Don't Be Caught Dead – Creditor's Claims Die Within One Year After Debtor Dies – Or Do They? Do Recent Cases Leave Room for New Practical Suggestions?

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As "baby boomers" age, probate litigation will undoubtedly have a "boom" of its own. And creditors will, increasingly, have to be making claims following the death of a debtor. This particular area of the law is a veritable minefield for attorneys representing creditors, due to a strict one-year statute of limitation that can be counter-intuitive in many situations.

Actions on Creditors' Claims Must be Filed Within One Year from the Debtors' Death

The Statute of Limitations for filing a claim against an estate is a strict one year after the date of the debtor's death, under California Code of Civil Procedure Section 336.3, which provides in pertinent part:

> (a) If a person has a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust or under another instrument, whether the promise or agreement was made orally or in writing, an action to enforce the claim to distribution may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

Cal. Code Civ. Proc. Section 366.3(a).

This time bar is quite absolute in most creditors' cases, as provided in CCP section 366.3 (b):

> (b) The limitations period provided in this section for commencement of an action shall not be tolled or extended for any reason except as provided in Sections 12, 12a, and 12b of this code [pertaining to calculation of days], and Part 3 (commencing with Section 21300) of Division 11 of the Probate Code [pertaining to Will contests].

Cal. Code Civ. Proc. Section 366.3(b) [explanation added].

The Court of Appeal recently emphasized the importance of filing strictly within the one year time frame, in the case of *Estate of Ziegler,* 187 Cal. App. 4th 1357, 1366, 114 Cal. Rptr. 3d 863 (2011), where the Court held time-barred the claim of decedent's long-time caregivers seeking transfer of title to decedent's house based upon a written agreement transferring title. In *Estate*

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of Ziegler, the claim was filed three weeks after expiration of the one-year statute of limitations. The Court held that CCP Section 366.3(b) applied and barred the claim.

The legislative history behind CCP Section 366.3, enacted in 2000, reveals the purpose of the bill to make a consistent statute of limitations for all claims arising from a contract, whether written or oral, express or implied, for payment of money, or (especially) a contract to make a will or other quasi-contractual claim such as a *Marvin*[2] claim. The legislative history reflects: "Existing law . . . [¶] . . . [¶] . . . [d]oes not provide a uniform statute of limitations for claims arising from a contract to make a will or other promise or agreement with a decedent to a distribution from an estate or trust." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1491 (1999-2000 Reg. Sess.) as amended Jan. 3, 2000, p. 3.) The same analysis explained further, "Current law has an uncertain statute of limitations in regard to equitable and contractual claims to distribution of estates. In some cases, the statute may run three years from discovery of the action or four years under a contract theory. [¶] Section 1 of the bill establishes a one-year statute of limitations for the enforcement of these claims, consistent with the current limitations period for claims against a decedent. (See Code of Civil Procedure section 366.2.) According to the sponsor, `[t]he consistency of the new statute of limitations with the current statute regarding claims against a decedent will also give greater assurance to fiduciaries who are attempting to administer estates.'" (*Id.* at p. 4, underscoring omitted.)

The Senate analysis also reflects that the reason for the new statute of limitations was more to clarify ambiguities and discrepancies in existing law than to shorten the statute of limitations per se: "Existing law specifies the statute of limitations applicable to a claim against a decedent's estate based upon a contract to make or to revoke a will or trust as three years from discovery of the action, or four years from the date of the contract or instrument in writing. (Probate Code Section 150.) [¶] Existing case law has interpreted these statutes, as they apply to contracts to make or revoke wills or trusts, to be one year from the date of death. [¶] This bill would establish the statute of limitations to file a claim for distribution of an estate under any instrument or an equitable estoppel theory as one year from the date of decedent's death, which may not be tolled except for a `no contest' action. The bill would apply only to actions brought on claims concerning persons dying after the effective date of the bill." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1491 (1999-2000 Reg. Sess.) as amended Mar. 23, 2000, pp. 2-3, underscoring omitted.)

A short limitations period was seen as beneficial to promote the prompt settlement of estates and to conform the limitations period for such claims to the same one-year period that applies to claims that could have been asserted against the decedent during his or her lifetime. (*Id.* at pp. 11-13.)

<u>Exceptions to the One-Year Rule May be Emerging</u>

[2] *Marvin v. Marvin*, 18 Cal. 3d 660, 134 Cal. Rptr. 815 (1976), affording rights to unmarried cohabitants under theories including, *inter alia*, breach of express or implied Contract, partnership or joint venture, quantum meruit, specific performance, constructive trust, or equity where other remedies "inadequate."

In two recent cases, the courts have begun to recognize at least some of the difficulties creditors face, especially where the circumstances are such that a creditor would not believe it necessary to file a claim within one year, or at all.

A Recent Case Holds the One Year Statute of Limitations Not Applicable to Debts Based on Statute

In the case of *Maxwell-Jolly V. Martin***,** 198 Cal.App.4th 347 (2011), the Court of Appeals of California, First District, Division Two, distinguished obligations based on a statute from those based on a contract. The Court held that the uniform one-year statute of limitations did not apply to all actions arising from claims for payment out of an estate, but rather would not apply if the action could be pursued on a statutory theory without any alleged breach of contract. In *Maxwell-Jolly V. Martin*, supra, the debt arose from a Medi-Cal reimbursement statute.

The *Maxwell-Jolly* court distinguished *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509 [75 Cal.Rptr.3d 19] (*Ferraro*), in which a family dispute over an estate was framed in terms of fraud and conversion as well as breach of contract, but the Court held the claims governed and barred by section 366.3. The *Maxwell-Jolly V. Martin* found the *Ferraro* and other cases to be "significantly distinguishable from the case before us, in large part because they all involved an express promise, a promise distinctly lacking in this case." The *Maxwell-Jolly V. Martin* Court did not apparently find an "express promise" in the argument, advanced by the Debtor, that the obligation only arose if the Medi-Cal recipient "agreed" to accept Medi-Cal payments on the terms offered, and in that context impliedly "agreed" to reimburse the state from his or her estate after death. The Court found such a construction to be "untenable."

A Recent Case Holds the One Year Statute of Limitations May be Equitably Estopped

Similarly, in *McMackin v. Ehrheart,* 194 Cal. App. 4th 128, 122 Cal. Rptr. 3d 902 (2011), the California Court of Appeal, Second District, found that the one-year statute of limitations under CCP 366.3 does apply to *Marvin*-type palimony claims, where based on an express or implied promise. However, the *McMackin* case held that application of the Statute of Limitations can be negated by the claimant's proper showing of equitable estoppel. This may have important implications for creditors.

In *McMackin*, the decedent, who died after a long battle with cancer, had promised her life partner of 17 years that he could live in her house for the rest of his life. Although she never put this promise and agreement in writing, other people, including the decedent's mother and sister, a mutual friend, and the girlfriend's housekeeper, were all aware of the promise and agreement.

The woman died intestate in 2004, leaving her two adult daughters as her legal heirs. They did not open a probate case for their mother's estate until 2008, more than three years after her passing. All during that time, the claimant continued to live in the home and pay the expenses thereof, as they had agreed, and as the daughters well knew. From 2004 until about 2009, the two daughters acquiesced in their mother's promise to the client, and gave no indication that they would one day dispute the client's right to live in the home.

Five years after the woman's death, in 2009, the daughters took the position that the claimant had to sign a lease and pay rent to continue living in the home, allegedly because the parties had a falling out about other money matters. A few months later, the daughters served a 60-day notice to quit on the claimant, and sought eviction.

The claimant filed a civil action for breach of contract, promissory estoppel, trespass to land, declaratory relief, and other related claims, and immediately sought a temporary restraining order and preliminary injunction, seeking to prevent the daughters from taking any further actions to eject him from the home, until the civil action was resolved. The Court granted the temporary restraining order, and after further briefing and another hearing on the merits, granted the preliminary injunction. The client later amended his complaint to allege a cause of action for his rights as an unmarried cohabitant pursuant to the oral agreement for a life estate, under the seminal California case, *Marvin v. Marvin*, 18 Cal. 3d 660, 134 Cal. Rptr. 815 (1976).

The daughters appealed the preliminary injunction, asserting the one year from death statute of limitations under CCP Section 366.3.

The claimant argued that CCP section 366.3 should not apply, either by definition under the *Marvin* claim, or under equitable estoppel: the decedent's daughters, by their own wrongdoing, lulled the client into believing that they would never dispute his right to live in the home for life, and, therefore, caused him to forbear from filing suit during the one-year limitations period. The Court of Appeal held that, upon a proper showing at trial, the doctrine of "equitable estoppel" could overcome the statute of limitations, and the promise of a life estate would be enforced in the client's favor.

The equitable estoppel argument was especially challenging in the face of CCP section 366.3(b), which provides in pertinent part: "The limitations period provided in this section for commencement of an action shall not be tolled or extended for any reason." The Court of Appeal explained that this provision did not preclude the application of the doctrine of equitable estoppel:

> [T]here is a distinction between tolling and equitable estoppel. Tolling concerns the suspension of the statute of limitations. The doctrine of equitable estoppel applies only after the limitations period has run to preclude a party from asserting the statute of limitations as a defense to an untimely action where the party's conduct has induced another into forbearing to file suit. (Citation omitted.) Thus, the restrictions on tolling set forth in section 366.3, subdivision (b) do not apply to the issue of whether the doctrine of equitable estoppel can be used to preclude a party from asserting the statute of limitations.

McMackin v. Ehrheart, 194 Cal. App. 4th 128, 142, 122 Cal. Rptr. 3d 902, 913 (2011) citing *Battuello v. Battuello*, 64 Cal. App. 4th 842, 847, 75 Cal. Rptr. 2d 548 (1998).

As the Court explained, "the 'defendant, having, by his own wrongdoing, prevented the plaintiff from instituting his suit, will not be permitted to take advantage of his own wrong by setting up

the statute [of limitations] as a defense.'" *McMackin,*194 Cal. App. 4th at 142, 122 Cal. Rptr. 3d 902 at 913 quoting *Pashley v. Pacific Elec. Ry. Co.,* 25 Cal. 2d 226, 231–232, 153 P.2d 325 (1944). On that basis, the client's preliminary injunction was affirmed.

Lessons for Creditors – Some Practical Suggestions

Implications of *McMackin v. Ehrheart* for a *Marvin* claimant, or any other creditor who is going to know when an obligor has died, are fairly obvious:

1) During the lifetime of the promisor, be sure all promises are put in writing, memorialized and secured by a recorded instrument.

2) Make an official creditor's claim within one year of a decedent's death, for any outstanding obligation or promise the decedent made to the claimant. This may require the claimant's initiative in opening a probate, if none has been opened, in which to file the claim.

This also may require the claimant to bring a legal proceeding against the estate—often the family of the decedent—with whom the claimant may have absolutely no dispute at the time.

Common sense would dictate that if the decedent's estate were cooperative, it might be sufficient for the claimant to obtain from the estate representative, within one year from the date of death, a written, signed "Estoppel Certificate" acknowledging the existence of the debt, expressly tolling and/or waiving any statute of limitations, and agreeing that the debt will be paid and the promise effectuated by the estate, without the necessity for filing a probate or making an official "creditor's claim." But this may or may not work –in *Stewart v. Seward* 148 Cal.App.4th 1513 (2007), the court found no tolling or estoppel in a claim falling within Section 366.3, where the formal notice rejecting the creditor's claim, signed with three months remaining but mailed to the creditor with two months and 27 days remaining before one year after the date of death, contained the boilerplate language that "three months" remained to file a lawsuit after rejection of the claim. The creditor filed two days late, three months after the date the rejection notice was mailed, but the Court found it time-barred. The *Stewart* case certainly requires that the estate's intent to be bound and estopped be very clearly and expressly acknowledged. " 'A finding of waiver requires clear and convincing evidence of intentional relinquishment of a known right with awareness of the relevant facts. The waiver may be express, based on the party's words, or implied from conduct indicating an intent to relinquish the right.' " *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 456, cited in *Stewart v. Seward, supra* .

Can a Commercial Creditor or Lender Document Estoppel to Avoid the One-Year Rule?

Implications of *McMackin v. Ehrheart* for a commercial creditor or lender are even less clear, especially because such creditors often do not learn of an obligor's death for more than one year. Further discussion on this point is needed and invited.

1) Could estoppel be built into the underlying documents? Creditors may consider a provision in underlying documentation that expressly requires notice of the death of any obligor or co-

obligor, and which deems lack of such notice to be agreement by the Estate of the obligor that the debt will be paid and the promise effectuated by the estate, without the necessity for filing a probate or making an official "creditor's claim." (Better check the successor inurement clause as well!)

2) Could annual loan file reviews include affirmatively obtaining an "Estoppel Certificate" signed by all obligors, affirming that no obligor has died as of the date of the Certificate, or alternatively, that an obligor has died and the obligor's estate representative agrees in writing that the debt will be paid and the promise effectuated by the estate, without the necessity for filing a probate or making an official "creditor's claim?"

Whatever the implications and suggestions for minimizing the volume of time-barred obligations, one sure editorial comment can be made in conclusion: in this area of law, the one-size-fits-all statute of limitations of CCP Section 366.3, barring claims after one year from an obligor's death, leaves too many legitimate claims without remedy. Under many circumstances, the one year time frame is counter-intuitive at best and a "trap for the unwary" at worst, as the *Stewart* court wrote. Let us hope that the law in this area continues to develop and move into closer alignment with the realities of how estates and decedent's debts are handled.