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Understanding California Nonclaim Statutes and Statutes of Limitations

Steven J. Andre

UNDERSTANDING CALIFORNIA NONCLAIM STATUTES AND STATUTES OF LIMITATIONS

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I. TOLLING OF THE STATUTE OF LIMITATIONS WHILE A CLAIMANT PROCEEDS UNDER A NONCLAIM STATUTE

Nonclaim statutes are enacted to restrict the manner in which claims can be brought against decedents' estates. They prescribe the time for doing so and the way a claim must be presented to the estate's administrator for consideration. The statute of limitations for bringing a legal action is generally tolled while this procedure is undertaken by the claimant. The tolling rule has evolved in judicial analysis from equitable principles and has been codified. The failure of the claimant to adhere to the nonclaim statute's requirements precludes pursuing legal action against the estate.

While the problem examined here is specifically analyzed in the context of California law, it is by no means isolated to that jurisdiction. Nationwide, the vexing problem with ascertaining whether a particular claim is subject to a nonclaim statute has frequently plagued confused claimants seeking to secure redress from a decedent's estate. In a number of jurisdictions the statutes apply, or are held to apply, only to "creditors." The meaning of this term has been given varied interpretation. It is interpreted by the courts of different jurisdictions to sometimes exclude tort claims as opposed to "contingent" or liquidated claims.[1] California differentiates between

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1 I. J. Schiffres, *Tort Claim as Within Nonclaim Statute*, 22 A.L.R. 3d 493 (1968).

claims that are equitable and those that are not (i.e., those compensable in damages). The latter are construed by its courts to be "creditor" claims under the state's nonclaim statutes. The issue addressed here has general application to the extent that it has to do with the tolling effect on the applicable statute of limitations of a claimant who follows the nonclaim procedure for a claim that is not subject to the nonclaim statute.

While the Legislature seeks to define statutes of limitations in terms of basic fact patterns, California courts, adhering to Pomeroy's elusive primary right approach,[2] interpret them in terms of basic legal concepts. The two paradigms do not mesh,[3] and the result is evident in the confusion ensuing from the Legislature's adoption of California Civil Procedure Code ("CCP") Section 366.3 and judicial efforts to apply it.[4]

California Probate Code ("Probate Code") Section 9352 tolls the running of the limitations period while a claimant pursues the nonclaim procedure.[5] Where a claim involves a promise to devise something to the claimant, Probate Code §9352 is at loggerheads with the strict one-year limitation period for lawsuits to enforce a promise for distribution of an interest in an estate set forth in CCP §366.3.

Typically, CCP §366.3 is drafted to encompass a fact pattern: "[C]laims which arise from a promise or agreement with a decedent to distribution from an estate or trust or . . . another legal instrument . . . ."[6] The problem is this fact pattern can encompass a number of primary rights and legal and equitable relief.[7]

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2 3 Witkin, Cal. Procedure (2d), Pleading § 22.

3 Steven J. Andre, *California Personal Injury Statutes of Limitations: The Modern Tort and the Judicial Abandonment of an Archaic Doctrine,* 27 SANTA CLARA L. REV. 657, 686-687(1987), *available at* http://www.works.bepress.com/stevenjandre/4/.

4 CAL. CIV. PROC. CODE § 366.3 (Deerings 2009).

5 CAL. PROB. CODE § 9352 (Deerings 2009).

6 Assembly Floor Analysis, Concurrence in Senate Amendments, Assem. Bill No. 1491 (1999-2000 Reg. Sess.) as amended April 4, 2000, pp. 1-2.

7 Stewart v. Seward, 148 Cal.App.4th 1513 (2007) (the same basic facts – a promise by a decedent to devise property – can sound in a variety of primary rights depending upon other factors not addressed by the language

According to the judicial mindset, the pertinent question should be: first, what primary right is at issue and, second, what limitations period, if any, governs the cause of action.[8] But the Legislature, marching to the beat of a different drum, has made this inquiry process unworkable.

II. THE BACKGROUND AND DEVELOPMENT OF STATUTES OF LIMITATIONS AFFECTING CLAIMS AGAINST ESTATES

California's one-year statute of limitations period applicable to claims against estates is set forth at CCP §366.2 and CCP §366.3.[9] These sections seek to cover the recurring fact situation involving a decedent's promise to devise property.[10] The predecessor to CCP §366.2 and CCP §366.3 was former CCP §353.[11] CCP §353 was repealed and CCP §366.2 was enacted due to concerns over the adequacy of notice to creditors raised by the U.S. Supreme Court in

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of CCP §366.3. The factual allegations can, therefore, be subject to different limitations periods which are framed in a fashion more palatable to the courts by describing causes of action rather than fact patterns. The *Stewart* court identified the substantive basis for the claim as an equitable one for quasi-specific performance of an agreement for distribution of the estate (imposing a resulting trust). This should be contrasted with a claim (involving the same facts) for imposition of a trust based upon constructive fraud (subject to CCP §338(d)), or a damage claim for a liability incurred by the decedent while alive (covered by CCP §366.2) or a will contest action); *See also* Day v. Greene, 59 Cal.2d 404, 411(1963).

8 *Stewart*, 148 Cal.App.4th at 1522-23 (the court in *Stewart* glossed over the problem posed by the different legislative and judicial perspectives concerning what it is that limitations periods have application to – fact patterns or primary rights. It did this by juxtaposing the relief requested with the "claim" and then defining the claim in terms of the fact pattern rather than the cause of action: "[T]he pertinent question is not the nature of the relief or remedy being requested but rather, the nature of the claim itself. Because Stewart's claim arose from an alleged oral promise or agreement concerning distribution from Wilmer's estate, the instant action is governed by the limitations period of section 366.3.").

9 CAL. CIV. PROC. CODE §§ 366.2-366.3 (Deerings 2009).

10 Assembly Floor Analysis, *supra* note 6.

11 CAL. CIV. PROC. CODE § 353 (Repealed).

Tulsa v. Pope.[12] CCP §366.2 was substantially the same as CCP §353(b).[13] At this point, the Legislature perceived a background of confusion regarding the applicable statute of limitations addressing the common fact pattern relating to claims brought based on a decedent's failure to make a promised devise.[14]

The adoption of a one year limitations period was explained by the 1990 California Law Revision Commission in terms of the unusual nature of claims after one year, the exception from the one year period where public policy favors enforcement beyond that time and the practice in other jurisdictions.[15] The Commission

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12 Tulsa Professional Collection Services Inc. v. Pope, 485 U.S. 478 (1988); *See also* Dawes v. Rich, 60 Cal.App.4th 24 (1997) (recounting the background of CCP §366.2: "The statute was enacted because of concern the four-month claims period which governed probated estates was not constitutionally sound if applied to creditors who did not have actual notice of a probate administration. The Law Revision Commission believed a one-year statute running from death would pass constitutional muster because '. . . it allows a reasonable time for the creditor to discover the decedent's death, and it is an appropriate period to afford repose and provide a reasonable cutoff for claims that soon would become stale.'").

13 *See* Farb v. Superior Court, 174 Cal.App.4th 678 (2009).

14 *Compare* Ludwicki v. Guerin, 57 Cal.2d 127 (1961) (four year statute of limitations based on the limitations period for written contracts under CCP §337), *with* Estate of Brenzikofer, 49 Cal.App.4th 1461 (1996) (two year statute of limitations for oral misrepresentation), *and* Day v. Greene, 59 Cal.2d 404 (1963) (three year limitations period based on constructive fraud), *and* Potter v. Bland, 136 Cal.App.2d 125, 134 (1955) (oral agreement subject to CCP §339(1)).

15 *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507, 513 (1990) (according to the Commission, recommendation of the one-year period was based on several considerations: "(1) In estate administration, all debts are ordinarily paid. Even under the existing four-month claim period it is unusual for an unpaid creditor problem to arise. A year is usually sufficient time for all debts to come to light. Thus it is sound public policy to limit potential liability to a year; this will avoid delay and procedural complication of every probate proceeding for the rare claim that might arise more than a year after the decedent's death. (2) The one year limitation period would not apply to special classes of debts where public policy favors extended enforceability. These classes are (i) secured obligations, (ii) tax claims, and (iii) liabilities covered by insurance. The rare claim that may become a problem more than a year after the decedent's death is likely to fall into one of these classes. (3)

acknowledged the need to extend the period for certain claims for which public policy compels a longer period. One might suppose this would include claims based on fraud, since such causes of action may by their nature remain hidden for years. But, the Commission's recommendation limited itself to tax debts, claims covered by insurance, and secured claims.

In 1998 the language of CCP §366.2 was amended to cite the exceptional instances in which the limitations period would be tolled.[16]

In *Battuello v. Battuello*,[17] involving the same general fact pattern of a decedent's unfulfilled promise for postmortem performance,[18] the court recognized that CCP §366.2 was limited to causes of action accruing while the decedent was alive. The Legislature responded by enacting CCP §366.3 in 2000. CCP §366.3 represented a continuation of the Legislature's effort to impose a uniform one-year period for claims against estates. It targeted cases arising out of the familiar fact pattern represented in *Battuello*.[19]

The Legislature's express intent in enacting CCP §366.3,[20] as explained in *Embree v. Embree*,[21] was to achieve consistency in the

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Every jurisdiction of which the Commission is aware that has considered the due process problem addressed by the recommendation, including the Uniform Probate Code, has adopted the one-year statute of limitations as part of its solution.").

16 CAL. CIV. PROC. CODE §§ 366.2(a)-(b)(4) (Deerings 2009).

17 Battuello v. Battuello, 64 Cal.App.4th 842 (1998).

18 *Id.* (the nature of the promised devise in *Battuello* made equity proper.).

19 Quasi-specific performance relief is (to make matters more confusing) also designated "equitable estoppel" because under the circumstances the decedent's estate is estopped from asserting the statute of frauds requirement that the agreement be written. *See generally* CAL. PROB. CODE § 21700; Brown v. Superior Court, 34 Cal.2d 559 (1949); Walker v. Calloway, 99 Cal.App.2d 675 (1950) (and cases cited therein); Ludwicki v. Guerin, 57 Cal.2d 127, 130 (1961); Martin v. Kehl, 145 Cal.App.3d 228 (1983); Estate of Brenzikofer, 49 Cal.App.4th 1461, 1468-69 (1996).

20 CAL. CIV. PROC. CODE §§ 366.3(a)-(b).

21 Embree v. Embree, 125 Cal.App.4th 487 (2004) (explaining the purpose of CCP §366.3 in ensuring the orderly settlement of estates in the course of wrestling with one of the statute's perplexing ambiguities. The court observed: "Although section 366.3's use of 'may,' as opposed to 'shall' or 'must,' arguably creates some ambiguity as to whether it establishes a true

limitations period applicable to claims for distribution of an interest in an estate.[22] The Legislature sought to encompass claims accruing after the decedent dies (e.g., quasi-specific performance relief pertaining to an unfulfilled promise to devise) within the one-year limitations period.[23] CCP §366.3 was enacted to affect claims (like *Battuello*) that were not subject to the claim filing requirements to begin with – equitable suits to compel specific performance. The language of the section is, however, in no way restricted to equitable claims. Plainly, the section would cover a promised devise of a fixed monetary sum that would not merit quasi-specific performance relief – claims for damages are included.[24]

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one-year limitations period for breach of a covenant-to-will agreement, any possible ambiguity is eliminated by examination of the legislative history of the section: '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 [enacting section 366.3] 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).' Section 366.3 is applicable to all persons (including [decedent]) dying after January 1, 2001.") (citation omitted).

22 *Id.* at 492 n.4 (actually, the supposed ambiguity reflects the statute's function in some cases of extending the statute of limitations for a cause of action against someone who passes away.); *See also* Delgado v. Estate of Espinoza, 205 Cal.App.3d 261 (1988); Fazio v. Hayhurst, 247 Cal.App.2d 200, 202 (1966).

23 Senate Rules Committee, California Committee Analysis (April 6, 2000) (the legislative history of CCP §366.3 contains the following reference to quasi-specific performance (a.k.a equitable estoppel) claims: "This bill establishes 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.").

24 This has unquestionably produced some confusion, *see infra* note 115. Since the Legislature regarded the specific performance type claims it was addressing as not being legal claims (and as not subject to and not supposed to be brought through the claims procedure), there was never any need for it to worry about whether the claim process should toll the running of the statute of limitations. The Legislature simply overlooked the same fundamental requirement for equitable relief that has vexed litigants for

III. APPLICATION OF EQUITY TO STATUTES OF LIMITATIONS IN CALIFORNIA

Equity, a natural law concept, developed as a means of addressing the necessary imperfection of the law. The idea is that because the law speaks generally to the public as a whole, rather than to the circumstances of specific cases, man-made law may fail to achieve justice. It is the role of the court acting in equity to do this. The doctrine finds its origins in English legal theory. *Eyston v. Studd* recognized that equity was "no part of the law, but a moral virtue which corrects the law."[25]

The view that equity existed to supplement and rectify the deficiencies of the law is stated by Blackstone, who referred to the role of equity as "the correction of that, wherein the law (by reason of its universality) is deficient," and believed that there ought to be "somewhere a power vested of excepting those circumstances" in which applying the law would produce an unjust outcome.[26] The function of courts acting in equity has been accepted by California courts.[27]

Like judicial review, equity represents a niche courts have carved out for themselves to allow them to provide some control over the acts of the Legislature. It was created in pursuit of the mysterious phantom "justice" where the law fails to provide. The Legislature can

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almost 100 years – an inadequate legal remedy. CCP §366.3 was not designed to tamper with or redefine the existing body of law distinguishing between treatment of legal and equitable claims. Most likely the Legislature did not even consider the rule that determination of a creditor's claim depends upon ~~whether damages are available as an adequate remedy,~~ not upon whether the claim arises from a promise for distribution from the estate.

25 Eyston v. Studd, 75 Eng.Rep. 688, 695-96 (C.P. 1574).

26 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41 (Collins & Hannay 1830), *available at* http://books.google.com/books?id=lxBo6zahhOoC.

27 Cal. Jur. 3d, Equity § 2 ("The primary purpose of equity is to supplement the deficiencies of the law, and accordingly, equity will interpose its jurisdiction for the purpose of rendering justice only in those cases in which the law itself is incapable of rendering it.").

no more declare *Marbury v. Madison*[28] null and void than it can abrogate equity. Such action would be beyond the pale and would entail invading a province the courts have declared their own. Whether the Legislature really sought to restrict or tamper with the power of the courts to do equity by enacting CCP §366.2 and CCP §366.3 is highly doubtful. What appears more likely from the history of these sections and their language is that the Legislature sought to restrict the use of codified extensions and tolling provisions.

IV. THE PURPOSE OF STATUTES OF LIMITATIONS CONCERNING CLAIMS AGAINST ESTATES AND EQUITABLE EXCEPTIONS

The purpose of the limitations periods imposed by CCP §366.2 and CCP §366.3 is to protect a decedent's heirs, legatees, or beneficiaries from stale[29] and unknown claims, and thus to "effectuate the strong public policy of expeditious and final estate administration."[30] This purpose of preventing stale claims is no different than the purpose of statutes of limitations generally.[31]

The equitable exceptions recognized by the doctrines of equitable estoppel and equitable tolling do not conflict with the statute of limitations objective of barring stale and dilatory claims. Nor do they conflict with the additional objective of CCP §366.2 and CCP

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28 Marbury v. Madison, 5 U.S. 137 (1803).

29 *See* Collection Bureau of San Jose v. Rumsey, 24 Cal.4th 301, 308 (2000).

30 Bradley v. Breen, 73 Cal.App.4th 798, 805 (1999).

31 Norgart v. Upjohn Company, 21 Cal.4th 383, 395 (1999) (the Supreme Court observed: "'Statute of limitations' is the 'collective term . . . commonly applied to a great number of acts,' or parts of acts, that 'prescribe the periods beyond which' a plaintiff may not bring a cause of action. It has as a purpose to protect defendants from the stale claims of dilatory plaintiffs. It has as a related purpose to stimulate plaintiffs to assert fresh claims against defendants in a dilatory fashion. Inasmuch as it 'necessarily fix[es]' a 'definite period[ ] of time', it operates conclusively across the board, and not flexibly on a case-by-case basis. That is to say, a cause of action brought by a plaintiff within the limitations period applicable thereto is not barred, even if, in fact, the former is stale and the latter dilatory; contrariwise, a cause of action brought by a plaintiff outside such period is barred, even if, in fact, the former is fresh and the latter diligent.").

§366.3 of barring unknown claims. They provide an equitable exception to the bar of the statute of limitations where the claimant is conscientious in pursuing the claim, where the claim is known to the defendant, and where the defendant is not prejudiced by allowing the plaintiff to pursue the claim.

The California Code of Civil Procedure enumerates a number of situations where the running of the statute of limitations will be suspended.[32] The oft-stated objective of equity is to allow the courts to give effect to the legislative purpose implicit in the law. Assuming CCP §366.2 and CCP §366.3 represent a legislative mandate that the importance of promptly achieving finality in administering estates overrides the foregoing statutory exceptions to the running of the statutes of limitations, the courts should not be able to use equity to accomplish what the Legislature explicitly declined to do. Otherwise, courts could just find war, minority, insanity, etc., all still qualify in equity to toll the running of the limitations period despite the Legislature's determination that they do not qualify in law.

There needs to be a discernable basis for the courts to apply equity in the form of equitable tolling or equitable estoppel when minority, impossibility, and other sound excuses are not legally acceptable. The distinction would seem to derive from the special purpose of CCP §366.2 and CCP §366.3 in protecting estates from unknown claims – not in the general statute of limitations objective of capping a timeline. Both equitable exceptions, unlike the statutory

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[32] CCP §351 through CCP §356 set forth equitable circumstances tolling the limitations period: CCP §351 (absence of defendant from the state); CCP §352 (minority, insanity, imprisonment of plaintiff); CCP §352.5 (defendant subject to independent order of restitution for the injury as condition of probation); CCP §353 (death of plaintiff); CCP §353.1 (state court assumes jurisdiction over practice of plaintiff's attorney due to legal or other causes); CCP §354 (state of war bars plaintiff's access to court); and CCP §356 (commencement of action stayed by injunction or statutory prohibition). In addition to the tolling statutes at CCP §351-56, there are tolling provisions in CCP §328 (delayed accrual for minor or insane person in action for recovery of real property), CCP §328.5 (delayed accrual for imprisoned person on action for recovery of real property), and CCP §358 (delayed accrual where two disabilities coexist).

exceptions, are judicially crafted for situations where the estate knows about the claims and is protected from unknown, stale claims.

V. THE DEVELOPMENT OF EQUITABLE EXCEPTIONS TO STATUTES OF LIMITATIONS IN CALIFORNIA

A. The Relation Back Doctrine – Amendment of Pleading

Prior to the emergence of equitable relief responsive to statute of limitations defenses, the courts had long accepted a legal fiction permitting a good faith litigant to amend an action to add a party to an action and thereby avoid the bar of the statute of limitations. California courts acted liberally in looking beyond the status of a party and in acknowledging that a new party's entry in the action relates back to the filing date of the original pleading for statute of limitations purposes where the interest the new party pursues is the same interest stated in the original pleading. The constructive notice provided by the filing of the complaint was sufficient.

The court in *Cox v. San Joaquin Light & Power Co.*[33] considered whether a widow of a wrongful death victim, who sued in her individual capacity, was barred by the statute of limitations from amending the action to insert herself in her capacity as administratrix of the decedent's estate. The court found that the action was not barred by the statute of limitations because the addition of the new party related back to the filing date of the original complaint.[34]

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33 Cox v. San Joaquin Light & Power Co., 33 Cal.App. 522 (1917).

34 *Id.* at 526-27 (the court contrasted Dubbers v. Goux, 51 Cal. 153 (1875)); *Id.* at 529 (*Dubbers* was an action brought by a husband whose wife was substituted as plaintiff after the limitations period ran. In that case the Supreme Court observed the factual distinction: "It is not pretended that she had succeeded to any interest held by her husband pending the action, nor that she had any joint interest with him in the subject matter. On the contrary, she was substituted . . . not to prosecute the same cause of action stated in the complaint . . . but another and distinct cause of action in her separate right.") (citations omitted); *Cf.*, Bartalo v. Superior Court, 51 Cal.App.3d 526, 533 (1975) (similarly, a husband's effort to add his claim for loss of consortium to his wife's timely personal injury action after the statute of limitations period had expired was rejected by the court. The court found that this amendment could not relate back because it was not a mere

Other early cases involving addition or substitution of plaintiffs looked past technical considerations regarding "who" was bringing the action to consider the substantive issue of "what" the action was about in terms of evaluating whether notice was provided to a defendant.[35]

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change in legal theory or formal change, but set forth a different factual basis for recovery: "Husband's claim to a loss of consortium is a wholly different legal liability or obligation. The elements of loss of society, affection and sexual companionship are personal to him and quite apart from a similar claim of the wife. . . . The general rule governing the permissibility of the bringing in of additional plaintiffs after the period of the statute of limitations has elapsed, or of the assertion of the defense of the statute of limitations against them, is that where the additional party plaintiff, joining in a suit brought before the statute of limitations has run against the original plaintiff, seeks *to enforce an independent right*, the amended pleading does not relate back, so as to render substitution permissible or to preclude the defense of the statute of limitations.") (citation omitted); *See also* Anderson v. Barton Memorial Hospital, Inc., 166 Cal.App.3d 678 (1985) (holding that an heir's wrongful death claim was a personal and separate cause of action against which the statute of limitations runs precluding intervention – after the limitations period had run – in a wrongful death action brought by other heirs of the decedent); *See also* Basin Construction Corp. v. Dept. of Water and Power of the City of Los Angeles, 199 Cal.App.3d 819, 825 (1988) (rejecting an intervener's attempt to avoid the bar of the statute of limitations on the basis that over six years earlier their insurer (State Farm) had concluded a different action concerning damage to different property from the same fire: "Appellants fail to show that State Farm's claim . . . either in actuality or by operation of some legal principle, brought to the attention of respondent the claims or issues related to the uninsured losses suffered by them."); Dilberti v. Stage Call Corp., 4 Cal.App.4th 1468 (1992) (when complaint concerning injuries to a passenger sustained in an automobile accident erroneously named the uninjured driver as the plaintiff, substitution of the passenger after the statute of limitations had run, where the body of the original complaint did not mention the passenger, was a substantial change to the nature of the action involving the enforcement of an independent right); Phoenix of Hartford Insurance Companies v. Colony Kitchens, 57 Cal.App.3d 140 (1976) (rejecting substitution after statute of limitations had run of a plaintiff insurer, seeking recovery under a subrogation provision, into a personal injury action as a recovery sought on a different set of facts than one supporting a tort action.).

35 Missouri, Kansas and Texas Railway Co. v. Wulf, 226 U.S. 570 (1913) (substitution of the administratrix of an estate in an action for recovery of damages for wrongful death was not barred by the statute of limitations

In *Alvez v. Toprahanian,*[36] the court allowed an amendment substituting a plaintiff in his correct capacity as guardian of the estates of certain minors after the limitations period had lapsed. The *Alvez* court, in rejecting the argument that the amended complaint substituted an entirely different cause of action, observed the liberal spirit of avoiding technical traps in favor of substantive considerations that now permeated the law.[37] The court held, "The amendment made no change in the substance of the action . . . . The amendment permitted

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where original complaint was filed timely by an improper party); Ruiz v. Santa Barbara Gas, 164 Cal. 188 (1912) (amendment substituting general administrator of estate as plaintiff after statute of limitations would have run does not bar action); Estate of Butzow, 21 Cal.App.2d 96 (1937) (holding that a timely will contest inures to the benefit of an interested party who enters that action after the limitations period has run); California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, Inc., 50 Cal.2d 844, 851 (1958) (upholding an amendment to a complaint brought by a corporation at trial after the close of evidence to substitute an individual, Hudson, as the plaintiff: "The amendment to the complaint stated no new cause of action against the defendants, nor did it state any new facts. It does not appear that defendants were prejudiced thereby and the court did not abuse its discretion in permitting the amendment and inclusion of Hudson as plaintiff . . ."); Kirman v. Borzage, 75 Cal.App.2d 865 (1946) (held in an action to foreclose a mechanic's lien, a third amended complaint which alleged that plaintiff Mary Kirman, as administratrix, furnished the labor and materials, while the original complaint alleged that Mary Kirman and George Kirman, as co-partners, did so, was not a wholly different legal liability or obligation from that originally stated); California Central Airlines v. Fritz, 169 Cal.App.2d 436 (1959) (denial of amendment to substitute "California Coastal Airlines, a California corporation, doing business as California Central Airlines" for "California Central Airlines, a California Corporation" held reversible error).

36 Alvez v. Toprahanian, 39 Cal.App.2d 126 (1940).

37 *Id.* at 129-30 ("Courts under the reformed system of procedure look to the substance of things rather than to form, and to persons and things rather than mere names. This manner of treating things constitutes the life and spirit of the reformed system of procedure. That system was designed to enable courts of justice to brush aside technicalities affecting no substantial right, and decide cases upon the merits. In the case at bar the body of the complaint clearly indicated that the intention was to sue the Clio Mining Company and recover upon its debt, and the parties appearing in that action could not close their eyes to substantial facts and rely upon mere technical omissions in the caption or title of the case . . . .") (citation omitted) (quoting Lindsey v. Superior Court, 100 Cal.App 37, 41 (1929)).

was one as to form only and not as to substance and, in our opinion, was properly allowed by the trial court."[38]

The standard under this "reformed system" has become more liberal since the older cases cited *supra*. The concern with whether an amended pleading would relate back to the date of the original pleading for statute of limitations purposes under the older cases was whether it stated a new cause of action. The new standard recognized by the courts is whether the different pleadings are based upon the same general set of facts. The Supreme Court described the shift:

> [W]hether or not a "new cause of action" is stated is no longer the test. In *Austin v. Massachussetts Bonding & Ins. Co.* this court reviewed the relevant decisions beginning with those of the *Atkinson* [*v. Amador & Sacramento Canal Co.* (1878) 53 Cal. 102] vintage, and found "a development which, in furtherance of the policy that cases should be decided on their merits, gradually broadened the right of a party to amend a pleading without incurring the bar of the statute of limitations." In its modern formulation the rule is that "the amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the *same general set of facts*."[39]

In the past 50 years, an abundance of cases look past the technical designation of a party to the substantive issue of whether the interests asserted against the defendant have been conveyed by a

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38 *Id.* at 131.

39 Wilson v. Bittick, 63 Cal.2d 30, 37 (1965) (citations omitted) (allowing amendment to action for ejectment to expand the description of the land in question after statute of limitations ran); *See also* Branick v. Downey Savings & Loan Ass'n, 39 Cal.4th 235, 219 (2006) ("The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts,* (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one.").

statement of the same general set of facts in the earlier form of the action.[40]

The analysis was applied to a plaintiff who failed to file suit against a decedent's estate representative in *Delgado v. Estate of Espinoza*.[41] That case dealt with the predecessor to CCP §366.2, which differed in that it allowed one year from the date letters were issued in which to file an action. The plaintiff filed suit against a tortfeasor who caused him personal injuries in a traffic collision. The suit was not filed within the one-year period applicable to personal injury actions at that time. Apparently unbeknownst to the plaintiff the tortfeasor died

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40 Harrison v. Englebrick, 254 Cal.App.2d 871, 875 (1967) (an employee's workers compensation insurer that paid him worker's compensation and whose complaint for recovery of the benefits paid against a third person was filed almost three years after the date of injury was not barred because its complaint related back to the date the employee filed a timely action for personal injury damages against the negligent third party. The court concluded: "The purpose of the statute of limitations is to give the adverse party timely warning of the real claims against him and to prevent the assertion of stale claims. That purpose was substantially served here when the employee . . . filed his complaint less than six months after the injury occurred."); Cloud v. Northrop Grumman Corp., 67 Cal.App.4th 995 (1998) (allowing amendment to complaint in wrongful termination action to substitute bankruptcy trustee where original plaintiff was barred from proceeding by her bankruptcy, although statute of limitations had run); Bank of America, National Trust & Savings Assn. v. Superior Court, 35 Cal.App.3d 555 (1974) (substitution of plaintiff from "Continental Casualty Company" to "Continental Assurance Company" resulted in no substantial prejudice to the defendant and related back to the filing date of the original complaint for statute of limitations purposes); Pasadena Hospital Assn. v. Superior Court, 204 Cal.App.3d 1031 (1988) (allowed the addition as a plaintiff of a professional corporation to a doctor's libel suit on the basis that no prejudice could result to the defendant hospital); California Air Resources Board v. Hart, 21 Cal.App.4th 289 (1993) (amendment to complaint against a motorcycle dealer for violations of the Health and Safety Code, substituting the People of the State of California in place of the Air Resources Board, was proper because it did not substantially change the nature of the action); Jensen v. Royal Pools, 48 Cal.App.3d 717 (1975) (in action for damages for a defective pool, where club lacked standing and there was no prejudice to defendants, substitution after the limitations period had run was allowed of the Jensens, individually and as representing the class of owners).

41 Delgado v. Estate of Espinoza, 205 Cal.App.3d 261 (1998).

in the crash. After letters were issued, the plaintiff filed a timely claim. When the claim was denied, the plaintiff amended what would have been an untimely lawsuit to name the personal representative and state a count based on his claim. The court rejected the challenge that the statute of limitations barred the amended complaint and had no problem with the idea that the plaintiff could substitute the new party – the personal representative – in place of the decedent. It held, "If a complaint is already on file a claimant may proceed by amendment rather than filing a new action."[42]

Similarly, in *Burgos v. Tamulonis*,[43] a lawsuit for personal injuries was filed against a tortfeasor who died several months after the plaintiff was injured. The plaintiff did not learn of the death until over one year afterward. The court held that the plaintiff was entitled to amend her complaint to name the personal representative.[44] The court reasoned the action against the decedent's estate related back to the lawsuit brought against the decedent:

> The first amended complaint seeks recovery in the same general set of facts as the original complaint. It arises from the same accident and seeks recovery for the same injuries. Thus, it will be deemed filed on the date of the original complaint. "[W]hen a complaint is amended only to identify a party by its proper name, the gravamen of the complaint remains unaltered, and hence the later pleading relates back to the earlier pleading."[45]

Essentially the treatment of the amendment substituting or adding a party as relating back to the filing date of the original pleading differs little from the equitable tolling analysis which permits an action to be maintained based upon the fact that the claimant had pursued a different remedy within the statutory period which did not pan out. One significant difference between the two doctrines concerns notice to the defendant. Since notice is deemed given by virtue of the

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42 *Id.* at 266.

43 Burgos v. Tamulonis, 28 Cal.App.4th 757 (1994).

44 *Id.* at 763.

45 *Id.* (citations omitted).

filing of the complaint, the question of actual notice (and prejudice) to the defendant does not factor into the equation for an amended pleading the way it does with the equitable tolling analysis that developed subsequently.[46]

B. Action Already Commenced by Another Claimant: Nominal Defendants, Joinder, and Intervention

There is no statute of limitations prerequisite that a claimant must file his or her own independent lawsuit in order to avoid the effect of the one year statutes of limitation set forth in CCP §366.2 and CCP §366.3 – only that "an action may be commenced" within one year after the date of death. Examination of the term "commencement of an action" yields no such requirement that the interested party bring their own lawsuit. CCP §350 provides, "An action is commenced . . . when the complaint is filed."[47] CCP §411.10 similarly provides, "A civil action is commenced by filing a complaint with the court."[48]

That there is no requirement that a claimant file a separate claim or lawsuit within the one year period for each form of remedy sought is addressed by the court in *Dobler v. Arluk Medical Center Industrial Group, Inc.* (*"Dobler I"*),[49] and *Arluk Medical Center Ind. Group, Inc. v. Dobler* (*"Dobler II"*).[50] In *Dobler I*, a creditor filed a timely claim in the probate proceeding and obtained a judgment against the estate. The estate was insufficient to satisfy the judgment, so the creditor sought to enforce it against trust property. The trustee asserted the claim was barred by CCP §366.2 because no separate claim had been filed against the trust within one year of death. The court rejected the argument that a claimant was required to file a

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46 Likewise, courts construing California's doe defendant statute, CCP §474, have looked to unreasonable delay or actual prejudice (laches) to the defendant occasioned by the addition of a new defendant; *See* Sobeck & Associates, Inc. v. B & R Investments No. 24, 215 Cal.App.3d 861, 870 (1989).

47 CAL. CIV. PROC. CODE § 350 (Deerings 2009).

48 CAL. CIV. PROC. CODE § 411.10 (Deerings 2009).

49 Dobler v. Arluk Medical Center Industrial Group, Inc. (Dobler I), 89 Cal.App.4th 530 (2001).

50 Arluk Medical Center Ind. Group, Inc. v. Dobler (Dobler II), 116 Cal.App.4th 1324 (2004).

separate claim or action within one year of death for each form of remedy sought. It held the creditor had preserved its right to pursue trust property by filing a timely claim in the probate proceeding.[51]

After remand, the creditor discovered that the trust property had been distributed. The court in *Dobler II*, held that the proper remedy for the creditor was to pursue recovery from the property distributed to the trust beneficiaries in accordance with Probate Code §19400.[52] No requirement existed that a separate claim or action be made within one year against the trust beneficiaries.

Similarly, the court in *Ferraro v. Camarlinghi*[53] accepted this view and held that a claimant's filing requirement was vicariously satisfied by a lawsuit filed by her sister on a theory of relief which benefited both sisters. Although the plaintiff in *Ferraro* was named as a nominal defendant in her sister's action, had she not been named, there would appear to be no obstacle to her intervening as a party where she had an interest in the subject matter of the action (a share in the estate). Presumably the action filed by her sister provided notice of her claim based on the same general facts.[54]

A claimant's entry into an existing action to satisfy the one year limitations period would, for the same reasons, be accomplished by joinder (CCP §389) or intervention (CCP §387), assuming other prerequisites for doing so are satisfied.

C. Emergence of the Application of Equity to Statutes of Limitations Situations in California

1. Election of Remedy cases, Equitable Estoppel, and Equitable Tolling

The fundamental idea that equity exists to provide justice where the law, due to its inherently general and imperfect nature, fails

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51 *Dobler I*, 89 Cal.App.4th at 535.

52 *Dobler II*, 116 Cal.App.4th at 1338-39.

53 Ferraro v. Camarlinghi, 161 Cal.App.4th 509 (2008).

54 *Compare* Freeman v. State Farm Mut. Ins., 14 Cal.3d 473, 488-91 (1975).

to adequately do so is the basis for applying equitable principles to statute of limitation analysis by California courts.[55]

The history of judicial interpretation of statutes of limitations in California[56] reflects a movement from strict construction[57] to increasing recognition that equitable considerations should play a role in filling the gaps left by the statutes. Initially, this developed in the abandonment of earlier holdings requiring that exceptions to statutes

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55 Lewis v. Superior Court (Perret), 175 Cal.App.3d 366, 372 (1985) (the inadequacy of codified exceptions and the need to supplement them by equitable principles is stated in *Lewis*, which involved a lawyer who was struck by an automobile and disabled days before he planned to file a complaint on the eve of the running of the statute of limitations. The court considered existing statutory relief (at CCP §351-56) involving impossibility, and employed equity to fill the gap: "Careful comparison of these statutory exceptions reveals the manifest common legislative purpose of attempting to avoid unjust application of statutes of limitation where circumstances effectively render timely commencement of action impossible or virtually impossible. Certain of the exceptions are apparently fashioned in response to very early cases wherein unjust results occurred for lack of a particular express tolling exception. The Legislature in 1872 formulated its exceptions by specification of circumstances, rather than by direct statement of general principle. Of course it could not then predict all of the circumstances that come within the purpose of the tolling exceptions which could prevent timely filing. It is therefore appropriate for courts to construe the statutory tolling scheme and implicit tolling exceptions to effect the ostensible legislative purpose.") (citations omitted); *Id.* at 380 (the appellate court invoked the common refrain for applying equity: "Language of statutes of limitation must admit to implicit exceptions where compliance is impossible and manifest injustice would otherwise result. We hold that the facts here presented give rise to an impossibility of compliance with the statute of limitation." What distinguishes this case from the equitable estoppel and equitable tolling cases is that the question of avoiding prejudice to the defendant does not factor into the equation.).

56 The United States Supreme Court had found equitable exceptions to statute of limitations requirements much earlier; *See* Telegraphers v. Ry. Express Agency, 321 U.S. 342 (1944) (the Court tolled the statute of limitations for a court action while the plaintiff pursued a lengthy administrative proceeding over the same claim for wages.).

57 Tynan v. Walker, 35 Cal. 634 (1868); Miller & Lux Inc. v. Superior Court, 192 Cal. 333, 339 (1923).

of limitations be explicitly stated by the Legislature and the acceptance of the equitable doctrine of estoppel as an implicit tolling exception.[58]

The courts in the last sixty years have recognized that a defendant's wrongful conduct in causing a plaintiff to blow the statute should estop the defendant from relying upon its protection.[59] With this foothold established, the courts subsequently moved to apply equitable principles to situations where the defendant was not at fault in inducing plaintiff's late filing.

2. Judicial Recognition That Pursuit of an Administrative Remedy Tolls the Statute of Limitations

The judicially adopted rule that a plaintiff's pursuit of an administrative or other remedy prevents the statute of limitations from

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58 Benner v. Industrial Acc. Com., 26 Cal.2d 346, 350 (1945); Muraoka v. Budget Rent-A-Car, Inc., 160 Cal.App.2d 107 (1984); Kunstman v. Mirizzi, 234 Cal.App.2d 753, 755-56 (1965); Langdon v. Langdon, 47 Cal.App.2d 28, 31-32 (1941).

59 Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 411 (1944) (the plaintiff had submitted a claim of loss to his insurer and commenced his action immediately after the insured denied coverage but before the waiting period specified in the contract of insurance had elapsed. The defendant insurer obtained numerous continuances of trial. At trial, defendant successfully moved for nonsuit on the procedural ground that the action – which was now beyond the applicable statute of limitations for commencement of a new action – was fatally premature: "The Bollinger court held that the nonsuit was erroneously granted. It held that fairness and equity required construction of the principle underlying the language of §355 which, by its language, tolls statutes of limitation for one year where a plaintiff timely commences action and a judgment favorable to him is reversed on appeal, to extend to situations where the defendant obtained a nonsuit in the trial court rather than a reversal on appeal. The Court reasoned that 'the running of the statute of limitations may be suspended by causes not mentioned in the statute itself. It is settled in this state that fraudulent concealment by the defendant of facts upon which a cause of action is based or mistake as to the facts constituting the cause of action will prevent the running of the period . . . .'") (citations omitted); *Id.* at 409-10 (the Court recited the equitable view that where the Legislature formulates tolling exceptions by specification of particular circumstances, rather than statement of a general principle requiring tolling, judicial ascertainment and promotion of the broad underlying policy is necessary.).

running is colored by the reasoning that equity is needed to fill in gaps left by the law. *A. Teichert & Son, Inc. v. State of California*[60] was an action by a construction contractor brought after the limitations period had run but shortly after submission of the plaintiff's claim to the State Board of Control. The court addressed the effect of the plaintiff's administrative claim on the statute of limitations applicable to the lawsuit and identified a basis for tolling the statute of limitations deriving from both statutory[61] and contractual[62] requirements for exhaustion of administrative remedies as a prerequisite to legal action.

Although nothing specific existed in the contract language or the law to except Teichert from the effect of the statute of limitations, the court recognized the unstated rule that the statute of limitations is tolled while arbitration or administrative proceedings are pending, and held that the appellant's claim proceeding tolled the statute of limitations.[63]

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60 A. Teichert & Son, Inc. v. State of California, 238 Cal.App.2d 736, 746 (1965) (the court referred to the codified rule of exhaustion of administrative remedies: "A basic doctrine of law demands exhaustion of a party's administrative remedies before he files suit, even though no statute makes it a condition of his right to sue. Although the rule of exhaustion usually involves statutory procedures, the administrative remedy may be nonstatutory. The federal courts consistently hold that provisions in federal public works contracts for the administrative settlement of contract disputes preclude resort to the courts until exhaustion of the administrative procedure.") (citations omitted).

61 *Id.*

62 *Id.* (the court went on to look at contractual requirements making exhaustion of administrative proceedings a prerequisite to litigation: "A related doctrine of contract law also defers accrual of such claims. Contract provisions for the extrajudicial settlement of disputes are binding on the parties whether the arrangement is technically a common-law or statutory arbitration or something akin. Mandatory contractual remedies must be exhausted before resort to the courts.") (citations omitted).

63 *Id.* at 746-47 (the court based its reasoning on the common acceptance of the rule by courts in similar contexts: "The statute of limitations is suspended during the pendency of administrative proceedings forming a necessary prelude to a lawsuit. Also, when contractual disputes are submitted to arbitration or some other form of reference, the statute of limitations is usually tolled. Under one doctrine or the other, claims under Teichert's contract with the state did not accrue and the two-year period on

In *Elkins v. Derby*,[64] the Supreme Court recognized the doctrine of equitable tolling which applies "[w]hen an injured person has several legal remedies and reasonably and in good faith pursues one."[65] Instead of looking to fault on the part of the defendant, the Court looked to whether the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. Notice to the defendant was the critical consideration: "[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings."[66] The Court held that where the plaintiff exercised diligence and good faith in electing to pursue an alternative administrative remedy without success, the statute of limitations is tolled for that period irrespective of whether the administrative remedy is a prerequisite to the commencement of the legal action.

The Supreme Court gave voice to the English concept that courts may construe implicit exceptions where purely technical application of procedural rules would result in manifest injustice.[67] The Court considered the plight of a plaintiff who had initially brought a timely claim for worker's compensation benefits. After the limitations period had run, it was determined the plaintiff was not an employee of the defendant. The plaintiff then filed a civil action and the defendant asserted the bar of the statute of limitations. Although recognizing that the plaintiff could have avoided the statute of limitations problem by filing the civil action during the pendency of the worker's compensation proceeding, the Court nevertheless concluded that this "awkward duplication of procedures is not necessary to serve the fundamental purpose of the limitations statute, which is to insure timely notice to an adverse party so that he can assemble a defense when the facts are still fresh."[68] The filing of the earlier action was

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filing such claims with the State Board of Control did not start until completion of the settlement procedure established by section 9(f) of the Standard Specifications.") (citations omitted).

64 Elkins v. Derby, 12 Cal.3d 410 (1974).

65 *Id.* at 414.

66 *Id.* at 417 n.3.

67 *Id.* at 420 n.9; *See also* Nichols v. Canoga Industries, 83 Cal.App.3d 956, 963 (1978).

68 *Id.* at 412.

sufficient to put the defendant on notice and tolled the running of the statute of limitations.[69]

Later, the Supreme Court approved tolling of state court actions against government agencies while plaintiffs unsuccessfully sought alternative relief in the federal courts for the same injuries.[70] The courts of appeal followed suit in developing the equitable doctrine. In *Nichols v. Canoga Industries*,[71] a state action was equitably tolled during the pendency of a federal action even though the remedies were not inconsistent and could have been pursued simultaneously. In *Baillargeon v. Department of Water & Power*,[72] the Second District tolled a claim for supplemental disability benefits during the pendency of a related workers' compensation claim. *Collier v. City of Pasadena*[73] considered the tolling effect of a related claim for workers' compensation on an action for a disability pension.[74]

D. Analysis of Equitable Tolling

The rationale for equitable tolling prevails even where the administrative proceeding is not mandatory.[75] The courts have found that the running of the limitations period is tolled even where the earlier remedy was pursued in error.[76]

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69 *Id.* at 417-18.

70 *See* Addison v. State of California, 21 Cal.3d 313 (1978); Jones v. Tracy School Dist, 27 Cal.3d 99 (1980).

71 Nichols v. Canoga Industries, 83 Cal.App.3d 956 (1978).

72 Baillargeon v. Dep't of Water & Power, 69 Cal.App.3d 670 (1977).

73 Collier v. City of Pasadena, 142 Cal.App.3d 917 (1983).

74 *Id.* at 923 (the court traced the development of equitable tolling to three lines of cases: "Prior to the 1970s, statutes of limitation had been tolled when a plaintiff filed a case which promised to lessen the damages or other harm that might have to be remedied through a second case. The statute for the second case was tolled while the plaintiff pursued the first, presumably to further the public purpose of minimizing harm. Another line tolled statutes of limitation when administrative remedies had to be exhausted before a court would consider the case.") (citations omitted).

75 *Elkins*, 12 Cal.3d at 414.

76 *Id.*; *See also* Rodriguez v. Superior Court, 160 Cal.App.3d 956, 961 (1984).

Addison v. State of California[77] identified three factors considered in deciding whether "equitable tolling" should apply. These three factors, which have become requirements for equitable tolling relief, are: (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the plaintiff.[78]

The notice to the defendant from the first claim is supposed to alert the defendant of the need to investigate – satisfying the purpose of the statute of limitations in protecting defendants from stale claims. It represents the flip side of the equity coin from the concept of laches.

Related to the notice component is the second factor, requiring a fundamental similarity between the two claims sufficient to put the defendant on notice. The two "causes of action" need not be absolutely identical. The critical question is whether notice of the first claim affords the defendant an opportunity to identify the sources of evidence which might be needed to defend against the second claim.[79] There needs to be some nexus between the essential facts in the two proceedings, but they may differ.

The factor of reasonable conduct on the part of the plaintiff would seem to contemplate that the plaintiff act diligently. It would also seem to contemplate that the filing of the first claim, or pursuing the first remedy, was not unreasonable under the circumstances.

The doctrine of "equitable tolling" is supported by several important policy considerations. First, it secures the benefits of the statutes of limitation for defendants without imposing the costs of forfeiture on plaintiffs. Secondly, it avoids the hardship upon plaintiffs of being compelled to pursue, simultaneously, several duplicative actions on the same set of facts. Thirdly, it lessens the costs incurred by courts and other dispute resolution tribunals, at least where a

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77 Addison v. State of California, 21 Cal.3d 313 (1978).

78 *Id.* at 319.

79 *Collier*, 142 Cal.App.3d at 925.

disposition in the case filed in one forum may render the proceeding in the second unnecessary or easier and cheaper to resolve.[80]

E. Overlapping of the Concepts of Relation Back and Election of Remedies

The distinction between the line of cases dealing with adding/changing parties (relation back) and the cases involving election of remedies (tolling) blurs when it comes to decertified class actions. *Guenter v. Lomas & Nettleton Co.*[81] addressed a class action which was denied certification. The action concerned the plaintiffs' joint claim as beneficiaries under a deed of trust. After the statute of limitations period had expired, a motion was brought to add the twenty-seven beneficiaries as plaintiffs.[82]

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80 *Id.* at 926.

81 Guenter v. Lomas & Nettleton Co., 140 Cal.App.3d 460 (1983).

82 *Id.* at 467-68 (in finding that the amendment related back to the filing date of the original complaint, the court reviewed the law: "The California Supreme Court has shown a liberal attitude toward allowing amendments of pleadings to avoid the harsh result imposed by a statute of limitations. However, certain requirements must be met in order for an amended pleading to relate back to the time of filing the original complaint. In the case of a change in pleading theory, an amendment is permitted following expiration of the statute of limitations, and the amended complaint will be deemed filed as of the date of the original pleading provided recovery is sought in both pleadings on the same general set of facts. Plaintiffs have been permitted to amend pleadings and to substitute named defendants for fictitious defendants without incurring the bar of the statute of limitations. 'However, a party may only avail himself of the use of naming Doe defendants as parties when the true facts and identities are genuinely unknown to the plaintiff.' In certain circumstances, a party has been allowed to amend his complaint to add or substitute new plaintiffs after the statute of limitations has run. 'Generally, a different plaintiff was substituted in because there was a technical defect in the plaintiff's status (an administrator for a deceased plaintiff; a stockholder in place of a corporation; etc.); a necessary party was joined; or a nominal plaintiff was removed and the real party in interest took his place.' On the other hand it has been stated that 'the doctrine of relation-back does not apply where the cause of action in the complaint is in favor of one plaintiff whereas the cause of action in the amended complaint is in favor of another plaintiff.'") (citations omitted).

Applying the relation back doctrine to the common claim under the deed of trust, the court looked to *Jensen v. Royal Pools*,[83] which permitted individual plaintiffs to substitute in place of an unincorporated association, and *Dhuyvetter v. City of Fresno*,[84] where an amendment was sought in a decertified class action to add the children of the class plaintiffs, and recognized:

> The same reasoning applies to the instant case. The trial court erred in not allowing plaintiff Guenter to amend his complaint to add the other beneficiaries of the deed of trust as named plaintiffs with such amendment relating back to the original complaint, since such beneficiaries were plaintiffs in the original complaint as they were members of the class appellant Guenter sought to represent.[85]

The rule allowing the relation back doctrine to apply to decertified class actions involving common questions of fact and law was approved by the California Supreme Court in rejecting its application to a mass tort (DES) personal injury action. The Court's reasoning reflects election of remedies/tolling aspects:

> The policies of ensuring essential fairness to defendants and of barring a plaintiff who has "slept on his rights," . . . are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. (quoting American Pipe & Construction Co. v. Utah, 414 U.S. 538, 554-55 (1974)).[86]

The Court recognized the difficulty with attributing notice to a defendant of individual claims involving a "lack of commonality"

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83 Jensen v. Royal Pools, 48 Cal.App.3d 717 (1975).

84 Dhuyvetter v. City of Fresno, 110 Cal.App.3d 659 (1980).

85 *Guenter*, 140 Cal.App.3d 468-69.

86 Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1121 (1988).

from the class action.[87] This requirement is really no different than the "same general set of facts" requirement for substituting a party in non-class actions. This development with class actions parallels development in the federal arena.[88]

Applying the *Jolly* rule, the court in *Becker v. McMillin Constr. Co.*,[89] addressing a case in which a class was not certified, allowed addition of individual homeowners in a suit for construction defects to relate back to the original filing date. The court observed that in *Jolly* the discrepancies between factual and legal issues, and the nature of the relief sought in the class action and the individual action, were too great to presume adequate notice to the defendants from the earlier action.[90] The court noted that lack of commonality will prevent application of the tolling doctrine,[91] stating, "[T]olling is to be allowed only where the class action and the later individual action or intervention are based on the same claims and subject matter and similar evidence."[92] The court similarly concluded that the defendant

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87 *Id.* at 1125; *Cf.*, Bangert v. Narmco Materials, Inc., 163 Cal.App.3d 207, 210 (1984) (disapproved of in *Jolly* at n.20. Rather than a common right of recovery, *Bangert* involved an "amendment to add 92 additional plaintiffs, each with an independent right of action." Certification was denied in this suit for personal injuries and property damage for a lack of sufficient community of interest.).

88 Crown, Cork & Seal v. Parker, 462 U.S. 345 (1983); *See also* Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 808 (2006) ("Such tolling discourages the filing of precautionary lawsuits and motions to intervene by absent class members who were happy to remain behind the scenes as long as the class action proceeded but who do not want to forfeit their claims to a statute of limitations defense in the event class certification is denied.").

89 Becker v. McMillin Constr. Co., 226 Cal.App.3d 1493 (1991).

90 *Id.* at 1499.

91 *Id.* at 1500.

92 *Id.* at 1499 (the court held: "Even though there was clearly a lack of commonality for class certification purposes, the substantive class and individual claims were sufficiently similar to give McMillin notice of the litigation for purposes of applying the tolling rule. First, on the issue of the 'number and generic identities of the potential plaintiffs,' the filing of the Castro action on construction defect theories must reasonably be said to have put McMillin on notice that a certain number of homeowners in this specific subdivision were experiencing construction defects which might well lead to extended litigation, whether in a class forum or in individual

had received adequate notice of the nature of the substantive claims from the class action.[93]

The decertified class action cases reveal the similarity in statute of limitations analysis between tolling cases and relation back cases. This is because the claimant's election to choose the class action remedy amounts to the same thing as a decision to amend the pleading to substitute into the action as an individual (rather than a class) plaintiff. Analyzing the predicament of the claimant from either perspective results in the same judicial conclusion – the diligent claimant should be allowed to proceed. The reasoning depends upon notice, lack of prejudice to the defendant, and reasonable conduct on the part of the claimant.

VI. THE AVAILABILITY OF EQUITY – CAN A LAWSUIT BE FILED WITHOUT FIRST FILING A CLAIM?

The distinction between whether a claim is that of a creditor or an equitable claim has been pertinent to determining if the claim is subject to the claims filing requirements or if an action can be brought without the necessity of filing a claim. The frequent concern is whether failure to file a timely claim bars the action.[94]

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actions. The identity and number of potential claimants were thus ascertainable to a significant degree that was adequate to give the required notice of the addresses potentially involved in the action. Some turnover in home ownership was inevitable, which later discovery could reveal, but it cannot be disputed the 'generic identity' of plaintiffs was obvious.") (citation omitted).

93 *Id.*; *See also* San Francisco Unified School Dist. v. W.R. Grace & Co., 37 Cal.App.4th 1318, 1340 (1995); Tosti v. City of Los Angeles, 754 F.2d 1485 (9th Cir. 1985).

94 Walker v. Calloway, 99 Cal.App.2d 675 (1950); Pay Less Drug Stores v. Bechdolt, 92 Cal.App.3d 496 (1979); Wilkison v. Wiederkehr, 101 Cal.App.4th 822, 829-35 (2002) (holding that because the claim concerned a monetary interest in proceeds to the sale of promised real property, rather than the real property itself, the legal remedy of damages was adequate, the equitable remedy of quasi-specific performance was not available, and the failure to file a claim was, therefore, fatal.).

The active maxim here is that equity follows the law and will not afford a remedy where an adequate legal remedy is available.[95] The determination turns on whether the claim is adequately compensable in damages (money) or is of such a specific or unique nature that equity in the form of quasi-specific performance is proper. In the former case, a claim is a prerequisite to any action. In the latter case, since there is no creditor claim involved, filing a claim is not a condition precedent to commencing a lawsuit.[96]

Based upon the foregoing, ostensibly, a prospective claimant should simply plead the existence of a trust and seek an equitable award of compensatory relief as an alternative to judicial recognition of a trust, and thereby cover all the bases. This would seemingly avoid any need to file a claim – and the correlative complications – entirely. But the courts have not treated the problem so simply. Thus, the question of whether quasi-specific performance is available as a remedy becomes even cloudier for one seeking to enforce a contract to devise property.

The prospective claimant needs to understand that merely requesting equity does not mean that it is available, and merely because a court can formulate relief in the form of damages[97] does not mean that such relief is not equitable. The courts have perceived a

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95 *Wilkison*, 101 Cal.App.4th at 836 (the court, after reviewing this body of law, observed: "In effect these decisions hold that unless a plaintiff in an action for breach of a contract to make a will alleges and proves inadequacy of legal remedies, he will be denied specific performance in equity.").

96 There was nothing prior to Stewart v. Seward, 148 Cal.App.4th 1513 (2007), to prevent the claimant who sought an equitable theory of recovery (not subject to the claims requirements) from utilizing the claims process without danger. But, if they were outside the claims period or simply did not want to follow this procedure, they were not subject to its requirements and could avoid this step. The danger was that misjudging the availability of an equitable remedy and, therefore, the need to file a claim, could preclude the lawsuit against the decedent's estate. Thus, the safer route for the practitioner would have been to file a claim. *Stewart* has now imperiled that path as well.

97 CAL. PROB. CODE § 16420(a)(3) (Deerings 2009) (the court is not limited to imposing a trust. The statutory scheme allows a court to award what amounts to damages – repayment of the money lost on account of the breach.).

difference between the statutory confinement of the remedy for a breach of trust to equity versus the common law nature of the remedy available to the court. The latter – whether equity is available in the first place – is determined by assessing the adequacy of damages. *Wilkison v. Wiederkehr*,[98] which also dealt with a decedent's promise to devise an interest in real property, recognized that in ascertaining the primary right involved it is not enough that the claim framed by the pleadings is equitable in nature. Equity also requires that damages be inadequate.[99]

Discerning whether the right at issue is legal or equitable has hardly been easy for practitioners. Adding to the layers of perplexity that must be peeled away to make this assessment in the situation involving a promise to devise is a statutory limitation of a trust beneficiary's remedy to equity.[100]

In addition, the circumstances providing a basis for a trust also temper the need to demonstrate the inadequacy of damages. In other contexts, where an interest in real property is at issue, it is generally presumed that damages constitute an inadequate form of remedy. This is because of the unique nature of real estate.[101] Personal property, on

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98 Wilkison v. Wiederkehr, 101 Cal.App.4th 822, 833 (2002).

99 *Id.* at 830 (the court looked to the seminal Supreme Court decision in *Morrison v. Land*: "[I]t is elementary that where, as here, the primary right of a party is *legal* in its nature, as distinguished from *equitable*, and one for which the law affords some remedy, as here damages by way of compensation for breach of contract, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice. No principle of equitable jurisprudence is more firmly established than this. . . . For instance, the exclusive jurisdiction of equity to grant relief by way of specific performance of a contract will be exercised only in those cases where the legal remedy of compensatory damages is insufficient . . . .") (quoting Morrison v. Land, 169 Cal. 580, 586 (1915)).

100 CAL. PROB. CODE § 16421 (Deerings 2009) (one seeking equitable relief to enforce a contract to make a will (quasi-specific performance for a resulting trust) or for fraud (constructive trust) has to sue in equity – they have no choice. Why the Legislature is involved in determining when equity is proper should not provoke concern here. This section merely codifies the treatment of trusts at common law.).

101 13 Witkin, Summ. Cal. Law (10th), Equity § 28.

the other hand, only qualifies for equitable relief where it is shown to be unique or scarce in some way.[102] With respect to dispositions of estates, the courts distinguish between specifically identified property (e.g., "my blue, silk ascot") and an indefinite disposition (e.g., "whatever property I own at the time of my death")[103] as determining whether a court may award specific performance or damages.

Because an action for breach of trust duties is "within the peculiar province of a court of equity,"[104] the courts depart from the rule requiring inadequacy of damages and are more inclined to order the transfer of personal property to a beneficiary.[105] But, this willingness to relax the requirement to permit equity in the aforementioned situations does not imply the converse. The underlying reasons for the exceptions to the rule do not provide a basis for limiting claimants to equity where damages permit an adequate remedy, or mean that courts should be reluctant to allow damages where they are adequate.[106]

A claim made against an estate can take several forms and the Legislature has sought to set timelines for pursuing a claim with a number of statutes of limitations. A claim for damages is subject to the claim requirements.[107] A claim for a specific property may not be susceptible to compensation in damages and, where this is the case, equitable relief is in order. Equitable relief, depending upon the facts, can take the form of a fraud-rectifying constructive trust (to give effect to what the testator agreed to do) or intention-enforcing quasi-specific performance (to give effect to what the testator or contracting parties intended). Sorting out which form of relief is involved has been the

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102 *Id.* at § 30.

103 Westbrook v. Superior Court (Fairchild), 176 Cal.App.3d 703, 711-14 (1986).

104 Bacon v. Grosse, 165 Cal. 492 (1913).

105 Cal. Jur. 3d Trusts § 381; 13 Witkin, Summ. Cal. Law (10th) Trusts § 319.

106 *See Stewart*, 148 Cal.App.4th at 1517 (the court in *Stewart* neglected to ask the critical question regarding the adequacy of damages in a situation where equity was not sought. Significantly, it failed to do so in the face of Seward's request for an award of damages in the amount of "50% of the value of the subject property.").

107 Chahon v. Schneider, 117 Cal.App.2d 334, 346 (1953).

source of litigation for almost a century and addressing the confusion has generated a great deal of case law.[108]

An example of such confusion is the decision in *Stewart v. Seward*.[109] The holding of *Stewart* seems at odds with the basic tenet that equity follows the law. *Stewart* involved the same old problem with a decedent's unfulfilled promise to devise something. In this case, it was a one-half interest in real property. Because Stewart's cause of action was covered by the language of CCP §366.3,[110] the court found she was not a creditor.[111] The plaintiff in *Stewart* elected to proceed by way of the claims procedure – a perfectly reasonable approach given the broad definition of a "claim" set forth at Probate Code §9000.[112] Naturally assuming that the limitations period had been tolled and that she was required to wait for the claim to be rejected before filing suit, the plaintiff did not become concerned when the one-year limitations date drew nigh.

The rationale of the decision – finding that the limitations period was not tolled because the plaintiff's claim was not a "creditor's" claim[113] – does not comport with the principal that equity

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108 *Morrison*, 169 Cal. at 584-86; Zellner v. Wassman, 184 Cal. 80, 84-85 (1920); Potter v. Bland, 136 Cal.App.2d 125, 134-35 (1955); Payless Drug Stores v. Bechdolt, 92 Cal.App.3d 496, 501-02 (1979); Estate of Watson, 177 Cal.App.3d 569, 573 (1986); Wilkison v. Wiederkehr, 101 Cal.App.4th 822, 828 (2002).

109 *Stewart*, 148 Cal.App.4th at 1522-23.

110 Unlike CCP §366.2, which concerns creditor damage claims which accrued prior to death, CCP §366.3 does not contain provision for tolling the one year period while the claim procedure is pursued.

111 Stewart, 148 Cal.App.4th at 1521-23 (this conclusion was apparently reached because the court regarded CCP §366.3 as covering only causes of action that sound in equity (involving quasi-specific performance such as a resulting trust)).

112 *See* CAL. PROB. CODE § 9000(a)-(c) (which defines "creditor" and "claim").

113 *Stewart*, 148 Cal.App.4th at 1520 (according to the court's analysis, claims for money damages actionable at the time of death, as opposed to claims based on an unfulfilled promise to devise property, would fall under the language of CCP §366.2, which explicitly tolls the running of its one year limitations period while the claims process unfolds. Because Seward's claim involved an equitable remedy, use of the nonclaim procedures was unnecessary according to the court. It held that mistakenly invoking the

should not be allowed where damages are an available remedy.[114] The threshold question the court in *Stewart* needed to resolve to determine if Stewart was a "creditor" was whether Stewart had an adequate available legal remedy – a monetary award.[115] The rationale is also difficult to reconcile with Probate Code §9352 and tends to undermine the reasoning supporting the established doctrine that the statute of limitations should not run while a party pursues one avenue of recourse.

The procrustean logic of *Stewart*'s treatment of CCP §366.3 as imposing a one year timeline regardless of whether the claim procedure is followed or not has now been taken a step further. The court in *Estate of Ziegler*[116] addressed a situation (same story, different names) where the decedent's written promise to provide was, at least from the claimant's perspective, performed by the decedent.[117] Acting

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nonclaim process did not toll the running of CCP §366.3's limitations period.).

114 Zellner v. Wassman, 184 Cal. 80, 84 (1920) ("[I]nadequacy of the legal remedy is the keystone of equitable jurisdiction.").

115 *See Stewart*, 148 Cal.App.4th at 1517 (Stewart sought, in the alternative, "damages to equal 50% of the value of the subject property." There appears to be no reason why a factual finding could not be reached as to the property's value. Following the accepted analysis of the pertinent issue would have resulted in the determination that Stewart had an adequate legal remedy. Consequently, Stewart was a creditor. Therefore, Stewart's claim was required to be submitted through the claims procedure. Ironically, if Stewart's lawsuit were filed prior to completing that process, it would be barred (*See Morrison*, 169 Cal. at 584-85). But, instead of properly focusing 1) on Probate Code §9352's tolling language, which obviously tolls claims for monetary amounts premised on unfulfilled decedent promises in spite of CCP §366.3's no extension/ tolling language, or 2) focusing on the remedy and letting equity follow law, the Second District was distracted by the language of CCP §366.3. This poorly drafted language, as explained above, was included for the necessary purpose of encompassing actions seeking the equitable remedy of a resulting trust, not to expand the scope of equity, change the definition of a "creditor's" claim or alter the application of the claims filing requirements.).

116 Estate of Ziegler, 187 Cal.App.4th 1357 (2010).

117 *Id.* at 1366 (in spite of the signed writing's present statement that Ziegler was "signing over my house and property," which he identified by address, the court did not consider whether the document amounted to a grant deed. The court simply treated the document as a contract. The claimant

in accordance with Ziegler's contractual promise to leave his house, the claimant took possession shortly after Ziegler's death. It seemed the property was already granted and a suit seeking specific performance would be moot.[118] The court did not see it that way. Within one year of Ziegler's death, at the behest of the would-be proud new homeowner who was seeking to formalize the transfer of title, the public administrator commenced probate proceedings. Out of the blue, Ziegler's heirs from Germany asserted their right to the real estate.[119]

A claim for the house (premised upon an equitable theory of specific performance of the decedent's contractual obligation) was filed some thirteen months after Ziegler died.[120] This was followed by a petition filed pursuant to Probate Code §850 for an order to have title transferred.[121] Months thereafter, suit was brought. The heirs asserted

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apparently did not seek to record the document. (*See* In Re Estate of Wolf, 128 Cal.App. 305, 309-10 (1932) (considering the sufficiency of property descriptions consisting of mere street addresses in bequests and grant deeds)) Evidently, given the strict construction of CCP §366.3 by the courts, had he done so and had an ensuing quiet title action been unfavorable to his purported deed and/or proprietary estoppel theory, the running of the one year period would – following the logic of *Stewart* - not have been tolled while he pursued that remedy, notwithstanding notice to the heirs of his claim. Likewise, his equitable theory that the heirs are estopped to assert title in view of his reliance upon the decedent's conduct would not survive the strict application of CCP §366.3.).

118 *Id.* at 1360 (the claimant argued that he was not making a claim for distribution – that the document was self-fulfilling and vested title immediately upon decedent's death without the need for distribution.).

119 Telephone interview with Alexandra S. Ward, Esq. (Feb. 28, 2011) (according to the attorney who handled the claimant's appeal, the distant heirs emerged on the scene when they were located by an heirfinder service).

120 *Id.* at 1362 (*Seward* would indicate that utilizing the claim process was triply pointless here. Since the claim was not for damages, but sounded in equity, the claims procedure was improper from the outset. Invoking it did not toll the running of the statute of limitations, and the limitations period had already run.).

121 *Id.*; *See* CAL. PROB. CODE § 850(a)(2)(C) (Deerings 2009) (in keeping with his view that he had already received the real estate, the claimant petitioned to have the property transferred to him pursuant to Probate Code §850, which provides, *inter alia*, that an interested person may petition for an order "[w]here the decedent died in possession of, or holding title to, real or

the statute of limitations. The court gave short shrift to the argument that because the property had already been transferred, no claim was necessary. The court also rejected the argument that the claim was not for "distribution" such that CCP §366.3 had no application.[122]

Ziegler's analysis is illustrative of the difficulty courts are having in applying CCP §366.3. Predictably, the court treated the statute as applying to causes of action (primary rights) rather than the fact pattern involving "a promise or agreement with a decedent to distribution." The court observed that CCP §366.3 applies regardless of whether a claim is based upon a legal (contractual) or equitable theory, and regardless of whether damages or specific property is sought.[123] Lamenting the inequitable result, the court held the failure to file suit within one year prevented it from honoring Ziegler's written bestowal. The operative wrong in this recurring fact pattern has invariably been identified by courts as the promisor's breach in failing to provide by some method (will, trust, joint tenancy, or other technique) for the promisee to get the promised property.[124] But, *Ziegler* differed from the usual fact pattern in as much as the decedent and the claimant believed they had done all that was necessary to carry out their agreement, thus any distribution appeared unnecessary. As a means of circumlocution of the problem posed by the absence of any need for "distribution" and to reconcile CCP §366.3 with the judicial

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personal property, and the property or some interest therein is claimed to belong to another.").

122 *Id.* at 1366 (the court reasoned that the term "distribution" was not used by the Legislature in the same sense generally used in probate matters and effectively removed it from the equation. Consequently, since his claim to the house arose from "a promise or agreement with a decedent," CCP §366.3 applied. From this point, the court saw the claimant's difficulty as turning upon confusion of a contract with a deed, bequest or other beneficiary designation required by that contract to be made in a separate instrument. In essence, the claimant who moved into the house merely had possession, not title. Absent title, he was in the same shoes as someone claiming on a contract to devise. Title remained subject to the probate process, specifically distribution by the administrator pursuant to court order.).

123 *Id.* at 1365.

124 Accordingly, Ziegler's failure to provide for such a distribution of the house would be the actionable wrong, not some subsequent malfeasance to deprive or divest the claimant of ownership.

approach (looking to the wrongful act rather than the fact pattern), the court treated the operative wrong (violation of a primary right) giving rise to the claimant's cause of action as the estate administrator's refusal to perform the decedent's contractual obligation.[125]

VII. APPLICATION OF TOLLING TO CCP §366.3 FACT PATTERNS

The overwhelming trend over the past 100 years has been to liberally construe statutes of limitations where the interests of the defendant in receiving notice of the claim are protected and the claimant has acted reasonably in pursuing his or her rights. There is simply no good reason to apply Probate Code §9352's tolling provisions where claims based on promises for distribution are compensable in damages, but not where such claims involve equitable remedies. The claim should toll the running of the limitations period without requiring the claimant to try and resolve such legal conundrums or pursue multiple remedies.

Likewise, there is no good reason for courts to shy away from application of equitable tolling merely because the Legislature used the word "toll" in the statutory language of CCP §366.3. The Legislature also used the word "extended" which apparently raises no judicial trepidation about applying equity so far as estoppel relief is concerned. It could be said that there is a fundamental difference in the nature of the two types of equitable relief. Equitable estoppel does not "toll" or "extend" the statutory period. Instead, it depends upon the wrongful conduct of the defendant in causing the plaintiff to miss the deadline. Rather than suspend the running of the statutory period for

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125 *Ziegler*, 187 Cal.App.4th at 1366 (one difficulty with such an approach would arise when the administrator does not refuse performance (breach) until after the one year period has elapsed. In theory, a beneficiary should wait for the probate process before assuming possession of estate property. The reality is a different story. The promisee who, upon the promisor's death and with "grant" in hand, takes the promised *objet d'art*, set of golf clubs, or whatever and wanders away is likely not going to have any idea that there is a problem until over a year later when the administrator asks for the item to be returned.).

equitable reasons, it prevents the defendant from relying upon it as a defense.

The objective of treating the election of an incorrect forum or remedy as sufficient to satisfy the statute of limitations is in keeping with the maxim of jurisprudence: "Equity regards as done that which ought to be done."[126] Equitable tolling depends upon a lack of prejudice to the defendant. It does not "relate back" or otherwise satisfy the statute of limitations requirement. It merely prevents the running of the statutory period for a reasonable time to allow the plaintiff an opportunity to file suit. So, it could be argued that equitable tolling, unlike equitable estoppel, "tolls" or "extends" the applicable limitations period and that application of this equitable doctrine is banned by the statutory language. But, this misses the whole point of equity.

The applicability of equitable tolling to causes of action covered by CCP §366.2 and CCP §366.3 has not been addressed by the courts and, despite the no-tolling language of these sections, is not precluded by statute. Nor does the legislative history of these statutes indicate such a legislative intent. Because the doctrine is equitable, there is certainly a serious question as to whether it is subject to legislative limitation. Indeed, the entire purpose of equity is to afford relief to a party to whom the law, for whatever reason, has failed to afford justice.

What is clear is that the Legislature is not seeking to usurp the role of the judiciary in doing equity. Obviously, it established legislative priorities to which courts should adhere in addressing issues of claims against decedents' estates relating to stale and unknown claims. A direct effort by the Legislature to diminish the courts' equitable function would be certain to raise judicial hackles. Such an effort to interfere with the ability of courts to give equitable relief does not appear from the statutory language or history of CCP §366.2 and CCP §366.3, and these sections should not be construed to be a legislative assault on this judicial function.

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126 CAL. CIV. CODE § 3529 (Deerings 2009).

Application of the doctrine of equitable tolling would not contravene the objectives of statutes of limitations where the claims process suffices to provide notice of the nature and details of the cause of action allowing the estate's personal representative to investigate and defend. The California Supreme Court has recognized "the policy of the law of this state [ ] favors avoiding forfeitures and allowing good faith litigants their day in court."[127] Equitable tolling is consistent with the legislative objective of protecting estates from stale and unknown claims. Accordingly, an appropriate construction of the claims statutes and these statutes of limitations in keeping with the enlightened approach of the past fifty years would seem to compel courts to handle this legislative confusion in favor of stopping the running of the limitations period while the claims process is pursued.

VIII. CONCLUSION

The conflict identified in *Stewart* between Probate Code §9352 and CCP §366.3 would be resolved – and nonsensical consequences avoided for claimants who follow the claims procedures – by allowing suit to be brought on the timely rejected claim in accordance with the requirements of the claims procedures, notwithstanding the one year from death requirement. This seems to be the obvious legislative purpose behind enactment of Probate Code §9352, which tolls the running of the applicable statute of limitations while the claim procedure runs its course.

Probate Code §9352 provides, with respect to claims in simple and general terms: "The filing of a claim . . . tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection."[128] This language is non-exclusive and codifies the judicially created equitable rule that a party pursuing redress for a wrong should have the running of the limitations period tolled while they do so. The courts have imposed this requirement without regard to whether exhaustion of administrative remedies is a mandatory prerequisite for a lawsuit and irrespective of whether a party is

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127 Addison v. State of California, 21 Cal.3d. 320, 320-21 (1978).

128 CAL. PROB. CODE § 9352(a) (Deerings 2009).

successful in pursuing the earlier form of relief.[129] Likewise, common law principles of tolling should apply for similar reasons where a party invokes legal procedures other than filing a claim.[130]

Applying Probate Code §9352's statutory tolling requirement to a party pursuing a claim against an estate who (because they were seeking an equitable remedy) should have instead filed a lawsuit, would seem to present a straightforward analysis and conclusion. The plaintiff acted reasonably, defendants received notice from the earlier filing and there was no prejudice to the defendant. So, the running of the statute of limitations should be tolled while the plaintiff pursues a remedy in the wrong forum and they should thereafter be permitted to proceed with their lawsuit.

The equitable tolling approach is, as its designation suggests, a "tolling" analysis. It stops the running of the statute for equitable reasons, rather than preventing the defendant from relying upon its protection for equitable reasons. Its applicability to causes of action covered by CCP §366.2 and CCP §366.3 has not been resolved by the courts and, despite the no-tolling language of these sections, should not be precluded.

The no tolling language of CCP §366.2 and CCP §366.3 should be understood not as a restriction upon courts' jurisdiction in equity, but as a limitation upon application of those excuses specifically enumerated in tolling statutes, such as minority.[131] Resolving this question depends upon balancing the purpose of the equitable tolling doctrine in preventing injustice to a plaintiff against the purpose of the statute.[132] Weighing the Legislature's intent to

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129 Elkins v. Derby, 12 Cal.3d 410, 414 (1974); Garabedian v. Skochko, 232 Cal.App.3d 836, 841 (1991); Lewis v. Superior Court, 175 Cal.App.3d 366, 375 (1985); Campbell v. Graham-Armstrong, 9 Cal.3d 482 (1973).

130 Such as the method of transferring title utilized by the claimant in *Estate of Ziegler* (*See supra* notes 116-25, and accompanying text).

131 *See* Levine v. Levine, 102 Cal.App.4th 1256, 1265 (2002).

132 Stalberg v. Western Title Ins. Co., 27 Cal.App.4th 925, 932 (1994) ("[T]he equitable tolling doctrine fosters the policy of the law of this state which favors avoiding forfeitures and allowing good faith litigants their day in court. . . . The 'injustice to the plaintiff occasioned by the bar of his claim' must be balanced against the policy underlying the statute of limitations.") (quoting *Addison*, 21 Cal.3d at 320-21).

protect decedents' estates from creditors' stale and unknown claims against the objective of protecting diligent claimants from forfeiture, who understandably elect to pursue the claim process, would seem to compel the conclusion that tolling should apply.

Had the Legislature properly considered the distinction between equitable and legal remedies in drafting CCP §366.3, the path would be clearer. Probate Code §9352 and the common law rule provide for tolling of the statute of limitations while claimants pursue the claims process. This protection should not depend upon whether a claimant's claim is based upon an unfulfilled promise by a decedent or whether a legal or equitable remedy is at issue. Even where Probate Code §9352 fails to protect a claimant who misguidedly files a claim or commences some other procedure when they should have filed a lawsuit, equitable tolling should be available to avoid the forfeiture of the claimant's rights.