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**CERTIFICATE OF TYPE SIZE AND STYLE**

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman proportionally spaced font in accordance with this court's administrative order dated July 13, 1998.

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**ISSUES PRESENTED FOR REVIEW**

I.

(as framed by the certified question)

WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID WAIVER

II.

IF SECTIONS 733.702 AND 733.710 ARE CONSIDERED STATUTES OF NONCLAIM, WHETHER ILLINOIS NATIONAL IS PRECLUDED NONETHELESS FROM RAISING THE NONCLAIM STATUTES IN THE BAD

FAITH-EXCESS JUDGMENT ACTION WHEN THE INSURED ESTATE FAILED  
TO PLEAD OR OTHERWISE RAISE THOSE STATUTES AS A DEFENSE TO  
THE UNDERLYING WRONGFUL DEATH-PERSONAL INJURY ACTION

## ARGUMENT

### **I. Sections 733.702 and 733.710 should be construed as statutes of limitations.**

#### **A. Section 733.702**

Illinois National engages in a lengthy historical analysis of the case law and statutory amendments to support its contention that the current version of section 733.702, Florida Statutes, was intended to operate as a jurisdictional statute of repose or nonclaim rather than a statute of limitations that can be waived. *See* Answer Brief of Appellee at 18-34. Illinois National's analysis, however, fails to overcome the fact that this court's decision in *Barnett Bank of Palm Beach County v. Estate of Read*, 493 So. 2d 447, 448 (Fla. 1986), holding that section 733.702, Florida Statutes, operates as a statute of limitations, has never been overruled. Although section 733.702 has been amended since *Barnett Bank* was decided, the amended version of the statute was construed by this court in *Spohr v. Berryman*, 589 So. 2d 225 (Fla. 1991). In that case, this court unequivocally reaffirmed its holding in *Barnett Bank* that although section 733.702 is "known as a statute of nonclaim, it is nevertheless a statute of limitations." *Spohr*, 589 So. 2d at 227.

#### **B. Section 733.710**

For the reasons expressed in his initial brief, May urges the court to adopt the holding of the third district in *Baptist Hosp. of Miami, Inc. v. Carter*, 658 So. 2d 560

(Fla. 3d DCA 1995), that section 733.710, Florida Statutes, should be construed as a statute of limitations subject to waiver. In this respect, although not cited by Illinois National, May acknowledges that in *Lutheran Brotherhood Legal Reserve Fraternal Benefit Society v. Estate of Petz*, 24 Fla. L. Weekly D2628 (Fla. 2d DCA Nov. 24, 1999), the second district recently aligned itself with the conflicting authority, *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 164 (Fla. 4th DCA 1996).

**II. Even if sections 733.702 and/or 733.710 are construed as statutes of repose, Illinois National is precluded from raising the nonclaim statutes in the present bad faith action because the Bradley Estate waived that defense by failing to plead or otherwise raise it in the underlying wrongful death-personal injury action.**

On this second point, Illinois National essentially relies on cases holding that that a jurisdictional statute of nonclaim operates as an “automatic bar” regardless of whether the statute is raised as an affirmative defense. *See* Supplement to Answer Brief of Appellee at 6-7. In response, May contends that although the personal representative is not required to plead or otherwise raise a jurisdictional nonclaim statute as a defense to a claim filed in the probate proceeding, the statute of nonclaim must be asserted as an affirmative defense to an independent action filed against the estate outside the probate proceeding. In this respect, only one case cited by Illinois National, *Payne v.*

*Stalley*, 672 So. 2d 822 (Fla. 2d DCA 1995), involved an independent action filed against the estate. In that case, the court upheld a ruling of the probate court barring a claim based on a judgment obtained in Michigan federal court as untimely under sections 733.702 and 733.710, Florida Statutes, even though neither statute was raised as an affirmative defense in the federal court litigation. Interestingly, the second district cited *Crosson v. Conlee*, 745 F.2d 896 (4th Cir. 1984), for the proposition that a “federal court should decline jurisdiction if [the] judgment would not be enforceable in defendants’ Florida probate proceeding.” *Payne*, 672 So. 2d at 823. That observation, however, appears inconsistent with the general principle expressed in *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994), that “subject-matter jurisdiction concerns the power of the trial court to deal with a class of cases to which a particular case belongs,” and with the more specific proposition “[t]hat an action has become time-barred does not mean that the court is automatically divested of its inherent power to deal with the general subject matter.” *Attache Resort Motel, Ltd. v. Kaplan*, 498 So. 2d 501, 503 (Fla. 3d DCA 1986), *rev. denied*, 511 So. 2d 298 (Fla. 1987). *See also Allen v. Oakbrook Securities Corp.*, 24 Fla. L. Weekly D2774 (Fla. 4th DCA Dec. 15, 1999) (explaining distinction between failure of subject matter jurisdiction and failure to state a cause of action). Thus, in this case, the circuit court which entered judgment in favor of Prockup and against the Bradley Estate in the wrongful death-personal injury action had jurisdiction over the person and subject

matter, and, therefore, that judgment properly forms the basis for a bad faith-excess judgment suit against the estate's liability insurer. *Cf. Curbelo v. Ullman*, 571 So. 2d 443, 445 (Fla. 1990) ("It is well settled that where a court is legally organized and has jurisdiction of the subject matter and the adverse parties are given an opportunity to be heard, then errors, irregularities, or wrongdoing in proceedings, short of illegal deprivation of opportunity to be heard, will not render the judgment void."); *McGehee v. Wilkins*, 31 Fla. 83, 86, 12 So. 228, 228 (1893) ("Where a court has jurisdiction of the person and subject-matter, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or not, it is valid and binding till reversed.").

Finally, Illinois National criticizes May, as administrator ad litem, for adopting a legal position in this case which the insurer contends is inconsistent with the financial interests of the estate and its beneficiaries. *See* Supplement to Answer Brief of Appellee at 12-13. In response, the efforts of the administrator ad litem to marshal assets for the benefit of creditors is not inconsistent with the estate's interests or the administrator's legal obligation. Indeed, the representatives of the estate are obligated by statute to consider the "bests interests" of "creditors as well as beneficiaries." § 733.602(1), Fla. Stat. (1991).

## **CONCLUSION**

May respectfully urges the court to hold that sections 733.702 and 733.710, Florida Statutes, operate as statutes of limitations rather than statutes of repose. Alternatively, even if sections 733.702 and 733.710 are construed as statutes of repose, May urges the court to hold that the estate must nonetheless plead noncompliance with those statutes as an affirmative defense to an independent action against the estate, failing which, such defenses are deemed waived.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to B. Richard Young, Esquire, 309-B South Palafox Place, Pensacola, Florida 32501, David L. McGee, Esquire, Blount Building, Suite 700, Pensacola, Florida 32501, and Robert W. Goldman, Esquire, Goldman & Felcoski, P.A., 4933 Tamiami Trail North, Suite 203, Naples, Florida 34103 by U.S. Mail on this 24th day of January, 2000.

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