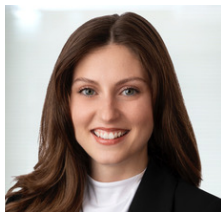


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INSIGHT

California Plaintiff Substitution Cases Need Proactive Discovery

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Alexandra Patterson
Hollingsworth



Alexandra Stubblefield
Hollingsworth



California Code of Civil Procedure Section 377 outlines requirements for plaintiff substitution.

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Plaintiffs' attorneys in coordinated litigation often disregard details when substituting a party who has legal authority to pursue a case after the named plaintiff dies. This is due to the difficulties they face in keeping track of client inventory.

California's Judicial Council Coordinated Proceedings, or JCCP, are immense in size and tend to go on for many years, so defense counsel should know what to do if a plaintiff passes away before a final verdict.

Aspects of the California Code of Civil Procedure Section 377 outline requirements for plaintiff substitution for defense practitioners litigating cases in which plaintiff substitution is required in what the American Tort Reform Foundation has [deemed](#) a "judicial hellhole."

California Procedural Rules

The first step after discovering that a plaintiff has died is to determine if the decedent's claim survives. Survival actions are different from wrongful death claims.

The Court of Appeals for the Sixth District of California has [stated](#), "[u]nlike a cause of action for wrongful death, a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event."

After determining that the action survives, a new plaintiff must be substituted for the claim to continue. Under CCP Section [377.30](#), California law prefers the substitute to be a personal representative that was appointed by a probate court.

If there is no personal representative, a successor in interest—defined under CCP Section [377.11](#) as the beneficiary of the decedent's estate—may continue the action.

Under CCP Section [377.32](#), the successor in interest must execute and file a sworn affidavit or a declaration along with a copy of the decedent's death certificate. The affidavit must state the decedent's name, the date and place of the decedent's death, as well as:

- A copy of the final order showing the distribution of the decedent's cause of action to the successor in interest (if the decedent's estate was administrated).
- The following language: "No proceeding is now pending in California for administration of the decedent's estate" and "No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding."
- Either of the following with supporting facts: "The affiant or declarant is the decedent's successor in interest ... and succeeds to the decedent's interest in the action or proceeding," or "The affiant or declarant is authorized to act on behalf of the decedent's successor in interest ... with respect to the decedent's interest in the action or proceeding."

Practical Implications

Understanding the legal framework for substitution is just one part of navigating the JCCP landscape. Practitioners also should consider the statute of limitations and discovery strategies.

Statute of limitations issues: California courts have [stated](#) that an unsubstituted decedent's case can't move forward because "[u]ntil there has been a substitution, [p]laintiff's former counsel lacks authority to continue litigating on [the] decedent's behalf."

Under [CCP Section 366.1](#), survival actions must begin before the latter of six months after the decedent's passing or within the limitations period that would have applied had the decedent not passed away.

In California, liberal amendments to pleadings may be [allowed](#), even if the statute of limitations has expired.

Some California Courts have [found](#) that if the amended complaint rests "on the same general set of facts as the original complaint and refers to the same accident and the same injuries as the original complaint," then the amended complaint will relate back to the date of the original complaint.

However, an amended pleading that adds a new substituted plaintiff who tries to enforce an independent right or impose greater liability won't relate back to the filing of the original complaint for amendment purposes.

Because California allows for liberal amendment of pleadings, practitioners should be aware that a delayed substitution likely won't result in the dismissal of the case.

But it's vital to know which decedents have or haven't been properly substituted, because a case can't progress and will be subject to dismissal unless a proper party-in-interest successfully moves to be substituted into the case.

Proactive and diligent discovery: From the time a JCCP is formed, counsel should create a system that tracks plaintiffs' claims and regularly update it. Knowing the inventory of plaintiffs' claims will help in case evaluation and litigation strategy.

It could well be that no plaintiff is prosecuting the case, and defense counsel could seek relief on this fact alone.

Knowing the inventory of claims pursued against your client and keeping discovery records organized and comprehensive is essential. Having such a system helps when pursuing a variety of dispositive options, including voluntary dismissals or settlement.

By applying California CCP Section 377, staying abreast of the applicable statute of limitations, and keeping diligent discovery records, counsel can seek desirable relief for their client.

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Author Information

[Alexandra E. Patterson](#) and [Alexandra L. Stubblefield](#) are associates at Hollingsworth focused on complex litigation involving pharmaceutical, products liability, and toxic tort matters, among others.

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