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FILING TORT CLAIMS AGAINST DECEDENT'S
ESTATES WITHIN NON-CLAIM STATUTES:
A SURVEY

The question of whether claims founded on tort need be filed in accordance with non-claim statutes as regards decedents' estates has been a confused one in the area of probate law. Legislatures have not usually dealt with the problem specifically. The courts in turn have had difficulty in interpreting the wishes of the legislature because of the circumspect language employed. Although statutory construction is an important judicial function, the terminology used in many statutes makes such construction difficult.

This article will attempt to analyze some of the various non-claim statutes and judicial decisions which construe them, in order to discover whether or not tort claims against decedents' estates need be filed, as other claims must, within a specified time or be barred forever. Some consideration will also be given to the question of whether or not filing of tort claims should be required as a matter of policy in the orderly administration of decedents' estates.

Historically non-claim statutes were restricted to claims arising *ex contractu* rather than *ex delicto*.¹ The reason generally given is that the word "claim" refers to obligations which the decedent owed based on a debtor-creditor relationship. Obviously then a tort claim cannot be such a debt until reduced to judgment. In direct opposition to the historical position of exclusion of tort claims from the provisions of non-claim statutes, the California Legislature has provided for their inclusion. Prior to 1949, section 707 of the California Probate Code did not require the presentation of claims grounded in tort against the estates of decedents. In 1949, however, it was amended to read:

All claims arising upon a contract . . . and all claims for damages for physical injuries or death or injury to property . . . must be filed or presented within the time limited in the notice . . . and any claim not so filed or presented is barred forever.²

Thus, California became one of the very few states which by legislation compelled the filing of tort claims against decedents' estates. Whether or not California's legislation in this area represents a trend is difficult to perceive. Neither Oregon nor Nevada have precisely decided the question, and their statutes employ the word "claim" without distinguishing contractual claims from tort claims.³

¹ See, e.g. *Payne v. Meisser*, 176 Wis. 432, 187 N.W. 194 (1922); *Will of Heinemann*, 201 Wis. 484, 230 N.W. 698 (1930); *Lounsbury v. Eberlein*, 2 Wis. 2d 112, 86 N.W. 2d 12 (1957).

² CAL. PROB. CODE §707 (1949). E.g. *Casey v. Katz*, 114 Cal. App. 2d 391, 250 P. 2d 291 (1952); *Halpert v. Berlinger*, 127 Cal. App. 2d 6, 273 P. 2d 274 (1954).

³ ORE. REV. STAT. §116.510 (1961); NEV. REV. STAT. §147.040 (1961).

The ambiguous quality of the word "claim" is, as we shall see, one of the most vexing problems which the courts must solve, especially in light of the historical position. New Mexico, a sister state of California, has not been as legislatively explicit in its non-claim statute, which again provides only that "all claims must be filed within six months. . . ."⁴ The result is that the courts of New Mexico have said: "We conclude the statutes providing for the filing of claims . . . do not cover tort claims. . . ."⁵ The court follows the normally accepted rationale when legislation is not explicit, that is, by referring the problem back to the legislature:

The legislature may, if it desires uniformity in the time for filing claims in the probate court and that for suits against executors and administrators for torts of decedents, easily provide that the latter must be brought within six months from the appointment of the administrator or the qualification of the executor.⁶

This statement, couched as it were in terms of a directive to the legislature, could hardly be regarded as merely a subtle prompting of legislative action. In Oklahoma, the same result is reached where the statute refers only to "claims"⁷ even where the claim is based on a fraud where the state is suing to recover old age assistance payments allegedly wrongfully obtained by decedent-recipient.⁸ The Texas court has followed the same pattern by stating:

Non-claim statutes do not require that contingent or unliquidated claims for money, such as require the intervention of a jury to ascertain the amount, be first presented to an executor before suit thereon is authorized.⁹

A third example of a type of non-claim statute is found in South Dakota. There the time limit for filing claims is four months after the first publication of notice to creditors; the statute then requires:

All claims arising upon a contract whether the same be due, not due, or contingent, must be filed within the time limited in the notice, and any claim not so filed is forever barred.¹⁰

In interpreting this statute, the South Dakota court considered the argument put forth by the administrators that since the object of statutory provisions requiring claims to be presented is to apprise the administrator and the court of their existence, so that proper and timely arrangement for payment can be made, there exists therefore no reason for not ap-

⁴ N.M. STAT. ANN. §33-802 (1941, Comp.).

⁵ *Frei v. Brownlee*, 56 N.M. 677, 248 P. 2d 671 (1952).

⁶ *Id.*, 248 P. 2d at 675.

⁷ 58 OKLA. STAT. §341 PROBATE COURT CODE (1951); *Gottsch v. Ireland*, 358 P. 2d 1097 (Okla. 1961).

⁸ *Becker v. State*, 312 P. 2d 935 (Okla. 1957).

⁹ *Allen v. Denk*, 87 S.W. 2d 303 (Tex. 1935).

¹⁰ S.D. CODE §35.1404 (Supp. 1960).

plying the provisions of the statute to tort claims as well as claims founded on contract. The court responded with this statement:

. . . it is not our function to determine what ought to be. The language of the statutes now before us is plain and unambiguous. We must construe the law as we find it.¹¹

As a general rule those states whose statutes specifically refer to filing claims "arising upon a contract" will not, by negative inference, require filing of tort claims. Among states holding this position are: Arizona,¹² Minnesota,¹³ North Dakota,¹⁴ South Dakota,¹⁵ Idaho,¹⁶ and Utah.¹⁷

The problem area concerns those states in which the non-claim statute makes no reference to the type of claim which must be filed. In these states the courts have gone to great length in justifying the exclusion or inclusion of tort claims within the meaning of their respective non-claim statutes. A representative example is Montana where the court in finding that the non-claim statute did not apply to tort claims stated that as to these claims there was:

. . . nothing fixed or definite upon which the administrator or executor could act; and, necessarily, any such claims must first be reduced to judgment establishing their validity and the amount to be paid from the assets of the estate.¹⁸

In Tennessee, only three types of claims are provided for by statute:¹⁹ those evidenced by a written instrument, by a judgment or decree of the court, or by open account. Therefore, the Tennessee Court, again by negative inference, feels that a tort claimant cannot be deemed a "creditor" until he obtains a judgment.²⁰ The Mississippi Court has often stated that their non-claim statute applies only to contractual claims and not to those in tort.²¹ The Wisconsin Court has also found that a tort claim need not be filed within the period specified by the non-claim statute.²² Delaware has construed the word "claim" in its non-claim statute to mean a "sum justly and truly due."²³ The conclusion is inescapable that since tort liability of a decedent during the administration of his estate cannot be such a sum, the tort claimant is not within the purview of the statute unless his claim is reduced to judgment.

¹¹ *Olson v. Altemus*, 77 S.D. 429, 93 N.W. 2d 7, 9 (1958).

¹² ARIZ. REV. STAT. ANN. §14-570 (1956).

¹³ MINN. STAT. ANN. §525.411 (1945).

¹⁴ N.D. CENT. CODE §30-18-04 (1960).

¹⁵ Note 10 *supra*.

¹⁶ IDAHO CODE ANN. §15-604 (1947).

¹⁷ UTAH REV. STAT. ANN. §75-9-4 (1953).

¹⁸ *Hornbeck v. Richards*, 80 Mont. 27, 257 Pac. 1025 (1927).

¹⁹ TENN. CODE ANN. §30-704 (1955).

²⁰ *Collins v. Rufner*, 185 Tenn. 290, 206 S.W. 2d 298 (1947).

²¹ *Hancock v. Pyle*, 191 Miss. 546, 3 So. 2d 851 (1941); *Mossler Acceptance Co. v. Moore*, 218 Miss. 757, 67 So. 2d 868 (1953).

²² *Lounsbury v. Eberlein*, 2 Wis. 2d 112, 86 N.W. 2d 12 (1957).

²³ *Wilmington Trust Co. v. Wright*, 33 D. Ch. 63, 90 A. 2d 480 (1952).

A number of states have yet to pass on the question of whether tort claims, would or would not be included in their respective non-claim statutes. This group includes: Colorado, Connecticut, Kentucky, Maine, Maryland, North Carolina, Oregon, South Carolina, Vermont, Virginia, and West Virginia. Thus some sixteen states have decided that tort claims need not be filed within the time required by non-claim statutes. In addition at least twelve states have made no judicial pronouncement on the matter, and the wording of the particular statutes leaves only conjecture as to which position they would ultimately take.

Looking to the other side of the ledger, in addition to the California position previously discussed, we find the same variances in statutory language which allow the courts to find tort claims included within the meaning of the non-claim statute of the particular state. Alabama has decided that since tort claims have not been specifically excepted by the terms of the statute, they are therefore included.²⁴ In Arkansas, the non-claim statute has been strictly construed so as to disallow a tort claim which was not filed in the probate court within the time prescribed; although the executor had notice of pendency of action, because of service of process on him.²⁵ In New Hampshire, no action may be commenced against an executor or administrator unless a demand is exhibited to him within one year after original grant of administration. Since this applies to tort actions as well as to other claims, the mere commencement of action setting forth a claim in common counts was not a sufficient exhibit of the demand to meet the statutory requirements.²⁶ The New Jersey court explains its reason for deciding that tort claims come within the purview of their statute by stating:

It is obvious that an executor may be obligated to wait for the statute of limitation to operate before settling the estate, or to resort to tedious and expensive chancery litigation, if a tort claim is exempt from an 'order to limit creditors.' So in this respect the object of the act would be defeated, if it is not applicable to a claim in tort. When we turn to the statute itself, we find it contains ample indicia of an intent to include all claims enforceable by suit terminating in a money judgment.²⁷

In a recent Nebraska decision, the court found that a tort claim is an unliquidated and unestablished claim for damages and may not be regarded as "property"; therefore, such claim cannot be regarded as a direct interest in the estate in the absence of fixation of damages. Only if such claim were reduced to judgment would such claimant be entitled to statutory notice, and be subject to the time restriction for filing

²⁴ ALA. CODE Tit. 61, §211 (1940); *Moore v. Stephens*, 264 Ala. 86, 84 So. 2d 752 (1956).

²⁵ *Turner v. Meek*, 225 Ark. 744, 284 S.W. 2d 848 (1955).

²⁶ *Vanni v. Cloutier*, 100 N.H. 272, 124 A. 2d 204 (1956).

²⁷ *Forwood v. Green's Estate*, 42 N.J. Super. 423, 126 A. 2d 667 (1956) quoting *Hackensack Trust Co. v. Van Den Berg*, 92 N.J. L. 412, 105 Atl. 719 (1918).

claims.²⁸ Ohio, as does California, makes specific reference in their statute to tort claims, requiring them to be presented within four months of date of appointment of executor or administrator.²⁹

Generally, all courts are agreed that tort claims are not contingent claims within the meaning of non-claim statutes and, therefore, whatever exceptions to the requirements for time of filing of contingent claims do not apply to tort claims. For instance, in an early Rhode Island case it was held that a contingent claim within the meaning of the non-claim statute is one that depends for its effect upon some future event which may or may not happen. Since the event giving rise to the tort claim has already happened, such claim cannot be contingent even though the question of liability has yet to be determined.³⁰ It is interesting to note that a tort claimant will argue that his claim is contingent if a statute will afford a special exception to a filing of contingent claims; on the other hand a tort claimant will vociferously deny that his claim is contingent in order to avoid filing at all, in those states whose provisions are not clear as to whether any tort claims need be filed.

Another state that has strictly construed its statute is Washington where it was said, as early as 1925, that "it applies to claims of every kind and nature."³¹ When the court was faced with the problem of whether equitable estoppel might lie to prevent the bar of the statute from being raised, it refused to make any exception:

In keeping with the legislative spirit, this court has made no exceptions to the statute, and to now do so on the theory of equitable estoppel would be to drive an entering wedge which will tend to confusion and delay.³²

While on the subject of equitable relief from the requirements of non-claim statutes, it is important to note decisions in Iowa and New Hampshire. Although both of these states require the filing of tort claims within the time limited by their respective non-claim statutes, they have in addition a saving statutory provision which allows for late filing of claims when "peculiar circumstances entitle the claimant to equitable relief"³³ or when "justice and equity require it."³⁴ Generally, the plaintiff-claimant has the burden of showing that he was not guilty of culpable neglect in not filing his claim. In New Hampshire this burden was met by a showing that because of continuing negotiation with decedent's insurer, claimant believed mistakenly, without fault on his

²⁸ *In re Smith's Estate*, 175 Neb. 94, 120 N.W. 2d 537 (1963).

²⁹ OHIO GEN. CODE §10509-112 (1940); *Robinson v. Engle*, 96 Ohio App. 238, 120 N.E. 2d 611 (1953).

³⁰ *Hicks v. Wilbur*, 38 R.I. 268, 94 Atl. 872 (1915); see also, *Lounsbury v. Eberlein*, note 22 *supra*.

³¹ *Davis v. Shepard*, 135 Wash. 124, 237 Pac. 21, 22 (1925).

³² *Id.*, 237 Pac. at 24.

³³ IOWA CODE §635.68 (1962).

³⁴ N.H. REV. STAT. ANN. §556:28 (1955).

part, that a demand would not be required as preliminary to bringing a tort action. Therefore, the claimant was allowed to bring the action.³⁵ Similarly in Iowa, it was held that representations made by adjusters for the insurer issuing auto liability policy covering the decedent, led claimant to believe that a settlement would be made. After the statutory time had elapsed, the insurer denied liability and refused to negotiate.³⁶

A troublesome statutory designation is the word "creditor" as applied in non-claim statutes. Massachusetts has decided that a tort claimant is a "creditor" within the meaning of its statutory provision.³⁷ Pennsylvania has attempted to provide a clue by means of the commissions' comment to one of their non-claim statutes:

The word 'claimant' rather than 'creditor' is employed to include persons claiming on a tort as well as those claiming under contract.³⁸

Approximately twenty-one states appear to require the filing of tort claims against decedents' estates within the requirements of the various non-claim statutes of each state.³⁹ This group obviously represents no clear majority favoring this view. Indeed it would be difficult to predict that the trend is moving in this direction.

One obvious reason why states are reluctant to modify their long favored position of requiring only the filing of claims arising from contract is a complicated machinery involving the jurisdiction of probate courts. A glimpse into the problem is given by a Michigan case. In order to allow the probate court jurisdiction to try claims based on tort, the Supreme Court of Michigan held that since no exception was made for claims in tort according to the language of the statute, therefore:

. . . it was the purpose and true intent of the legislature in enacting the present probate code to make it optional upon the part of the claimant to file a claim based upon a tort in the probate court or file a tort action in the circuit court.⁴⁰

Again in Illinois, it was held that by instituting tort actions in Circuit and Superior Courts a claimant had followed proper procedure, since the Probate Court was without jurisdiction to try the claims, although

³⁵ Note 26 *supra*.

³⁶ *Cave v. Fahan*, 249 Iowa 1374, 92 N.W. 2d 434 (1958); *cf. Des Moines Transp. Co. v. Haring*, 238 Iowa 395, 27 N.W. 2d 210 (1947) and *Rindfleisch v. Mundt Estate*, 247 Iowa 1124, 77 N.W. 2d 643 (1956).

³⁷ *White v. Cormier*, 311 Mass. 537, 42 N.E. 2d 256 (1942).

³⁸ PA. STAT. ANN. tit. 20 §320.616, Commissions' comment (1958).

³⁹ In addition to those already mentioned the list must include: Florida, *Toney v. Adair*, 120 S. 2d 622 (Fla. 1960); Georgia, *Gross v. Shankle*, 97 Ga. App. 631, 104 S.E. 2d 145 (1958); Illinois, *In re Collignon's Estate*, 333 Ill. App. 562, 77 N.E. 2d 841 (1948); Indiana, *Woods v. Klobuchar*, 14 C.C.H. 2d Auto, 1196, 257 F. 2d 313 (3d Cir. 1958); Kansas, *In re Whittlesley's Estate*, 156 Kan. 157, 131 P. 2d 911 (1942); Missouri, *Helliker v. Bram*, 277 S.W. 2d 556 (Mo. 1955); New York, *In re Zutell's Will*, 213 N.Y.S. 2d 290 (1961); Wyoming, *Lindsay v. Collins*, 96 F. Supp. 994 (D. Wyo. 1951).

⁴⁰ *Chabere v. Page*, 299 Mich. 278, 299 N.W. 82 (1941).

the claims were filed with the Probate Court within the statutory period.⁴¹ It appears that where a Probate Court is without jurisdiction to try tort claims against decedents' estates, it is a probable deterrent to requiring such claims to be filed. The problem was solved by a Kansas court which held that the Probate Court had exclusive jurisdiction over tort claims against decedents' estates and therefore sustained a demurrer to the action brought in District Court.⁴² Thus in Kansas, at least, no constitutional prohibition was found which would prohibit probate courts from adjudicating claims founded on tort.

In addition to jurisdictional problems, three areas of policy come to mind. Although the courts have been reluctant to discuss policy in the cases, nevertheless they must play a major role in influencing the decisions which either include tort claims or exclude them. The first of these is the status of the tort claimant. The question arises whether he stands in a peculiar relation to the decedent, such that it is manifestly unfair to treat a tort claimant in the same manner as a contractual claimant. Most non-claim statutes provide for filing within one year from the granting of letters or from first notice to creditors (usually three to six months). The effect of such a short period for allowing claims to be filed is to force a tort claimant to act more quickly than may be practicable. Indeed, some tort claimants (those whose claims arise from personal injury caused by the decedent) may still find themselves in the hospital when the non-claim period expires. At least it can be said that the extent of injuries to the claimant will be difficult to ascertain within such a restricted time period. The problems of determining possible permanent disability and pain and suffering, which characterize the typical personal injury action, tend to place the tort claimant in a class by himself. In addition, the calculation of damages may be difficult to achieve when claims for medical expenses and loss of wages are purely speculative. If the rationale for requiring tort claims to be filed is to make the court and the executor aware of the possible debts of the decedent so that payment may be arranged, it is hardly likely that a claim for damages made within four months of an auto accident will truly reflect the alleged liability of the decedent.

The second policy area concerns the orderly and expeditious administration of estates. By requiring tort claims to be filed, an executor will be made aware of the possible solvency or insolvency of the estate and the distributees will be protected both against unreasonable delay in making distribution because of reservation of assets and also against the possibility of a suit by a tort claimant after distribution. However, even if tort claims are required to be filed it may not expedite the closing of the estate. Indeed the opposite effect may be reached, that is, that the

⁴¹ *In re Collignon's Estate*, 333 Ill. App. 363, 77 N.E. 2d 841 (1948).

⁴² *Shively v. Burr*, 157 Kan. 336, 139 P. 2d 401 (1943).

estate will have to be kept open until the claim is reduced to judgment. This could mean a prolonged period of waiting due to congested court calendars unless the probate court could try the tort action immediately.

The third policy consideration involves protection of executors and administrators from personal liability on tort actions which may be commenced after distribution of the assets. In the normal situation, it seems improbable to this writer that an administrator will be so ignorant of his decedent's affairs that he will close the estate and make distribution without realizing the existence of tort claims presently dormant. When a probate court has made an order for payment and an executor has acted pursuant to such order and has made distribution accordingly, it appears doubtful that an administrator will still be subject to suit on a claim not filed nor required to be filed.⁴³ It is highly unlikely that administrators and executors will refrain from closing estates until the statute of limitations has run on tort actions. The problem of protection for administrators may be more acute when a decedent carries no insurance or is under-insured. Insurance coverage is a factor which, to a great extent, eases the problem of expeditious administration of estates. It would appear that the presence of liability insurance promotes settlement of many tort claims without resort to litigation. From a practical standpoint, the administrator usually has all the protection he needs by virtue of liability insurance which decedents often carry.

In light of this discussion we must turn to New York where a compromise appears to have been reached by statutory enactment.⁴⁴

Under sec. 208 of the Surrogate's Court Act, if a claim is not made within seven months after the issuance of letters of administration, the administratrix shall not be chargeable for the satisfaction of claims or distribution of assets to the next of kin prior to the presentation of such a claim. However, the law is clear that sec. 208 protects only a fiduciary who distributes the assets in good faith and without the knowledge of any existing claims against the estate.⁴⁵

In this case the New York court commented *obiter dicta* that even if the contingent claimant sought a measure of damages in a fixed amount, a direction for reservation of assets based upon the relief sought would be of doubtful validity. However, since the claimant did not timely file his affidavit, he is precluded from enforcing his judgment against the administratrix some eight years later. However, New York provides means for reaching assets in the hands of distributees by virtue of section 170 of the Decedent Estate Law.⁴⁶ The question arises as to what assets are apt to be remaining in the hands of distributees eight years after distribution.

⁴³ See, 1958 Wis. L. Rev. 652 for a criticism of the Wisconsin position.

⁴⁴ *In re Zutell's Will*, 213 N.Y.S. 2d 290 (1961).

⁴⁵ *Id.* at 292.

⁴⁶ *Id.* at 293.

After viewing the problem of filing tort claims from the standpoint of the three interested parties—the claimant, the administrator and the distributee, this writer feels that it may be more desirable to require the filing of tort claims within the non-claim statute. The effect of requiring such filing appears to be more beneficial than harmful. It may bring about settlement of such claims with more speed since there will be pressure both from the administrators' position and from the claimant's. Requiring tort claims to be filed cannot help but secure a more efficient administration of estates, but the problem of what will happen after the filing of the claim cannot be overlooked. In the process of balancing the interests of all the parties concerned, finding the appropriate method to accomplish this objective is a task which is still to be carried out by many legislatures even to this date.

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