

## Calif. Survival Law Change Calls For Trial Preference Revamp

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The recently enacted Senate Bill 447 amends California's survival statute to allow a decedent's representative or successor on a decedent's cause of action to recover noneconomic damages for pain and suffering that were previously unavailable. But how that amendment will affect motions for trial preference in California remains to be seen.

This uncertainty results from provisions in California's trial preference statute that have historically allowed plaintiffs to argue as evidence of prejudice the risk of being deprived of the opportunity to recover damages for pain and suffering — a purported substantive right that disappears upon their death.

Now that the availability of non-economic damages will survive the moving party's death, the California Legislature needs to evaluate whether trial preference for certain categories of plaintiffs is necessary in light of the amendment to the survival statute, or alternatively, define what constitutes prejudice and the interests of justice warranting trial preference.

Until and unless that happens, the burden shifts to defendants to impress on state court judges that plaintiffs can no longer argue that the unavailability of damages for pain and suffering constitutes prejudice—or thwarts the interests of justice—if trial preference is not granted.

### **Recovery of Previously Unavailable Noneconomic Damages**

On Oct. 1, 2021, California Gov. Gavin Newsom enacted S.B. 447, which substantially amends the California Code of Civil Procedure Section 377.34, to allow a decedent's personal representative or successor in interest to recover damages for a decedent's pain, suffering, or disfigurement in a survival action.

California's survival statute previously expressly limited damages available to a decedent's personal representative or successor in interest to the "loss or damage that the decedent sustained or incurred before death," including penalties or punitive or exemplary damages that the decedent would have been entitled to recover. It specifically excluded damages for "pain, suffering, or disfigurement."

The practical effect of this expansion of noneconomic damages recoverable on a decedent's claim is that the decedent's representative or successor can now recover the same non-economic damages that were available to the decedent only prior to the decedent's death.

The new law applies to cases in which trial preference was granted prior to Jan. 1, 2022, or to cases filed between Jan. 1, 2022, and before Jan. 1, 2026.

### **Damages Availability and Trial Preference**

California's Legislature has not yet addressed the tension the amendment to the survival statute creates with the traditional arguments that plaintiffs put forth under California's trial preference statutory scheme.

California Code of Civil Procedure Section 36(a) allows a party over the age of 70 to petition the court for a preference to set trial within 120 days if the movant can establish that:

- The party has a "substantial interest in the action as a whole"; and
- The movant's health is such that a preference is "necessary to prevent prejudicing the party's interest in the litigation."<sup>[1]</sup>

In addition, the California Code of Civil Procedure Section 36(d) provides the court with discretion to grant trial preference when presented with "clear and convincing evidence" of substantial medical doubt one party will survive beyond six months, and that satisfies the court that the "interest of justice will be served" by granting preference.

Both provisions rely on the notion that the moving party will suffer prejudice to the movant's "interest of justice" if a trial is not held before the movant's incapacity or death.

Indeed, in the 1982 *Rice v. Superior Court* decision, the California Court of Appeal for the Second District made clear that the primary purpose of California Code of Civil Procedure Section 36(a) is to provide a protection for "litigants beyond a specified age against the legislatively acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and the opportunity to recover their just measure of damages or appropriate redress."<sup>[2]</sup>

In fact, that court affirmatively held that an elderly plaintiff's "entitlement to a preferential trial date safeguards a substantive right to recover damages for pain, suffering and disfigurement."<sup>[3]</sup>

In the 1990 *Granquist v. Sandberg* ruling, the California Court of Appeal for the Third District even found that a decedent's personal representative may file a malpractice claim to recover lost noneconomic damages if counsel failed to timely file a trial preference petition during the pendency of the decedent's action, defining the loss as a "substantive right" to recover a "just measure of damages."<sup>[4]</sup>

Plaintiffs counsel frequently argue that trial preference is necessary under California Code of Civil Procedure Section 36(a) to prevent the purported prejudice that will result if their client dies before trial and the decedent's successor on their cause of action cannot then recover damages for pain and suffering.

While case law has not made as clear that the unavailability of pain and suffering damages justifies trial preference to advance the "interest of justice," that argument is likewise often made in support of motions for trial preference brought under California Code of Civil Procedure Section 36(d).

And in the 2018 *Fox v. Superior Court* ruling, the California Court of Appeal for the First District allowed that under California Code of Civil Procedure Section 36(a), a plaintiff's assertion of imminent health issues "may be supported by nothing more than an attorney's declaration 'based upon information and belief as to the medical diagnosis and prognosis' of the party."<sup>[5]</sup>

This modest burden of proof, coupled with the alleged prejudice resulting from the potential inability to recover damages for pain and suffering, has led to the frequent granting of trial preference motions.

The amendment to California’s survival statute calls into question whether the Legislature should eliminate as superfluous trial preference based solely on age and potential prejudice due to the health of the moving party, or otherwise clarify what constitutes “prejudice” or the “interest of justice” justifying trial preference.

Without action by the Legislature, the responsibility will fall on defendants to highlight for state courts the significant impact the amendment to California’s survival statute has on the very purpose of trial preference. The availability of non-economic damages for the plaintiff’s representative or successor in interest ameliorates an alleged risk that occurs if the plaintiff dies prior to judgment.

As a result, one of the plaintiff’s cornerstone arguments that a preferential trial date is necessary to prevent prejudice, advance the interests of justice and protect a “substantive right to recover damages for pain and suffering” no longer exists. In turn, until the California Legislature acts to harmonize these laws, the survival statute amendment should provide state court judges with a basis for denying motions for trial preference in the appropriate cases.

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[1] Notably, the trial preference statute also has one other provision that accelerates the trial date of a plaintiff who is under the age of 14 regardless of the plaintiff’s health, unless the court finds the party does not have a substantial interest in the case as a whole. See C.C.P. Section 36(b).

[2] Rice v. Super. Ct. , 136 Cal. App. 3d 81, 88-89 (1982).

[3] Id.

[4] See Granquist v. Sandberg , 219 Cal. App. 3d 181, 187 (1990).

[5] Fox v. Super. Ct. , 21 Cal. App. 5th 529, 534 (2018).

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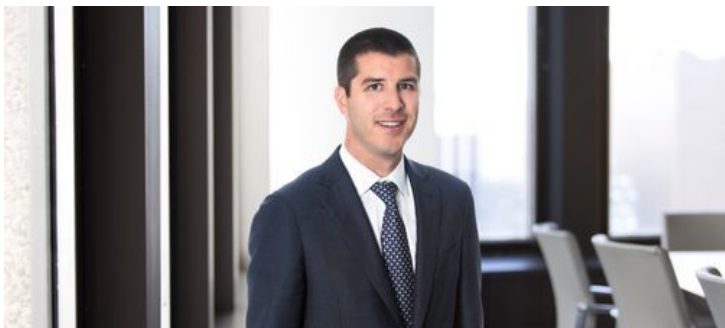
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