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Calif. Bill Would End Damages Injustice For Dead Plaintiffs

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A recent Law360 guest article took aim at S.B. 447, a bill currently pending in the California Senate. The article included many warnings that the sky is sure to fall if this bill passes.

The authors suggest that verdicts will skyrocket, insurance premiums will jump and prices for consumers will go up, due to what they call a "tort tax."

These, of course, are the usual arguments trotted out by corporations — without any reliable evidence — in the face of any law that would protect human beings from injury and death. They require a rebuttal.

Current California Law

In California, an injured person's cause of action against a wrongdoer survives when the injured person dies — but only in part. While family of the person who died may file a survival action along with a wrongful death case, they cannot recover damages for the pain, suffering or disfigurement their loved one suffered before death.

Those pain and suffering damages — clearly recoverable had the injured person survived — vanish at death. The result is a windfall to the defendant, all for the "fortuity" of the wrongdoer's conduct resulting in death rather than injury.

California is lonely in taking this position. Only four other states agree. The remaining 45, and the District of Columbia, permit recovery for these damages.

S.B. 447 would bring California in line with the overwhelming majority view that predeath pain and suffering damages should be recoverable. It should pass the Senate, and be signed into law.

What S.B. 447 Will Do

Because of the significant financial gain a defendant gets when a plaintiff dies, current law incentivizes

defendants to delay cases, in the hopes that the plaintiff will die before trial.

While this has been an issue for decades, it became especially acute during the COVID-19 pandemic. No longer is it only elderly, disabled or critically injured plaintiffs whose pain and suffering damages are at risk of vanishing with their death — it is now countless other plaintiffs as well.

Courts have been closed, and case progression slowed to a crawl for many months, creating a heavy backlog. Every plaintiff who dies before their long-delayed trial is a win for the defendant, who may wipe the noneconomic damages off the board and enjoy their good fortune.

Real-world examples are not hard to find. Consider 75-year-old George Sweikhart, the plaintiff in Sweikhart v. Akebono Brake Industry Co. Ltd., decided by the California Court of Appeal earlier this year. Sweikhart died on Feb. 25, after battling mesothelioma since June 2019.

Based on his condition, his attorneys had gotten a preferential trial date of June 1, 2020, but it was vacated due to COVID-19 court closures. The defendants refused to comply with discovery requests until the court intervened.

The court also vacated the new July 2020 trial date, but Sweikhart's attorney convinced the court to reschedule trial for Feb. 15 of this year. When the parties appeared for trial, the court again continued it, this time for two weeks.

Sweikhart passed away one week later. The defendant reaped the benefit of his death by avoiding significant pain and suffering damages it clearly owed.

The current law is inequitable. It protects negligent or willful defendants' pockets at the cost of human life. S.B. 477 balances the scale by holding defendants accountable for the human suffering they have caused. It also exerts tort law's full deterrent effect, and discourages delay and inefficient use of the courts.

Opponents' Boilerplate Anti-Consumer Arguments

The recent Law360 guest article on S.B. 447 spends time retreading old ground, while overlooking obvious responses.

First, where is the evidence insurance rates or consumer prices have ever decreased after any "tort reform" law passed? Why not cap CEO pay and corporate profit if the goal is to achieve lower costs of doing business and consumer prices?

The authors fail to mention that California's current law represents the small minority view among the states. Instead of acknowledging how far California is from the mainstream on this issue, the authors describe California's law as "long-standing," and imply that it is the result of a sound policy analysis.

To the contrary, the survival statute was passed in 1961, almost 90 years after the wrongful death statute. When passed, it was insurance industry lobbying that blocked predeath pain and suffering damages. There is no grand speech, spirited debate or venerated U.S. Supreme Court opinion behind the current state of the law — just insurance industry lobbying money.

The authors of the article next focus considerable attention on the fact that punitive damages could

increase incrementally with this change in the law. This is a curious moral tack to take in the debate on this reform.

Punitive damages are only permitted when despicable conduct occurs. Why are the authors more concerned about protecting despicable conduct than protecting victims of that conduct?

In a society of human beings, doesn't it make sense to prioritize the prevention of death by drowning, burning or toxic exposure over the bottom line of a corporation whose despicable conduct was the very cause of that death? Public policy should not be written to benefit the worst corporate actors and shield them from the full repercussions of their conduct.

Further, in warning that bad corporate actors may have to pay punitive damages for all the pain and suffering they cause, the authors overlook that punitive damages are the tail wagging the dog.

A 2011 report from the U.S. Department of Justice found that in the mid-2000s, plaintiffs sought punitive damages in only 10% of tort trials, and they were awarded in only 5% of cases where the plaintiff prevailed. The median punitive damages award was only $64,000.

The authors then use another well-known anti-consumer argument, that "everyone else will pay the price" for this reform. Of course, this argument is not accompanied by any data or evidence that everyone — or anyone — is paying the price in the other 45 states that allow these damages.

The lead author of the article hails from the Washington, D.C., area. The District of Columbia, Virginia and Maryland all allow predeath pain and suffering damages. Apparently the "tort tax" created by such damages is not so bad as to make it inhospitable to live in these places. Nor does it make it impossible for governments to provide satisfactory services without unacceptable taxes.

If there were any evidence that this change in policy actually increased taxes, insurance premiums or costs for consumer goods, would that not have been front and center in any piece advocating against this reform?

Finally, the authors reach a favorite anti-consumer line — the notion that this law will make companies leave California and ruin the economy, for two reasons. First, they will perceive that California is a bad place for business. Second, they will think they cannot get a fair trial in California.

On the first point, the authors provide no evidence that any corporation has ever looked at whether a state permits predeath pain and suffering damages when deciding where to operate. It is hard to imagine a CEO selecting one state over another based on predeath pain and suffering damages.

Even if this element of damages was a CEO's determining factor, she or he would have a hard time avoiding the other 45 states and the District of Columbia, where recovery for these damages is permitted, when picking where to operate.

More likely, businesses will look at the strength of the economy. From the end of the Great Recession through 2019, the economy in California grew 34.4%, the most in the country. This handily beat "business-friendly" Florida, which grew 23.2%.

The only state to keep pace was Texas, whose growth was 34% — but of course Texas allows predeath pain and suffering damages. Even after the pandemic, U.S. News and World Report ranks California's

economy as the 10th best this year, right behind Florida and Texas. Utah, the first-place state, incidentally, allows predeath pain and suffering damages.

On the second point, the authors rely on the U.S. Chamber of Commerce's 2019 Harris Poll to argue that corporations perceive California as having an unfair legal system. Of course, California perennially ranks low in corporate-driven polls like this. This reform can do little to lower California's rank when it is already always at or near the bottom, based on its reputation of providing consumer protections.

But does predeath pain and suffering even matter in a survey like this? The top eight states on the list all allow predeath pain and suffering damages. Florida ranks 46th, but it does not allow these damages.

In fact, the five states that do not allow these damages are scattered throughout the list — 9th, 17th, 21st, 46th and 48th. Even in a survey designed to focus on tort damages, permitting or not permitting recovery for predeath pain and suffering appears to do little to alter a state's position.

Why S.B. 447 Should Become Law

S.B. 447 is a long-overdue change to an imbalance in California law borne of insurance industry lobbying. For 60 years, California has been arbitrarily cutting off plaintiffs' claims for pain and suffering at death, which discounts their rights to recovery and provides a windfall to culpable defendants.

The ripple effect is apparent in defendants' purposeful delay of litigation, and subsequent inefficient use of the courts, resulting in plaintiffs dying — sometimes days before trial.

It is time for clear-minded and fair public policy on this issue, not the usual litany of anti-consumer arguments. The sky is not falling — the scale is balancing.

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Disclosure: Saeltzer is fourth vice president at Consumer Attorneys of California, which co-sponsored S.B. 447.