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Calif. Survival Damages Bill Would Cost Cos., Consumers

By **Mark Behrens and Mayela Montenegro-Urch** (June 7, 2021, 6:10 PM EDT)

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S.B. 447, a piece of legislation being championed by the tort bar in the California Legislature, will dramatically increase lawsuit damages in survival cases.

In California, when a person dies from an injury caused by someone else, the decedent's successors can file a survival lawsuit and recover damages that include out-of-pocket expenses, such as lost wages and medical bills, and any punitive damages that the decedent would have been entitled to recover had that person lived. Punitive damages provide a windfall to the recipient, because they are awarded to punish a defendant and deter tortfeasors.

Noneconomic damages, including pain and suffering, are not recoverable in California survival actions, because those damages are personal to the decedent, and not meant to compensate others. These awards also have a vindicatory element.

Indeed, the California Supreme Court held in Roby v. McKesson Corp. in 2009 that lower punitive damages are justified when accompanied by a large award for emotional distress because "the latter may be based in part on indignation at the defendant's act" and may serve "as a deterrent."

S.B. 447 overturns California's long-standing approach. The bill adds pain and suffering, loss of consortium, emotional distress and disfigurement damages to punitive and economic loss damages in survival lawsuits if the cause of action accrues before Jan. 1, 2026.

California tort awards will skyrocket — not only because of double-dipping of damages that other states avoid, but also because the higher verdicts will be used to support more extreme punitive damages awards.

The U.S. Supreme Court has held that punitive damages must bear a reasonable relationship to a plaintiff's actual or potential harm. With regard to S.B. 447, this means that as compensatory damages jump in survival actions due to the addition of noneconomic damages, the amount of punitive damages that is constitutionally permissible in a given case may jump too.

For example, in a survival action in which a plaintiff's economic damages recovery is $1 million, if a court applies a 4-to-1 ratio for punitive damages, the plaintiff could recover up to $4 million in punitive damages, for a total recovery of $5 million today.

Post-enactment, if the same plaintiff recovered $1 million in economic damages and $1 million in noneconomic damages, the 4-to-1 ratio would permit a punitive damages award of $8 million, for a total recovery of $10 million — a massive increase in just one case, that could be repeated across serial litigations.

Skillful plaintiffs attorneys will no doubt point to the opportunity for higher compensatory damages and threat of much higher punitive damages to raise case valuations and extract larger sums from defendants. Defendants may have little choice but to pay, since the threat of an enormous award may be present in many cases. Noneconomic damages in most settings are unlimited in California and, unlike many other states, punitive damages are uncapped as well.

The prospect of much larger awards in survival actions — and the much bigger contingency fees that will come with them — must have plaintiffs lawyers salivating. And there will be a benefit for families that have lost a loved one due to another's negligence.

Everyone else will pay the price. Sponsors of the bill have cast aside the "greatest good for the greatest number" approach to policy in order to provide unlimited recoveries to a few.

For example, state and local governments are frequently sued in civil actions, including in survival actions where a person has died from the negligent conduct of a government employee. If S.B. 447 passes, the cost to the public will be huge. To pay for this increased cost, California will either need to cut government services or raise revenue. California is already one of the highest-tax states in the nation.

California businesses are tiring of the Golden State's anticompetitive approach to governing. It is no secret that businesses are leaving the state in droves, tired of high taxes, burdensome regulations and a lawsuit culture that does not exist in most other states.

The Hoover Institution estimates that 765 commercial facilities left California in 2018 and 2019. This does not count the many other businesses or workers that left during the pandemic, or that are planning to leave as remote work becomes widely accepted. S.B. 447 will lead remaining businesses to question why they should stay.

Further, the bill reinforces the perception that California's civil justice system is not welcoming of job creators. A 2019 lawsuit climate survey for the U.S. Chamber Institute for Legal Reform by the Harris Poll ranked California near the very bottom of the country with respect to the fairness of the state's legal system.

The poll surveyed over 1,300 senior lawyers at many of the nation's largest companies. In particular, participants in the survey voted California the worst jurisdiction in the entire country with respect to damages. California cannot fall farther than 50th as a result of S.B. 447, but its placement in the cellar will be cemented. California regularly ranks high on the American Tort Reform Association's Judicial Hellholes list. The streak will not be broken if S.B. 447 is enacted.

Of course, ordinary citizens will pay too. The public may soon realize that the deep pocket is their own

pocket. If you own a car in California, your insurance premiums may jump. If you do business in California, you may face crushing lawsuits.

Shoppers may see higher prices. The sad fact is that the state's least wealthy citizens will be hit the hardest by the hidden "tort tax" that will be baked into the cost of goods and services to offset the higher costs on businesses from S.B. 447.

Plaintiffs lawyers need not worry, however, that the damage they will inflict on other businesses and consumers will backfire on them. Conveniently, California common law holds that emotional distress damages are not generally recoverable in attorney malpractice actions related to litigation.

S.B. 447 should be rejected when this Senate-passed bill is considered by the Assembly. But room for improvement also exists if the legislation does advance.

For example, noneconomic damages in survival actions could be capped, as they are in medical malpractice cases in California. Providing an adequate, but not unlimited, noneconomic damage award to relatives of deceased plaintiffs would help create balance in the bill.

Additionally, the law could be amended to limit noneconomic damages in survival actions to cases directly impacted by the court backlog resulting from COVID-19.

Further, the window of time before the bill sunsets should be narrower — e.g., two years — and the sunset should apply to cases filed after that date. Application of S.B. 447 to cases that accrue by Jan. 1, 2026, is too broad, and allows the bill to apply to lawsuits filed for years after that date.

Finally, what's good for the goose is good for the gander: Emotional distress damages should be allowed against plaintiffs firms for attorney malpractice related to litigation. But S.B. 447 should certainly not pass in its current form.

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