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PROCEDURE

PARTY SUBSTITUTION

Plaintiffs' attorneys in mass tort and serial litigation often ignore the details of proper substitution of deceased plaintiffs because of the difficulty keeping track of hundreds of clients, attorney Rosemary Stewart says. The author discusses the proper procedure and applicable law related to substituting an individual for a plaintiff who has died, and offers guidance to defendants' counsel on possible motions to dismiss.

Counsel, Know Thy Clients: Dismissals Under Fed. R. Civ. P. 25 For Failure to Properly Substitute for Deceased Plaintiffs

By Rosemary Stewart

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Hollingsworth LLP has obtained multiple dismissals of personal injury suits against client Novartis Pharmaceuticals Corporation based on the kinds of plaintiffs' errors described herein. A number of those dismissals are cited and described in this article.

While the substitution of a qualified individual for a plaintiff who dies during litigation in federal court is often regarded as a noncontroversial procedural step, the failure to do so in a timely and proper manner may lead to dismissal of the plaintiff's case.

Such failures are uncommon in most lawsuits in which counsel are in regular communication with their clients. However, plaintiffs' attorneys in mass tort and serial litigation have increasingly ignored the details of proper substitution because of the difficulty keeping track of hundreds of clients.

Of course, as the Eleventh Circuit recently noted, a large volume of cases does not excuse a plaintiffs' counsel's ignorance about whether or when many of his clients had died.[1] But the fact remains that plaintiffs' counsel in many such cases have little knowledge about or contact with their clients, who became plaintiffs simply by responding to a mass solicitation about alleged injuries.

Moreover, these types of cases often involve plaintiffs who are elderly or the recipients of medical treatments for pre-existing terminal illnesses. In these circum-

[1] *In re Engle Cases*, 767 F.3d 1082, 1087, 1114-15 (11th Cir. 2014) (affirming the dismissal of multiple personal injury actions filed against tobacco companies by persons later identified as deceased).

 ISSN 1529-0115

stances, the reality is that many plaintiffs will die before their lawsuits can be resolved.

The risk to plaintiffs—and opportunities for defendants—arising from substitution errors in such cases has been powerfully demonstrated in one piece of serial pharmaceutical products liability litigation being defended by the author's law firm, in which **more than 30 cases have been dismissed in the last three years based on improper substitutions**.

This article will explain the proper procedure and the applicable law related to substituting an individual for a plaintiff who has died—as well as pointing out how defense counsel should be examining the same circumstances for possible motions to dismiss.

Procedural Requirements for Substitution in Federal Court

Federal Rule of Civil Procedure 25(a) provides the requirements for substituting an individual for a party who dies after litigation is underway in federal court. The Rule begins by stating: ''If a party dies *and the claim is not extinguished*, the court may order substitution of *the proper party*.''[2] Determining (1) if a deceased party's claim has been ''extinguished'' or has ''survived,'' and (2) who is a ''proper party'' for substitution if the claim *has* survived, are both questions of state law.[3] How to answer these state law questions is addressed in subsection 2 below, but this article will first address the procedural requirements for substitution.[4]

Federal Rule 25(a)(1) requires a motion for substitution to be filed ''within 90 days after service of a statement noting the death'' of a party. If such a motion is not filed within 90 days, the Rule states that ''the action by or against the decedent must be dismissed.''[5] The referenced ''statement noting the death'' is typically known as a Suggestion of Death—although there is no requirement as to its title—and the document is not required to contain any particular information except to state that an identified party has died. There is also no specification in Rule 25 as to *when* a Suggestion of Death should be filed, and if a substitution motion is filed before a Suggestion of Death, there is no need for the Suggestion of Death to also be filed.[6]

However, if a Suggestion of Death is filed, Rule 25 requires that it be *served according to the Rule* before the 90-day deadline for a substitution motion will commence. This requirement has tripped up many litigants who believed they simply needed to file the Suggestion of Death with the Court and serve copies on counsel of record. In fact, Rule 25 states that both Suggestions of Death and substitution motions ''must be served on the *parties* as provided in Rule 5 and on *nonparties* as provided in Rule 4.''[7]

As to serving ''parties,'' federal Rule 5 provides that ''[i]f a party is represented by an attorney, service under this Rule must be made on the attorney,'' either by electronic means, hand-delivery, mail, or the other standard methods set out in the Rule.[8] Thus, service on counsel by means of the court's ECF system is the most common and acceptable means of serving a Suggestion of Death on any ''party.'' However, the separate requirement to serve ''non-parties'' under Rule 4 means first, determining which ''non-parties'' must be served, and secondly, properly serving those individuals. Service under Rule 4 generally requires personal delivery of a copy of the filing to the appropriate individuals or leaving a copy at each individual's home with a person of suitable age and discretion who lives there.[9]

And although Rule 25 does not identify which ''non-parties'' must be served, case law has clarified that the personal representative[10] of the deceased's estate (if one has already been appointed) or the immediate family members or ''next of kin'' (if no estate has been opened yet) should be served.[11] The logic of this requirement is that only the estate representative or the immediate family members of the deceased should be deciding whether to continue litigation commenced by the party prior to his death—rather than the attorney who represented the deceased litigant or other unrelated persons.

Federal Rule 25 also does not specify *who* should file Suggestions of Death, but the Rule does provide that ''[a] motion for substitution may be made by any party or by the deceased's successor or representative.''[12] As a result, there is no ground for objection when ''any party'' or any ''successor or representative'' of a deceased litigant files a Suggestion of Death. The defendant in a case involving a deceased plaintiff often has

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[2] Fed. R. Civ. P. 25(a)(1) (emphases added).

[3] *See In re Baycol Prods. Litig.*, 616 F.3d 778, 785 (8th Cir. 2010) (''whether the cause of action survives'' is determined by ''state substantive law,'' which also governs ''who can qualify as a proper party for substitution under Rule 25(a)(1)'' (citing *Moore's Fed. Practice* § 25.12[3] (3d ed. 2010)); *Giles v. Campbell*, 698 F.3d 153, 156 (3d Cir. 2012) (''The substantive law applied to determine whether a claim is extinguished [by the death of a party] is not supplied by Rule 25,'' but by ''the applicable [state] substantive law.'').

[4] Although federal Rule 25 applies whenever any individual plaintiff *or defendant* has passed away, this article is limited to the procedures that should follow the death of an individual *plaintiff* who has claimed personal injury from the actions, products, or services of a defendant.

[5] *See McKenna v. Pacific Rail Serv.*, 32 F.3d 820, 836 (3d Cir. 1994) (''After the suggestion of death is filed, a 90-day countdown begins. Within 90 days, some other party or the executor or administrator of the deceased must move for substitution . . . , or the deceased's case will be dismissed.''); *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, No. MDL 1407 (W.D. Wash. Mar. 29, 2006) (declining to extend Rule 25's 90-day deadline and dismissing case because the proposed substitute plaintiff did not satisfy the 90-day deadline of Rule 25).

[6] *See* Advisory Committee Notes to Rule 25—1983 Amendment (''A motion to substitute may be made . . . without awaiting the suggestion of death.'').

[7] Fed. R. Civ. P. 25(a)(3) (emphases added).

[8] Fed. R. Civ. P. 5(b).

[9] Fed. R. Civ. P. 4(e).

[10] The term ''personal representative'' in most states means the probate-court-appointed executor or administrator of a deceased person's estate who has been duly appointed by the probate authority in that state to manage the assets and resolve the financial affairs of the deceased person. Being named or nominated as executor or personal representative in an unprobated will does **not** confer any authority on an individual, as addressed *infra*.

[11] *See, e.g., Atkins v. City of Chicago*, 547 F.3d 869, 873 (7th Cir. 2008) (''[N]onparties with a significant financial interest in the case, namely the decedent's successors (if his estate has been distributed) or personal representative ([if] it has not been), should certainly be served.'').

[12] Fed. R. Civ. P. 25(a)(1).

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an incentive to start the 90-day deadline for a substitution motion because this forces the family or other successors of the deceased plaintiff to decide if they really wish to continue the litigation. If the family or successors *do* wish to continue the litigation, the Suggestion of Death also serves as notice that it is time to make sure an appropriate person is authorized and ready to assume the deceased plaintiff's position in the litigation. In many states, the only appropriate individual for such duty is the duly appointed ''personal representative'' of the decedent's estate (as discussed in more detail below). Thus a Suggestion of Death should also trigger the initiation of formal probate proceedings, if this has not yet occurred, to make sure that a personal representative has been duly appointed by the appropriate probate court in the deceased's home state.

There is some disagreement about whether counsel for a deceased party may file the Suggestion of Death on behalf of his deceased client. Some courts have noted that the lawyer loses his client upon the latter's death so the lawyer has no right to file the Suggestion of Death unless he also represents the family member or other person who intends to file a substitution motion to replace the deceased party in the litigation.[13]

However, the federal district court that presided over the multidistrict litigation involving the Aredia®/Zometa® medications, which was the U.S. District Court for the Middle District of Tennessee (hereafter the ''A/Z MDL court''), recognized that it is the plaintiff's counsel who should first become aware of his client's death, and who should, in turn, promptly advise the court and the other parties about the death. In its initial Case Management Order (''CMO'') issued in 2006, the A/Z MDL court provided that the plaintiff's counsel for any deceased plaintiff must file a Suggestion of Death within 30 days of the death of a plaintiff.[14] This time period gave the plaintiff's counsel the first opportunity to file the Suggestion of Death, and if the plaintiff's counsel did not do so, the defendant was then free to file and serve the Suggestion of Death and thus commence the 90-day time period set out in Rule 25 for a substitution motion to be filed.[15]

Where immediate family members of a deceased litigant are not parties to the litigation and are not personally served with copies of a Suggestion of Death pursuant to Rule 4, courts have found that the 90-day deadline set out in Rule 25 does not commence, so dismissal of such cases for non-compliance with Rule 25 is not appropriate.[16]

On the other hand, if a deceased plaintiff's surviving spouse is already a co-plaintiff in the action (such as for loss of consortium), and she is the deceased's only heir and beneficiary, service made upon the spouse by serving her counsel pursuant to the court's ECF filing system (*i.e.*, pursuant to federal Rule 5) is sufficient. But when a deceased plaintiff leaves immediate family members who are not parties to the suit or where there is doubt about who should be served with the Suggestion of Death or the substitution motion, it is good practice to personally serve all of the immediate family members of the deceased plaintiff.

In the Aredia®/Zometa® mass tort litigation, after realizing that certain plaintiffs' counsel did not always comply with Rule 25 or the A/Z MDL court's special substitution procedures, the defendant Novartis Pharmaceuticals Corporation began to file Suggestions of Death for deceased plaintiffs in order to commence the 90-day deadline for substitution motions. And where the 90-day period then passed without a substitution motion being filed, a number of federal courts dismissed with prejudice the actions pending against Novartis, either on the court's own initiative or by granting motions to dismiss filed by Novartis.[17]

When a proposed substitute plaintiff knows that she needs more time to file a motion for substitution and has good cause for requesting additional time—such as when she has filed a petition with her local probate court to become the deceased plaintiff's personal representative but the probate petition has not yet been acted upon—the proper procedure is for that person to file a timely motion for extension of time under federal Rule 6(b).[18] The motion should request more time to file the

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[13] *See, e.g.*, *Schmidt v. Merrill Lynch Trust Co.*, No. 5:07-cv-382-Oc-10GRJ (M.D. Fla. June 30, 2008) (''The deceased party's attorney is not the type of 'representative' contemplated by Rule 25(a)'' and does not have ''the authority to file a suggestion of death''); *Bass v. Attardi*, 868 F.2d 45, 50 n.12 (3d Cir. 1989) (explaining that counsel's filing of suggestion of death in district court was improper because ''[c]ounsel's attorney-client relationship with [the party] ceased at [the party's] death.'').

[14] *See* A/Z MDL court's CMO § V.A, *In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-md-01760 (M.D. Tenn. July 28, 2006), ECF No. 89. This requirement was later extended to require the plaintiff's counsel to file a Suggestion of Death within *60 days* of a plaintiff's death. CMO # 2 (M.D. Tenn. Aug. 17, 2006), ECF No. 103.

[15] The A/Z MDL court also included in its CMO, several other special provisions to govern substitution because most of the plaintiffs in the A/Z MDL were cancer patients whose cancers had already metastasized to bone, so everyone understood that many of the plaintiffs would not survive the term of the litigation proceedings they had commenced. *See id.* § V. These special provisions in the CMO included a requirement that plaintiff's counsel assist in initiating estate proceedings within 30 days of a plaintiff's death, and if probate court approval of an estate representative was taking longer than the 90-days period set out in Rule 25, the A/Z MDL court also created a ''provisional'' substitution option that would provide more time to open such estates. *Id.* at § V.C.2.

[16] *See, e.g. Ransom v. Brennan*, 437 F.2d 513, 516-19 (5th Cir. 1971) (service on the attorney for the deceased did not constitute good service on the deceased's surviving spouse who was the executrix of the deceased's estate because she was not a party to the suit before her husband died, and the attorney did not represent her at the time he was served); *Green & Pugliese v. Novartis Pharm. Corp.*, Nos. 03-06-0974, 03-06-0745 (M.D. Tenn. Aug. 16, 2011) (holding that Rule 25's 90-day time period was not triggered because ''there is no evidence that the Suggestions of Death were served [by plaintiffs' counsel] upon the deceased Plaintiffs' successors or personal representatives'').

[17] *See, e.g.*, *Falls v. Novartis Pharm. Corp.*, No. 3:13cv270 (D. Conn. Aug. 1, 2014) (granting motion to dismiss Aredia®/Zometa® claim where the 90-days deadline of Rule 25 was disregarded by the proposed substitute plaintiff and her counsel); *McGuinness v. Novartis Pharm. Corp.*, 289 F.R.D. 360 (M.D. Fla. 2013) (dismissing case because no proper motion for substitution was filed within Rule 25's 90-day deadline); *Lawson v. Novartis Pharm. Corp.*, No. 3:12-cv-74-MCR-EMT (N.D. Fla. Oct. 5, 2012) (action dismissed *sua sponte* based on the failure to file a timely motion for substitution pursuant to Rule 25).

[18] The Advisory Committee Notes to federal Rule 25 point out that the 90-day deadline applies ''unless the period is extended pursuant to Rule 6(b).'' *See* Notes of Advisory Committee on Rule 25—1963 Amendments. *See also Unicorn Tales,*

Rule 25 substitution motion and set out the pertinent facts that justify the requested extension.

Under Rule 6(b), if such a motion for extension is filed before the 90-day period in Rule 25(a) has lapsed, the movant must demonstrate ''good cause'' for the requested time extension, but if the 90-day period has already passed, the movant must demonstrate ''excusable neglect'' for the failure to act earlier.[19] ''Excusable neglect'' is not an easy standard to meet because it is *not* satisfied by an attorney's claiming he did not understand the Rule or did not realize that the deadline had passed because of his busy caseload.[20] Failure to demonstrate excusable neglect related to tardy motions for substitution has supported the dismissal of Aredia®/Zometa® cases filed against Novartis.[21]

Finally, a timely and proper motion for substitution filed under federal Rule 25(a) should always do two things: (1) It should identify and cite the applicable state law that demonstrates the deceased party's claim has not been extinguished due to his death; and (2) it should identify the person who is seeking to be substituted and explain why she is qualified under the governing state law, which will make her a ''proper party'' for substitution under Rule 25(a).[22]

The Substantive Requirements to Demonstrate: (1) Deceased Person's Claim Has Survived, and (2) 'Proper Party' Will Be Substituted

As noted at the beginning of this article, (1) whether a claim survives the death of the allegedly injured person and (2) who may be properly substituted for that deceased person, are both questions of state law. The state law that answers the first question is usually known as the ''Survival Statute'' in the home state of the deceased plaintiff.[23] Survival Statutes identify which kinds of claims survive the death of a litigant (or a would-be litigant) with language that may be as simple as ''[n]o cause of action dies with the person.''[24]

Other states have more detailed Survival Statutes that list the kinds of claims that survive death or the kinds of claims that do not survive death.[25] The ''extinguished'' claims in some states include a plaintiff's ability to seek punitive damages or damages for pain and suffering because these claims are deemed to be ''personal'' to the individual who has passed away.[26] But in nearly all of the states, personal injury litigation may be filed or continued notwithstanding the death of an allegedly injured person. The foregoing examples demonstrate the necessity of checking the specific language of the applicable state's Survival Statute before filing or challenging a motion for substitution.

Fortunately, the same state Survival Statutes often answer the second question of who is a proper party to file or continue litigation on behalf of a deceased person. For example, the Survival Statute in Missouri states that ''[c]auses of action for personal injuries . . . shall not abate by reason of [a party's] death . . . but . . . shall survive to *the personal representative* of such injured party.''[27] In other states, the Survival Statute is silent about who may file or continue such actions, but

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Inc. v. Banerjee, 138 F.3d 467, 470 (2d Cir. 1998) (affirming dismissal where Rule 6(b) motion could have been made to extend Rule 25's deadline, but no such motion was filed so it was properly deemed to have been waived).

[19] Fed. R. Civ. P. 6(b)(1)(B).

[20] *See, e.g., Kaubisch v. Weber*, 408 F.3d 540, 542-43 (8th Cir. 2005) (''[T]he misapplication or misreading of the plain language of Rule 25 does not establish excusable neglect.''); *United States v. Torres*, 372 F.3d 1159, 1163-64 (10th Cir. 2004) (''misinterpretation of a readily accessible, unambiguous rule cannot be grounds for relief''); *McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 594-96 (6th Cir. 2002) (counsel's misinterpretation of the law is not ''excusable neglect''); *Harrington v. City of Chicago*, 433 F.3d 542, 548 (7th Cir. 2006) (''neglect due to a busy schedule is not excusable''). In *Pioneer Inv. Co., v. Brunswick Associates Ltd. P'ship.*, 507 U.S. 380, 395-97 (1993), the Court explained the factors that should be examined case-by-case to determine whether ''neglect'' by a party or his counsel might be considered ''excusable.'' As for the fact that strict enforcement of time deadlines might penalize clients for their attorneys' neglect, the Supreme Court declared this irrelevant because clients ''must be held accountable for the acts and omissions of their chosen counsel.'' *Id.* at 397.

[21] *See Falls v. Novartis Pharm. Corp.* (''Plaintiffs' counsel has offered no valid justification for moving for substitution three months late and . . . attorney inadvertence on its own is not excusable neglect for an untimely motion for substitution.'' (citing multiple supporting decisions from other courts within the Second Circuit)); *McGuinness*, 289 F.R.D. at 363 (no ''reasonable basis for finding excusable neglect'' where plaintiff's counsel ''was well aware of Rule 25 and its implications'' but filed a faulty substitution motion two weeks late).

[22] If a lawsuit is pending in state court rather than federal court when a party dies, the procedural requirements for substitution are provided not by federal Rule 25, but by state law, usually in the form of a state procedural rule explaining how and when substitution may occur. While some of these state rules are modeled closely after federal Rule 25, other state rules contain substantially different substitution procedures. *Compare, e.g.*, Fla. R. Civ. P. 1.260(a) (state procedural rule for substitution in Florida is nearly identical to federal Rule 25) and Or. R. Civ. Proc, 34 (state procedural rule for substitution in Oregon contains requirements and time frames very different from federal Rule 25). Clearly, such rules must be examined for the particular state when substitution becomes necessary in a state court action.

[23] The home state of the deceased plaintiff—rather than the state where the lawsuit is pending—supplies the law that governs matters related to the probate of the deceased's estate and the survival of any claims or causes of action that the deceased had at the time of his death.

[24] Fla. Stat. Ann. § 46.021; *see also* N.Y. Est. Powers & Trusts Law § 11-3.2(b) (''No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed.'').

[25] *See, e.g.*, 12 Okl. St. Ann. § 1051 (''In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive''); *see also* Ala. Code § 6-5-462 (providing ''all personal claims upon which an action has been filed, except for injuries to the reputation, survive in favor of and against personal representatives; and all personal claims upon which no action has been filed survive against the personal representative of a deceased tort-feasor'').

[26] *See e.g., Ballweg v. City of Springfield*, 499 N.E.2d 1373, 1377 (Ill. 1986) (''Illinois law is clear that punitive damages are not recoverable under the Survival Act.''); Ariz. Rev. Stat. Ann. § 14-3110 (damages for pain and suffering are not available under the Arizona survival statute); Cal. Civ. Proc. Code § 377.34 (survival actions in California ''do not include damages for pain, suffering, or disfigurement''). In states with these kinds of provisions, the personal injury action itself may continue after the plaintiff's death, but the specified ''extra damages'' will not be recoverable.

[27] Mo. Rev. Stat. § 537.020 (emphasis added); *see also* N.Y. Est. Powers & Trusts Law § 11-3.2(b) (''For any injury an ac-

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case law from the state clearly identifies who may continue legal actions on behalf of a deceased person.[28] Once again, it is usually the ''personal representative'' of the deceased's estate who may continue the action, but a few states also permit ''heirs'' or other identified beneficiaries or successors of the deceased to commence or continue personal injury litigation.[29]

In California, whether the litigation is pending in federal or state court, a probate court-appointed personal representative of a deceased person may file or continue personal injury litigation,[30] but a separate, alternative procedure is also available to family members or others—if no estate has been opened and none is planned to be opened—to certify that they meet the state's definition of the ''sole beneficiary'' or ''all beneficiaries'' of the deceased.[31] If these certifications are acceptable to the court where the litigation is pending, the court may then substitute that sole beneficiary or all of the beneficiaries of the deceased as the proper substitute plaintiff(s) in the case, without the need to open an estate.[32]

In no state known to the author is the fact that a person has been named or nominated in a deceased person's will to be the executor or personal representative, sufficient to bestow power on that person to continue litigation. *A will must be probated before its terms have legal effect*, and a person so nominated in a will must be appointed as the executor or personal representative by a state probate court before she has power to act in that capacity for purposes of filing or continuing litigation.

Other parties to a lawsuit may challenge a motion for substitution if they believe the proposed substitute plaintiff does not have the requisite authority under the applicable state law to continue the action. Every state provides a certification—often designated as ''Letters Testamentary'' or ''Letters of Administration''—to prove the authority granted by a probate court to the personal representative (or other legal representative) of the deceased's estate. Other parties are entitled to see these papers, and knowledgeable plaintiff's counsel will attach a copy of the authorization document to the motion for substitution. The files of state probate courts are generally open to the public, so an opposing party who questions a proposed substitute party's claim of representational authority may check the facts by contacting the appropriate state probate court. If a proposed substitute plaintiff seeks approval to continue a deceased relative's lawsuit based on her being a lawful ''heir'' or ''beneficiary'' of the deceased—in the few states that permit such persons to proceed in this manner—some form of proof that the person is indeed an heir and authorized to act in that capacity should also be attached to the substitution motion.

In the Aredia®/Zometa® mass tort litigation, the defendant Novartis successfully moved to dismiss a number of personal injury suits where there existed a combination of significant substitution errors by the plaintiffs and their counsel. Sometimes these errors began when the plaintiffs' counsel asked the A/Z MDL court to substitute a family member of the deceased based on a representation that the family member was the ''personal representative'' or the ''executor'' of the deceased plaintiff's estate—when this was *not true*. The MDL court and the defendant Novartis relied upon these representations and assumed they were truthful, which led to the approval of a number of substitute plaintiffs who not only had made material misrepresentations to the court but also had assumed the role of substitute plaintiffs without having the necessary legal authority to do so.

The same ''substitute plaintiffs'' often found themselves in violation of federal Rule 25 and the A/Z MDL court's other specific requirements for substitution, such as the CMO requirement that estate proceedings be commenced for deceased plaintiffs within 30 days of death. These combinations of violations were cited in a number of dismissal orders issued by remand courts around the country,[33] as well as by the A/Z MDL court itself, which dismissed three cases for the same reasons before they were remanded.[34]

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tion may be brought or continued by the personal representative of the decedent.'').

[28] *See, e.g.*, *Evans v. Ascaro Inc.*, No. 04-CV-094-GKF-PJC (N.D. Okla. Feb 24, 2010) (''Under Oklahoma law, a decedent's tort claims may only be advanced by a legally appointed representative of the decedent's estate.''); *Will v. Nw. Univ.*, 881 N.E.2d 481, 492 (Ill. App. Ct. 2007) (''Illinois law has long made clear that, under [the Illinois survival statute], the cause of action must be brought by and in the name of the representative or administrator of the decedent's estate.'').

[29] *See, e.g.*, Utah Code Ann. § 78B-3-107(1)(a) (providing that a cause of action in a personal injury matter survives to ''the personal representatives or heirs of the person who died.''); Tex. Civ. Prac. & Rem. Code Ann. § 71.021(b) (''A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person.'').

[30] *See* Cal. Civ. Pro. § 377.31.

[31] *Id.*; Cal. Civ. Pro. § 377.10; Cal. Civ. Pro. § 377.11.

[32] The described procedure is unique to California, which also has a community property statute that provides that a surviving spouse automatically inherits his or her deceased spouse's interest in a lawsuit. Cal. Fam. Code § 760. Thus, a substitution motion filed by a surviving spouse of a California plaintiff should almost always be granted based on the movant's being the ''proper party'' under state law and thus being acceptable as the substitute plaintiff under federal Rule 25(a)(1).

[33] *See, e.g.*, *Porter v. Novartis Pharm., Corp.*, 1:06-cv-03052 (N.D. Ill. July 23, 2014) (dismissing case based on the ''flat-out, misrepresent[ations]'' to the MDL court that Mr. Porter had authority to pursue the litigation as the executor of his father's estate, and the fact that his failure to become the executor meant that he had no authority to continue the litigation based on the Illinois survival statute); *Wallace v. Novartis Pharm. Corp.*, 984 F. Supp. 2d 377 (M.D. Pa. 2013) (dismissal ordered after the court found material misrepresentations about the substitute plaintiff's status, the failure to obtain timely appointment as the personal representative of the deceased plaintiff as required by Pennsylvania law, violations of federal Rule 25, and violations of the MDL court's CMO); *McDaniel v. Novartis Pharm. Corp.*, No. 2:08-CV-02088 (W.D. Ark. Jan. 6, 2012) (finding no ''proper plaintiff to maintain a cause of action'' and dismissing case based on the substitute plaintiff's violation of the state survival and probate law in Arkansas as well as his violations of the A/Z MDL court's CMO and federal Rule 25).

[34] Report & Recommendation, *Spiese v. Novartis Pharm. Corp.*, No. 3:06-CV-0858 (M.D. Tenn. May 28, 2013), *dismissed with prejudice* (M.D. Tenn. June 14, 2013), *appeal docketed*, No. 13-5941 (6th Cir. July 16, 2013); Report & Recommendation, *Kathleen Wilson v. Novartis Pharm. Corp.*, No. 3:06-CV-0966 (M.D. Tenn. Apr. 10, 2013), *dismissed with prejudice* (M.D. Tenn. May 13, 2013), *appeal docketed*, No. 13-5771 (6th Cir. June 7, 2013); Report & Recommendation, *Cole v. Novartis Pharm. Corp.*, No. 3:06-CV-00506 (M.D. Tenn. June 10,

In a 2014 decision by the Fifth Circuit, the court reviewed the multiple misrepresentations about their authority made by two substitute plaintiffs (a son and daughter of the deceased plaintiff), their violations of the A/Z MDL court's CMO and Rule 25, and their failure to comply with the survival and probate laws of Texas—before affirming the district court's dismissal of the case.[35]

Other dismissal orders issued in the Aredia®/Zometa® litigation have focused more specifically on the lack of standing of the substitute plaintiffs because they had not obtained the necessary legal authority under the applicable state law to continue the action.[36] And still other dismissal orders addressed the failures to comply with the special substitution provisions set out in the A/Z MDL court's CMO.[37]

Other Considerations Involved in Bringing or Continuing Survival Actions

As noted above, most state Survival Statutes apply not only to lawsuits that were filed by a person prior to his death but also to claims or causes of action that the person possessed but had not filed prior to death. The filing of these claims is subject to the applicable statute of limitations for the particular causes of action to be asserted, although a few states have special statutes of limitations applicable to survival actions.[38]

Further, if the applicable Survival Statute provides that only a ''personal representative'' may file a claim on behalf of a deceased person, then a lawsuit filed in the name of the deceased or filed by someone who is *not* the personal representative of the deceased is generally subject to dismissal as a ''nullity'' because the named plaintiff had no legal authority or standing to file the complaint.[39] A motion to dismiss filed in federal court for this reason is not based on federal Rule 25, but on the lack of standing of the plaintiff, and is typically filed under federal Rule 12.[40]

If litigation involves a ''wrongful death'' claim as opposed to—or in addition to—a ''survival action'' for personal injuries suffered prior to death, state law must be examined for both kinds of legal actions. The two types of claims are often handled differently in terms of who may pursue them and who may collect damages. In personal injury litigation, as noted above, most states provide that only ''personal representatives'' may file or continue the litigation on behalf of the deceased, and any damages in those cases are paid into the deceased's estate to be distributed by the personal representative in the same manner that other assets were or will be distributed.

Wrongful death actions, on the other hand, may be pursued in a number of states by family members of the deceased—in their own names and for their own benefit—while still other states provide that only personal representatives may file wrongful death actions.[41] Clearly, a case that asserts both personal injury claims and wrongful death claims requires careful scrutiny of the state law regarding who may pursue each kind of action in order to determine if there is a plaintiff (or plaintiffs) with legal authority and standing to continue the litigation.

2013), *dismissed with prejudice* (M.D. Tenn. July 11, 2013), *appeal docketed*, No. 13-6046 (6th Cir. Aug. 13, 2013).

[35] *Jacqueline Wilson v. Novartis Pharm. Corp.*, 575 F. App'x 296, 298-99 (5th Cir. 2014) (affirming *Jacqueline Wilson v. Novartis Pharm. Corp.*, No. 4:12-cv-684-A (N.D. Tex. Feb. 15, 2013)).

[36] *Chiapel v. Novartis Pharm. Corp.*, No. 4:06-cv-1642-RWS (E.D. Mo. Jan. 23, 2014) (dismissing claims because the substitute plaintiff was not the personal representative of the deceased plaintiff's estate and thus had no ''legal status'' or ''standing'' to continue the litigation under Missouri law); *Blumenshine v. Novartis Pharm. Corp.*, No. 08-0567-CV-W-SOW (W.D. Mo. July 23, 2013) (''Dennis Blumenshine has no legal status as [the deceased plaintiff's] 'personal representative.' Therefore [he] lacks standing to continue litigating this case.''); *Rapa v. Novartis Pharm. Corp.*, No. 4:08CV01671-AGF (E.D. Mo. October 15, 2014), *appeal docketed*, No. 14-3612 (8th Cir. Nov. 18, 2014) (dismissing case because the provisionally substituted plaintiff did not obtain authority as the personal representative of her deceased husband and thus had no standing to continue the lawsuit on his behalf).

[37] *See, e.g.*, *Carter v. Novartis Pharm. Corp.*, No. 4:12-cv-605-DPM (W.D. Ark. June 4, 2013) (describing as an ''incurable problem'' the fact that the substitute plaintiff did not finalize his ''provisional substitution'' in clear violation of the A/Z MDL court's CMO); *Blumenshine* (finding dismissal appropriate for either the CMO violations or the lack of authority of the substitute plaintiff under Missouri state law); *McDaniel* (dismissing case based on the substitute plaintiff's violation of the A/Z MDL court's CMO, federal Rule 25, and the Arkansas state survival and probate law—''any one of which may justify dismissal'').

[38] *See, e.g.*, Va. Code § 8.01-229(B)(1) (extending the applicable statute of limitations to one year after a qualified personal representative has been appointed by a Virginia probate court); Tex. Civ. Prac. & Rem. Code Ann. § 16.062 (suspending the applicable statute of limitations for 12 months after the death of a person with a claim or until a qualified executor or administrator is appointed by a Texas probate court, whichever occurs first).

[39] *See, e.g.*, *In re Aredia & Zometa Prods. Liability Litig. (re Simard v. Novartis Pharm. Corp.)*, No. 3:06-MD-01760 (M.D. Tenn. 2012) (''[B]ecause there was no named plaintiff with standing at the time this action was filed, the court had no jurisdiction, and the case must be dismissed.''); *In re Engle Cases*, No. 3:09-cv-10000-J-32JBT (M.D. Fla. Jan. 22, 2013) (''[A] lawsuit filed in the name of a deceased individual is a nullity over which this Court has no jurisdiction.''), *aff'd*, 767 F.3d 1082, 1086-87 (11th Cir. 2014) (''As any lawyer worth his salt knows, a dead person cannot maintain a personal injury claim''). If the statute of limitations has not yet expired, this kind of error may possibly be resolved by the filing of a new complaint by the personal representative after she has obtained the necessary probate authority to act in that capacity.

[40] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (explaining that federal courts have no jurisdiction where the plaintiff has no standing to sue); *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) (''[I]f a plaintiff lacks standing, the district court has no subject matter jurisdiction. Therefore a standing argument implicates Rule 12(b)(1).'' (internal citation omitted)); *McKibben v. Chubb*, 840 F.2d 1525, 1532 (10th Cir. 1988) (affirming dismissal of survival action because brother of decedent had no authority under Kansas law to act on behalf of the decedent's estate and therefore he had no standing to proceed).

[41] In Colorado, for example, personal injury suits may be brought or continued only by the personal representative of a deceased. Colo. Rev. Stat. Ann. § 13-20-101(2). But in the same state, wrongful death actions may be pursued by the surviving spouse or other heirs of the deceased. *Id.* § 13-21-201. In Minnesota, wrongful death actions and surviving personal injury actions are addressed in the same statute, and a special ''trustee'' is required to be appointed by the court having jurisdiction over the actual or proposed litigation in order to pursue either kind of action. *See* Minn. Stat. §§ 573.01-.02.

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Finally, some states require approval by the probate court or the court where a survival action is pending in order to approve any proposed settlement of the lawsuit.[42] These state statutes recognize that a personal representative is acting on behalf of the heirs or beneficiaries of the deceased party's estate, and the approval requirement provides an opportunity for a court to determine if the proposed settlement is fair and reasonable to those beneficiaries. Other states do not have such a requirement in recognition of the fact that personal representatives already have a duty imposed by the probate court to act in a manner that is fair and reasonable to the heirs of the estate they are administering. Again, the appropriate state law on this issue must be checked if a survival action is proposed to be settled.

In summary, Rule 25 is not just ''procedural'' in nature. It permits substitution for a deceased plaintiff only when the plaintiff's claim has not been extinguished under state law and only when a qualified individual with authority to continue the suit—again, as determined by state law—has been identified in a timely motion for substitution. Defendants should carefully scrutinize motions for substitution to make sure that these requirements have been satisfied. If they have not, the defendant should oppose the substitution motion and consider its own motion to dismiss the action with prejudice.

[42] *See e.g.*, S.C. Code Ann. § 15-51-42 (''Any settlement of a wrongful death or survival action must be approved by either a probate court, circuit court, or United States District Court . . . .''); Cal. Prob. Code §§ 9835-37 (a California probate court-appointed personal representative who is pursuing a survival action for injury to the deceased must obtain authority from the probate court to settle that action).