



# Recovery of non-economic damages in survival actions

## The new law and what you need to know

By LOREN SCHWARTZ

On October 1, 2021, Governor Newsom signed into law SB 447, paving the way for plaintiffs in survival actions to recover compensation for the pain and suffering experienced by their loved ones prior to their passing. For family members of individuals who are seriously injured due to another's negligence, this legislation gives these family members the opportunity to tell the story of how that negligence impacted their loved ones – even if their loved ones do not get the opportunity to tell the story themselves.

At the same time, it allows plaintiffs to hold wrongdoers fully accountable for the harms which they caused while removing the financial windfall which defendants previously received when plaintiffs passed away before their cases could be resolved.

### Historical background

At common law, when a litigant died, their cause of action was deemed to have died with them. This rule of law was sometimes expressed with reference to the Latin expression *actio personalis moritur cum persona* – “a personal right of action dies with the person.”

In the 19th century, British Parliament overturned this rule of law and began allowing representatives of individuals who had passed away to pursue legal recourse on their behalf. American states subsequently and incrementally began to follow suit, enacting statutes of their own which allowed a decedent's personal representative or successor-in-interest to pursue legal recourse on the decedent's behalf – either by filing suit on behalf of the decedent or continuing an action which

had been filed by the decedent but which remained pending at the time of his/her passing. These laws came to be known as “survival” statutes.

Actions brought pursuant to survival statutes are commonly known as survival actions; they are conceptually and practically distinct from wrongful death actions. Wrongful death lawsuits are brought by family members of the deceased alleging that their loved one's death was caused by the negligence of another. The plaintiffs in a wrongful death suit seek damages for *their* losses resulting from the family member's passing, including any loss of financial support along with the loss of that family member's love and companionship.

Survival actions, on the other hand, are brought on behalf of the decedent regardless of whether or not the decedent passed away on account of another's negligence. Plaintiffs in survival actions are sometimes said to “step into the shoes” of the decedent. Unlike wrongful death actions, which seek to compensate family members based on *their* losses, survival actions act to vindicate the rights of the deceased (along with their estate) and seek recovery for damages sustained or otherwise incurred by the decedent prior to their passing.

### California and survival actions

In 1949, California enacted its first survival statute. This law, however, had a number of significant limitations. While it allowed representatives of the deceased to bring an action on their behalf, these suits were confined by statute to actions arising out of physical injury. Additionally, the law precluded the deceased's representatives from recovering compensation for the decedent's non-economic damages –

what people commonly refer to as pain and suffering.

The prohibition on recovery of a decedent's non-economic damages perpetuated systematic windfalls – a “death discount” if you will – for defendants in cases where the injured plaintiff died before their claims could be resolved. If a defendant could “wait out” a dying or terminally ill plaintiff such that the plaintiff died before getting to trial, they could thereby avoid having to pay for the pain and suffering which they caused.

In October of 1960, the California Law Revision Commission issued a report entitled Recommendation and Study Relating to Survival of Actions. The report included three recommendations relating to California's Survival Statute – (1) Expand the scope of the survival statute to include not only personal injury cases, but also actions not involving physical injury, including invasion of privacy, defamation, and malicious prosecution; (2) permit plaintiffs in survival actions to seek and recover punitive damages; and (3) permit plaintiffs in survival actions to recover compensation for the decedent's non-economic damages.

The following year, then Senator James Cobey (D) introduced SB 202, which sought to amend the then-existing survival statute on the books by codifying the three recommendations which had been made by the California Law Revision Commission. The bill, as initially introduced in the legislature, included language which would have codified all three recommendations. However, intense lobbying by the insurance companies reportedly led to the removal of the provision which would have permitted



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for recovery of non-economic damages. Ultimately, the law as passed, did expand the scope of survival actions to include actions not involving physical injury while also providing for the recovery of punitive damages. The prohibition on non-economic damages in survival actions, however, remained in place.

### The introduction and passage of SB 447

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Trial dates were vacated up and down the state. Litigants with terminal illnesses – including litigants who had secured expedited trial dates – were now unable to get to trial or otherwise resolve their lawsuits. There were instances reported of defendants refusing to agree to bench trials and then objecting to virtual trials, the tacit hope being that the plaintiff would die before his/her case could ever get to trial.

California, at the time, was one of only five states which precluded the recovery of non-economic damages in survival actions (Arizona, Colorado, Florida, and Idaho being the others).

Against this backdrop, the Consumer Attorneys of California and Consumer Federation of California sponsored a new bill – SB 447 – which would finally bring California in line with most of the country and allow litigants in survival actions to recover compensation based on the non-economic damages sustained by the decedent. The bill was introduced by State Senator John Laird (D) in 2021. Supporters included Consumer Watchdog, the Coalition for Humane Immigrants' Rights, Equal Rights Advocates and various labor organizations. Opponents of the Bill included the California Defense Counsel; the Civil Justice Association of California; and various insurance company associations.

### The law as it was

Prior to the passage of SB 447, California's Survival Statute – Cal. Civ.

Proc. 377.34 – was a single sentence and read as follows:

In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

### The new statute, with a time limit

The initial iteration of SB 447 would have simply removed the phrase "and do not include any damages for pain, suffering, or disfigurement." The bill subsequently underwent a number of changes, including changes restricting its applicability with respect to cases already filed along with other changes creating a sunset provision (of sorts). The law, as ultimately passed, leaves the already-existing language of Code of Civil Procedure section 377.34 undisturbed as subsection (a). Subsection (b) then reads as follows:

Notwithstanding subdivision (a), in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.

The statute goes on to outline certain reporting requirements, providing that a plaintiff who recovers compensation for a decedent's non-economic damages "shall, within 60 days after obtaining a judgment, consent judgment, or court-approved settlement agreement entitling the plaintiff to the damages" submit to the Judicial Council a copy of the judgment, consent judgment, or court-approved settlement agreement which includes

information regarding the case including (1) the date the action was filed; (2) the date of the case's final disposition; and (3) the amount and type of damages awarded, including economic damages and damages for pain, suffering or disfigurement.

On or before January 1, 2025, the Judicial Council, in turn, must then send a report to the Legislature detailing the information which it received in this regard.

The statute, lastly, includes language which provides that it does not alter section 3333.2 of the Civil Code (limiting non-economic damages in medical negligence cases to \$250,000.00, nor does it alter claims brought pursuant to the Elder Abuse and Dependent Adult Civil Protection Act.

### So, what does this all mean?

Starting January 1, 2022 – and at least through December 31, 2025 – plaintiffs who file survival actions will be entitled to recover compensation for the decedent's pain and suffering. For cases filed before January 1, 2022, these damages will only be recoverable if there was a prior order granting preferential trial setting.

One interesting thing to watch will be what happens to survival actions brought before January 1, 2022, where no motion for preference has been granted, but where the Statute of Limitations has yet to expire.

One option available for counsel representing plaintiffs in such cases may be to dismiss the currently pending lawsuit without prejudice and then re-file on or after January 1, 2022. While this course of action might theoretically expose the plaintiff to liability for defense costs, the potential upside of being able to obtain and recover pre-death pain and suffering should, in many cases, justify this exposure. If this is a course of action that you consider, make sure you first explain the pros and cons of such approach to your client and obtain their consent before filing the Request for Dismissal.



Other related options, with your client's consent, may include offering to pay the defendant's filing fee in the new suit in exchange for a waiver of costs on the dismissed suit or otherwise seeking a stipulation in the currently pending suit to the effect that, for the purposes of SB 447, it be deemed filed January 1, 2022. While the defendants might be inclined to reflexively balk at such an agreement which very clearly increases their exposure, the fact of the matter is that, provided the Statute of Limitations is still intact, if they don't agree to it, the plaintiff may dismiss and refile on or after January 1, 2022, in which case the defendants may very well find themselves with the same exact exposure.

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