



APRIL 2021



# The defendant is deceased, the heirs are cooperative and the damages exceed policy limits

## The steps to reaching a pre-litigation settlement above the policy limits touch both tort and probate law

By **JOSEPH R. LUCIA, DAVID BRILLANT, AND SARAH MADAN**

A potential client (which could include surviving heirs in a wrongful-death claim) has contacted you about representation in an automobile case that resulted in the responsible driver's death. You quickly determine that the damages exceed the available policy limits. The potential client is demanding that you pursue personal assets from the driver's estate.

Now the curveball. The surviving heirs of the defendant driver want to cooperate

with you and compensate the plaintiff above the policy limits. What do you do?

First, have the surviving heirs agree to a policy limit settlement *and* consent to your client filing a petition for probate to administer the defendant decedent's estate, and to transfer and assign their entire interest in the estate to your clients. This, in turn, will allow you to seek compensation above the available policy limits through a probate proceeding, but will also significantly limit litigation expenses.

Below is a general roadmap on how to achieve this result during the pre-litigation phase of your case.

### Statutory deadlines

Personal-injury cases involving a deceased defendant have many traps for the unwary. The various deadlines and statutes applicable in these cases are found in both the Code of Civil Procedure and Probate Code. The most significant deadline is the statute of limitations for filing a claim against an estate, which is *one year* from the date of the debtor's death. This limitation period applies to all tort and contract claims, accrued or unaccrued.

The public policy for reducing the specific limitations periods from two years



APRIL 2021

for negligence or four years from a breach of contract permits the efficient administration of decedent's estates. (Code Civ. Proc., § 366.2, subd. (a).) Additionally, when a decedent has an estate subject to probate administration, a creditor must file a timely creditor's claim. (Prob. Code, § 9100.) If these deadlines are missed, the claimant's recovery is limited to the decedent's insurance policy. (Prob. Code, § 554.)

### Immediate steps to be taken to preserve a claim above the policy limits

Commencing and completing a decedent's estate administration is a time-consuming process. Typically, it takes 12-18 months to complete a probate administration in California. The cost of conducting the estate administration should also be a factor. Administering an estate worth \$500,000 will trigger \$26,000 in counsel fees. (Prob. Code, § 10810.) If pursuing assets beyond the policy limits is not time- or cost-prohibitive, a proper investigation must occur, which would include the following steps:

- Conduct the following background research on the deceased defendant:
  - o **Testate, intestate, or a trust.** Determine if the decedent died testate, intestate, or with a trust;
  - o **Assets.** Identify property deeds or ownership interest in any business;
  - o **Heirs.** Identify the heirs at law or those named in decedent's last will and testament and obtain all of their contact information;
  - o **Liens/judgments.** Assess and determine any outstanding liens or judgments against the decedent. It would also be helpful to know whether there are any pending and/or prior bankruptcy filings; and
  - o **Employment.** Determine the defendant's employer at the time of the incident.
- Serve the defendant's insurance company with a preservation of evidence letter, including a demand for policy limits information. In this letter,

you should express that your client's damages exceed any available insurance policy limit and that you will be making a creditor's claim against the decedent's estate.

- **Probate Counsel – Know your limits.** If you do not have experience in handling probate administrations, partner with a probate attorney who can ensure that you meet all of your pleading requirements and statutory deadlines. It can be embarrassing, frustrating, and cause you to commit malpractice if you cannot satisfy the procedural requirements to commence a timely probate administration and file a timely creditor's claim.

You should set a target completion date of about six months from the date of the defendant's death to complete the above tasks so that you have ample time to resolve the third-party insurance claim, open probate and file a claim within the strict one-year statute of limitations.

### Perfecting the settlement – required settlement agreement language

Once you have completed the above investigative steps, you will have a much clearer picture of whether it makes financial sense to pursue recovery above the policy limit and from the decedent's assets. Assuming decedent's heirs agree to paying from decedent's estate, you must be precise with the settlement agreement terms.

Aside from the standard release language, you must include language that contains the decedent's heirs' consent to your client filing a petition for probate to administer the decedent's estate and assigns some or all of the estate's assets in satisfaction of the claim.

Here is an example of the necessary language that must be part of the settlement agreement:

**Decedent's Estate Proceeding; Assignment of Interest to Claimants.** *[SURVIVING HEIRS] confirm that they are the sole legal heirs to decedent's estate. Based on the facts and circumstances of this matter, and*

*[SURVIVING HEIRS]'s promises made as expressed in the Recitals, they consent to Claimants filing a petition for probate to administer decedent's estate, and transfer and assign their entire interest in the estate to Claimants, in equal shares, as part of the consideration to resolve Claimants' claims. [SURVIVING HEIRS] have read Probate Code Section 11604 and represent and warrant that they understand the consequences of assigning their entire interest in decedent's estate and freely and voluntarily agree to this assignment and it was not procured by duress, fraud, or undue influence. If [SURVIVING HEIRS]'s assignment is deemed invalid by a court, then they agree to transfer all their right, title, and interest in the Real Property to Claimants, as tenants in common, immediately after a court's order for distribution. [SURVIVING HEIRS] agree to execute any and all documents necessary to effectuate their agreement contained within this paragraph and the other provisions of this Agreement.*

**Representations and Warranties.** *The Parties make the following representations and warranties.*

(a) *[SURVIVING HEIRS] represent and warrant that they are the sole heirs to decedent's estate and that they have no knowledge of decedent having children or other lineal descendants. [SURVIVING HEIRS] further represent and warrant that they made the promise set forth in the Recitals and that they will not retract the promise and take any legal position with any court that would interfere with Claimants' ability to probate decedent's estate and convey title of the Real Property to themselves as a creditor, assignee of the sole intestate heir, or post distribution assignee.*

(b) *The Parties represent and warrant to each other that they have not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity not a Party to this Agreement, any right, claim, demand, damage, debt, liability, obligation, account, cost, expense, lien, or action which they have ever had against any of the Parties to this Agreement as of the date of execution of this Agreement.*



APRIL 2021

### Conclusion

It is critical to remember that a claimant has *one year* from the date of the decedent's death to make a timely creditor's claim against a decedent. Failure to make a timely creditor's claim limits the claimant's recovery to the policy limits within decedent's insurance policy. Even if the heirs agree to a settlement that includes decedent's probate assets, a claimant must commence the probate and file a proper creditor's claim within the one-year timeframe.



Lucia

Brillant

Madan

*Joseph R. Lucia of Rains Lucia Stern St. Phalle & Silver, PC litigates a wide variety of personal injury cases that result in catastrophic injury and wrongful death.*

*David Brilliant is a Trust and Estate attorney and is a certified specialist in estate planning, trust, and probate law by the State Bar of California Board of Legal Specialization.*

*Sarah Madan is a member in the Rains Lucia Stern St. Phalle & Silver, PC Personal Injury Group.*