

You Have Been Named a Nominal Defendant in a Wrongful Death Lawsuit



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The papers usually arrive weeks or months after the funeral. A process server hands you a summons and a complaint. Across the top of the summons are the words “Notice! You have been sued.” The case is about the death of someone you loved, and your name is listed as a defendant.

For most people, that is frightening and confusing. You did not cause the death. You may not even have known that another family member had hired a lawyer.

In a California wrongful death case, being named a defendant this way usually does not mean anyone is accusing you of anything. It means you are an heir, and the law requires every heir to be part of one lawsuit. The heirs who filed the case named you as a *nominal defendant* (a defendant in name only) to bring your claim into it.

It is, however, a warning that your rights are now at stake in a case someone else started, and you should act on it promptly.

A Nominal Defendant Is Not Accused of Wrongdoing

Code of Civil Procedure section 382 provides: “If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.” The California Supreme Court applied that rule to wrongful death cases more than a century ago: all the heirs should join as plaintiffs, and if one will not, that heir may be named as a defendant. (*Salmon v. Rathjens* (1907) 152 Cal. 290, 294–295.)

An heir named this way is, in the Supreme Court’s words, “in reality” a plaintiff. (*Watkins v. Nutting* (1941) 17 Cal.2d 490, 498; *Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697.) The lawsuit seeks nothing from you. It seeks compensation from the person or company whose wrongful conduct caused the death, and it brings your claim along with everyone else’s.

The One Action Rule Is Why You Were Named

[Code of Civil Procedure section 377.60](#) lists [who may bring a wrongful death claim](#). Generally that is the surviving spouse or domestic partner, the children, and the issue of deceased children, or, if there are none, those who would inherit by intestate succession. Others qualify in particular circumstances: a putative spouse, stepchildren, or parents who were dependent on the decedent; in some cases the decedent's legal guardians, when the parents have died; and a minor who lived in the decedent's household for the previous 180 days and depended on the decedent for half or more of the minor's support. (Code Civ. Proc., § 377.60, subds. (a)–(c).) This article calls all of them “heirs,” as the courts usually do.

Each heir has “a personal and separate cause of action.” (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692.) But California requires those claims to be brought together. As the Supreme Court explained, “all heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages.” (*Id.* at p. 694.) Lawyers call this the *one action rule*.

The rule protects the defendant from being sued again and again, by one heir after another, for the same death. It places the burden on the heirs who file the case. Plaintiff heirs “have a mandatory duty to join all known omitted heirs” in the single action. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808.) An heir who is wrongly left out may have a claim for damages against the heirs who failed to join them. (*Id.* at p. 809.)

So when another family member files a wrongful death case and you have not joined as a plaintiff, their lawyer must bring you in. Naming you as a nominal defendant and serving you with the summons is how that is done. Merely naming you, without serving you, is not enough. (*Id.* at p. 808.) Learn more about the [nominal defendant](#).

Why Families End Up on Opposite Sides of the Caption

Being named a nominal defendant does not always mean there is a family dispute. Common reasons include:

- **A deadline was close.** A wrongful death lawsuit generally must be filed within two years ([Code Civ. Proc., § 335.1](#)), but shorter or different deadlines can apply depending on who caused the death. A claim against a public entity, for example, generally must be presented within six months ([Gov. Code, § 911.2, subd. \(a\)](#)). The filing heirs may not have had time to reach you.
- **You could not be found** or did not respond to letters or calls.
- **You chose not to sue**, or had not yet decided.
- **You wanted a different lawyer** than the one the other heirs hired.

- **The family is divided.** A second spouse and the children of a first marriage, siblings who have not spoken in years, or a parent who was absent from the decedent's life may see the case, and the money, very differently.

Do Not Ignore the Summons

The summons directs a defendant to file a written response within 30 days after service. ([Code Civ. Proc., § 412.20, subd. \(a\)\(3\).](#))

The law treats a nominal defendant heir differently from an ordinary defendant. Because no relief is sought against the heir, courts have held that a default judgment against a nominal defendant is improper. (*Watkins, supra*, 17 Cal.2d at pp. 498–499; *Estate of Kuebler v. Superior Court* (1978) 81 Cal.App.3d 500, 504.) That does not make it safe to do nothing.

The real danger is that your own loss is never proved. In *Watkins*, the jury heard nothing about the losses of some of the decedent's children. The Supreme Court held that because the verdict represented only the damages of the heirs who presented their case, "the children who were not mentioned to the jury are not entitled to share in it." (*Watkins, supra*, 17 Cal.2d at p. 499.)

Doing nothing does not automatically forfeit your claim. A court may instruct the jury on the damages of a nominal defendant who does not take part in the trial. (*Kuebler, supra*, 81 Cal.App.3d at p. 504.) But you cannot safely assume that anyone else will gather and present the evidence of your loss. The other heirs' lawyer is working to prove their losses, not yours.

If no one presents your loss, the case may be settled or tried, and the money divided, on the strength of everyone else's loss but yours.

The Plaintiffs' Lawyer Is Not Your Lawyer

The lawyer who filed the case and named you represents the heirs who hired them. That lawyer does not represent you.

In the Court of Appeal's view, a lawyer for one heir owes a duty of loyalty to that client, and the court seriously questioned whether the lawyer could even discuss the case with an omitted heir without breaching that duty. (*Hall v. Superior Court* (2003) 108 Cal.App.4th 706, 714–715.)

That matters because heirs "may have competing interests in a settlement fund, which will often be less than the sum of the separate claims." (*Corder v. Corder* (2007) 41 Cal.4th 644, 658.) Every dollar allocated to one heir is a dollar not allocated to another.

California's Rules of Professional Conduct address this conflict. A lawyer may not represent multiple clients where there is a significant risk that the representation of one will be materially limited by duties to another, without each client's informed written consent. ([Cal. Rules of Prof. Conduct, rule 1.7\(b\).](#)) Even with consent, one lawyer may not represent two clients when one asserts a claim

against the other in the same case. (*Id.*, rule 1.7(d)(3).) And a lawyer who represents several heirs may not settle their claims together unless each gives informed written consent after disclosure of “the participation of each person in the settlement.” (*Id.*, rule 1.8.7(a).)

The rules do not require every heir to have a separate lawyer. Heirs whose interests line up can sometimes share one lawyer with informed written consent. But when a conflict appears, you should have independent counsel of your own. Signs of a conflict include:

- The other heirs or their lawyer propose a division of the money before you have been heard.
- You are told your share will be small because your relationship with the decedent was “distant.”
- You are asked to sign a settlement, release, or apportionment agreement.
- Your relationship with the decedent, or your dependence on them, is disputed.
- A minor child is among the heirs, and a parent is both the child’s representative and a competing heir.

How the Recovery Is Divided Among the Heirs

A wrongful death case usually ends with one number. [Code of Civil Procedure section 377.61](#) provides that “[t]he court shall determine the respective rights in an award of the persons entitled to assert the cause of action.” Under an optional jury instruction, the jury may be told to “return a verdict of a single amount for all plaintiffs,” which the judge then divides. (CACI Nos. 3921, 3922.) The courts leave the division to the judge because of the heirs’ “competing interests in the lump-sum award.” (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 533.) That procedure can be waived: where all of the heirs, properly represented by counsel, waive judicial apportionment, the jury should generally return a separate verdict for each heir. (*Id.* at p. 536.)

The same rule applies when one lump-sum settlement resolves every heir’s claim. After such a settlement, the trial court “must apportion the settlement proceeds” by the same measure it would use for a verdict: “the pecuniary damages suffered by each heir.” (*Corder, supra*, 41 Cal.4th at p. 653.)

The division is **not** based on inheritance. It “is not based on an heir’s statutory share under intestacy, but is based on the proportion that the heir’s personal damage bears to the damage suffered by the others.” (*Smith, supra*, 41 Cal.App.4th at p. 698.) Despite the word “pecuniary,” this is not just an accounting of lost financial support. Your share depends on evidence of your own loss: the support, gifts, and household services the decedent provided to you, and the love, companionship, comfort, and guidance you lost. (CACI No. 3921; see [How a California Wrongful Death Recovery Is Divided Among the Heirs.](#))

When heirs who have settled cannot agree on how to divide the settlement, mediation with a retired judge or trained mediator is a common first step. If that fails, the judge decides in a separate proceeding without a jury. (*Watkins, supra*, 17 Cal.2d at p. 498; *Kim v. Yi* (2006) 139 Cal.App.4th 543,

549–550.) A contested apportionment is slow, costly, and adversarial, and it is where a nominal defendant who has no lawyer is at the greatest disadvantage.

Not Every Settlement Affects You the Same Way

What a settlement means for a nominal defendant depends on what it covers and whether you were properly brought into the case.

- **A settlement of every heir's claim.** When one lump sum resolves all of the heirs' claims, including yours, the money is divided among all of the heirs by agreement or by the court, based on each heir's loss. (*Corder, supra*, 41 Cal.4th at p. 653.)
- **A settlement by some heirs that leaves your claim out.** Your claim is not necessarily part of their settlement fund. Instead, "the nonsettling heirs may continue to pursue the action against the defendant. This remains true even if the nonsettling heirs are nominally defendants in the case." (*Smith, supra*, 41 Cal.App.4th at p. 698.)
- **You were named but never served.** Then you were not properly joined. (*Ruttenberg, supra*, 53 Cal.App.4th at p. 808.) If the defendant settles with the other heirs anyway, naming you as a nominal defendant gave the defendant notice that you exist, and the Court of Appeal has held that the one action rule then does not bar the named heir's own later lawsuit. (*Romero v. Pacific Gas & Electric Co.* (2007) 156 Cal.App.4th 211, 215.)

In each situation, have a lawyer promptly evaluate the settlement, your evidence, and your options.

When a Child Is One of the Heirs

If a minor is an heir, the child must appear through a guardian or guardian ad litem, who may compromise the child's claim only with the court's approval. ([Code Civ. Proc., § 372, subd. \(a\)\(1\), \(3\)](#); see [Prob. Code, § 3500](#).) The petition for approval must disclose everything that bears on whether the settlement is reasonable (Cal. Rules of Court, rule 7.950), and the shorter expedited approval process is not available for a wrongful death claim (Cal. Rules of Court, rule 7.950.5(a)(2)). When you are both a parent and a nominal defendant heir, independent advice is especially important. (See [the wrongful death claims of minor children](#).)

What to Do If You Have Been Named

- **Note the date you were served.** The 30-day response period runs from service.
- **Keep every paper you received:** the summons, complaint, and any letters from the other heirs' lawyer.
- **Do not sign anything** (a settlement, release, apportionment agreement, or substitution of attorney) before an independent lawyer reviews it.

- **Do not assume the plaintiffs' lawyer is protecting you.** Ask in writing whom that lawyer represents.
- **Gather evidence of your relationship with the person who died:** photographs, messages, financial support, shared holidays, caregiving, and the people who saw it.
- **Contact an experienced California wrongful death lawyer immediately.**

Seek Experienced Wrongful Death Counsel Now

Being named a nominal defendant is not an accusation. It is California's way of making sure every heir is part of the one case that will decide what the family recovers for a death that should not have happened.

But your claim is now moving in a case that someone else filed, guided by a lawyer who represents someone else. Your share depends on whether your own loss is presented, and the division of the money may be negotiated or decided without you if you do not act.

If you have been named as a nominal defendant in a California wrongful death lawsuit, seek experienced wrongful death counsel right away. Have your claim evaluated, respond to the summons, and make sure your loss is heard.

Authorities

- Code Civ. Proc., §§ 335.1, 372, 377.60, 377.61, 382, 412.20.
- Gov. Code, § 911.2.
- Prob. Code, § 3500.
- Cal. Rules of Court, rules 7.950, 7.950.5.
- Cal. Rules of Prof. Conduct, rules 1.7, 1.8.7.
- CACI Nos. 3921, 3922.
- *Salmon v. Rathjens* (1907) 152 Cal. 290.
- *Watkins v. Nutting* (1941) 17 Cal.2d 490.
- *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690.
- *Corder v. Corder* (2007) 41 Cal.4th 644.
- *Estate of Kuebler v. Superior Court* (1978) 81 Cal.App.3d 500.
- *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512.
- *Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691.
- *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801.
- *Hall v. Superior Court* (2003) 108 Cal.App.4th 706.

- *Kim v. Yi* (2006) 139 Cal.App.4th 543.
- *Romero v. Pacific Gas & Electric Co.* (2007) 156 Cal.App.4th 211.



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Richard C. Harris is the principal attorney of Rich Harris, A Law Corporation. His practice is dedicated to helping families pursue wrongful death claims against reckless drivers, careless companies and negligent government agencies in all 58 California counties.

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