action alleging wrongful death pursuant to Code of Civil Procedure Section 377.60 is warranted. While the non-economic losses suffered by the original plaintiff are still lost, the plaintiffs in the new wrongful death action, who are the heirs of the original plaintiff (as defined

by Code of Civil Procedure Section 377.60), have a separate and independent claim for non-economic damages for the loss of the "care, comfort, and society" of the deceased person.

In addition, the economic losses sustained by the original plaintiff, which would have been a part of the claim filed on behalf of the estate of the deceased person, can be wrapped into the wrongful death claim. See Code of Civil Procedure Section 377.60. While a claim for punitive damages on behalf of the deceased person's estate may be pursued, there is no right to punitive damages in a wrongful death action except in very limited circumstances. (See Civil Code Section 3294(d), allowing punitive damages following homicide convictions).

Cases brought on behalf of or against a deceased person can put tort lawyers in murky waters. Though weaving in and out of tort and probate law may appear

daunting at first, it is better to gain a basic understanding of this unique dynamic earlier rather than later. Regardless of the overlap between these two areas of law, paying close attention to procedure can help tort lawyers avoid pitfalls associated with taking on a new area of law. Depending on the complexities of the issues involved, consultation with an attorney specializing in probate matters may well be warranted.



**Darren O. Aitken**, a partner with Aitken Aitken Cohn in Santa Ana. He practices civil litigation in the areas of insurance bad faith, personal injury, products liability and commercial torts.



**Atticus N. Wegman** is an associate with Aitken Aitken Cohn in Santa Ana. He practices personal injury law, including wrongful death, products liability and general negligence.