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## GUEST COLUMN

## Survivors will no longer recover pain and suffering damages

**Effective Jan. 1, 2026, California will no longer allow survivors to recover damages for a deceased loved one's pain, suffering or disfigurement in survival actions, narrowing recovery options and returning the state to the minority that limits such claims.**

By Eydith Kaufman

The families of deceased individuals will soon lose the right to recover damages for their loved one's pain, suffering and disfigurement. Effective Jan. 1, 2026, surviving successors in interest will no longer be able to seek these types of damages in death cases, returning California to the minority of states that don't allow recovery of pain and suffering damages by relatives of the deceased.

Because the law that permitted such damages on a trial period is expiring without extension, plaintiffs filing after Jan. 1, 2026, will have more limited recovery in their survival claims. This may reduce survival action awards where pain, suffering and/or disfigurement were significant.

### Wrongful death vs. survival claims

Wrongful death claims, governed by Cal. Code. Civ. Pro. Section 377.60, allow for the recovery of damages by family members when loved ones' deaths were "caused by the wrongful act or neglect of another." They are intended to compensate plaintiffs for the losses and injury they themselves have experienced as a result of their loved one's death.

Survival claims, in contrast, allow family members to step into the shoes of their deceased relatives and assert claims on their behalf. Governed by Cal. Code Civ. Pro. Section 377.30, this is a "cause of action that survives the death of



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the person entitled to commence an action or proceeding" and it "passes to the decedent's successor in interest." A survival claim permits certain heirs to recover damages such as medical expenses and lost earnings on behalf of the deceased.

Until January of 2022, any survival cause of action in California expressly precluded recovery for pain and suffering of the decedent. That type of recovery was deemed a personal cause of action that could not be quantified without the decedent's testimony.

### SB 447

In 2021, the Legislature enacted Senate Bill 447. The bill modified CCP Section 377.34, which quantifies the damages that can be awarded in survival actions. Subsection 377.34(a), as drafted, limits survival damages "to the loss or damage that the decedent sustained or incurred before death, ... and do not include damages for pain, suffering, or disfigurement."

The new law added subsection 377.34(b), to expand potential recovery for survival actions: "Notwith-

standing 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."

Effective Jan. 1, 2022, a decedent's personal representative or successor in interest could recover damages under the survival cause of action for the pain, suffering and disfigurement of the decedent, as long as the proceeding was granted a trial preference before Jan. 1, 2022, or the case was filed between Jan. 1, 2022, and Jan. 1, 2026. Any plaintiff recovering these damages under subdivision (b) was required to report the judgment, consent judgment or court approved settlement agreement to the Judicial Council, so it could later report back to the Legislature. Cal. Code Civ. Pro. Section 377.34(c) and (d)(1).

### SB 29

Despite the fact that most other states allow survivors to recover damages for their loved ones' pain and suffering, the Legislature appeared to be doing a "trial run" with SB 447, watching what happened when survivors were permitted to recover damages for their loved ones' pain and suffering, and

monitoring those claims over the course of four years. And now those four years are almost up.

An extension bill, SB 29, was authored by Senator John Laird. The bill would have extended the ability to recover pain, suffering and disfigurement in a survival action until Jan. 1, 2027. It would also have continued the requirement for reporting of judgments and court approved settlement agreements for such damages to the Judicial Council.

The bill was promoted by the plaintiffs' bar but targeted for defeat by the medical industry, which contended that it would conflict with MICRA, the malpractice legislation updated in 2022 with the passage

of AB 35. After being shelved in the Assembly Appropriations Committee, SB 29 was briefly revived for a few days and then dumped in the final hours of the legislative session.

#### **Conclusion**

SB 29 will not be on the list of new laws taking effect in 2026. Although it is certainly possible that legislators could introduce new bills in the future, as of Jan. 1, 2026, Californians will no longer be able to recover damages for the pain, suffering and disfigurement endured by their loved ones in survival actions.

Unlike MICRA claims, for which the date of claim settlement is generally the operative date for the amount of general damages under

the cap, the date on which a survival cause of action is filed will determine eligibility for expanded survival damages. This means parties who may be eligible to seek damages for their deceased loved one's pain, suffering and/or disfigurement now have a short window to file these claims before these damages are no longer valid.

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