January 23, 2019

XXX

XXX

 Re: Estate of XXX

Counsel,

I write as the lead trial lawyer for the surviving family members of XX and XX. These were good, fine folks who leave a good, fine family behind.

I have reviewed the file and note that Mr. XX has raised the possibility of attending mediation before a lawsuit is filed in this case. I am not interested in a pre-litigation mediation.

However, I am willing to accept payment of the full insurance policy limits on behalf of my clients before filing a lawsuit. This letter is, therefore, an offer to settle the claims of all of XX’s legal heirs in exchange for payment of the full availability insurance policy limits, including the primary and all excess policies. **This offer expires on February 25, 2019.**

Please take the time to check my verdict history when advising your clients and the insurance company decision-makers on this offer, including XXX.

Once this case is filed, I will have no motivation to settle it. Nor will my clients.

**I. Liability**

First, it’s undisputed and undisputable that XX’s driver, Mr. X, was 100% at fault and Mr. and Mrs. X were 0% at fault.

***The Police Report Establishes That Mr. X Was 100% At Fault***

Witnesses had seen Mr. Xdriving “dangerously” before the crash and saw that he almost had a head-on collision with other vehicles before colliding with Mr. and Mrs. X:

[police report excerpt]

The investigating officers clearly conclude that Mr. X was the sole cause of this crash:

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[police report excerpt]

***Mr. X Is Per Se Negligent***

Mr. X’s violation of California Vehicle Code section 21651 constitutes per se negligence.

CVC 21651. (a) Whenever a highway has been divided into two or more roadways by means of intermittent barriers or by means of a dividing section of not less than two feet in width, either unpaved or delineated by curbs, double-parallel lines, or other markings on the roadway, it is unlawful to do either of the following:

(1) To drive any vehicle over, upon, or across the dividing section.

(2) To make any left, semicircular, or U-turn with the vehicle on the divided highway, except through an opening in the barrier designated and intended by public authorities for the use of vehicles or through a plainly marked opening in the dividing section.

(b) It is unlawful to drive any vehicle upon a highway, except to the right of an intermittent barrier or a dividing section which separates two or more opposing lanes of traffic. Except as otherwise provided in subdivision (c), a violation of this subdivision is a misdemeanor.

(c) Any willful violation of subdivision (b) which results in injury to, or death of a person shall be punished by imprisonment pursuant to subdivision (h) of Section1170 of the Penal Code, or imprisonment in a county jail for a period of not more than six months.

Violation of a law raises a presumption that the violator was negligent. The presumption of negligence arises if (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff’s injury; (3) the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the plaintiff was one of the class of persons the statute was intended to protect. The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case.” *Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526 internal citations omitted; see also Cal. Law Revision Com. to Evid. Code § 669.

The harm that was intended to be protected against by banning crossing on a double yellow is what happened here: Mr. X crossed a double yellow line in a no passing zone and ran head-on into an oncoming vehicle. And the people who were intended to be protected by the statute – motorists like the Xs who were traveling the opposite direction – were the ones harmed by Mr. X’s violation of the statute. Thus, Mr. X was per se negligent.

***Several Witnesses Have Given Sworn Statements That Mr. X Was On His Way To The X Office For A Meeting On The Morning Of The Crash, Placing Him In The Course And Scope Of Employment***

Multiple witnesses establish that Mr. X was on his way to the X office for a meeting on the morning of the crash.

Attached are the declarations of several witnesses, confirming that Mr. X was on his way to the X office on the morning of the crash.

***Moreover, Mr. X was an Employee of X and, Therefore, A Permissive User Of The Vehicle***

Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner. Cal. Veh. Code, § 17150.

***In Addition, X Has Placard/Logo Liability For Its Truck And Mr. X In This Crash***

Under California law, [*Gamboa v. Conti Trucking, Inc.* (1993) 19 Cal. App. 4th 663](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993199744&pubNum=0003484&originatingDoc=I0506ffd56e3e11e49f6783c480129bc3&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Category)), as modified on denial of reh’g, (Nov. 15, 1993), and federal law, [*Planet Ins. Co. v. Transport Indem.*, 823 F.2d 285 (9th Cir. 1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987092826&pubNum=0000350&originatingDoc=I0506ffd56e3e11e49f6783c480129bc3&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Category)), there is an irrebuttable presumption, known as placard or logo liability, placed upon motor carriers rather than common-law doctrines of respondeat superior, master-servant, independent contractor and the like when there is a valid lease in effect and the commercial motor vehicle displayed the common carrier’s placard.

X, Inc. – the owner of the vehicle Mr. X was driving at the time of the crash – is a motor carrier. X’s placard is clearly displayed on the truck Mr. X was driving at the time of the crash.

[photo of vehicle at crash scene with placard/logo]

***X Was Negligent In Entrusting Its Vehicle To Mr. X, Who Had Multiple Driving Offenses In The Years Leading Up To The Crash And Had Just Finished Traffic School 10 Days Before The Crash***

 “One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.” [Restatement Second, Torts, § 390](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0290694171&pubNum=0101577&originatingDoc=I0506ffd56e3e11e49f6783c480129bc3&refType=TS&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Category)).

“In its simplest form the question is whether the owner [or other supplier] when he permits an incompetent or reckless person, whom he knows to be incompetent or reckless, to take and operate his car [or any other instrumentality], acts as an ordinarily prudent person would be expected to act under the circumstances.” [*Rocca v. Steinmetz* (1923) 61 Cal. App. 102, 109;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923118444&pubNum=0000660&originatingDoc=I0506ffd56e3e11e49f6783c480129bc3&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Category)) [*White v. Inbound Aviation* (1999) 69 Cal. App. 4th 910](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999042642&pubNum=0003484&originatingDoc=I0506ffd56e3e11e49f6783c480129bc3&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Category)).

Mr. X has a history of driving safety violations dating back to 2010. The most recent is a high-speed violation less than three months before the crash that killed the Xs. All of this information was known, or readily available, to X through a simple search.

Mr. X completed traffic school for his last driving offense on 3/19/18 - 10 days before the crash. X had ample information to put it on notice that Mr. X should not be entrusted with a company truck.

**II. Damages**

I’m enclosing a copy of the memorial video for X. Please watch it and make sure the insurance company decision-makers and your clients watch it too. These are the people X and Mr. X negligently killed. These are the people we’re going to be talking about at trial.

I’m also enclosing video clips of the surviving family members so the decision-makers can get a flavor for who they are. Make sure the insurance company decision and your clients watch this one too. These are the people who will testify at trial. They’re good people. They’ve suffered a big loss.

X were active until their last days. X loved taking care of her grandkids, visiting with her sons several times a week, doing water aerobics, taking care of her home and generally being out and about. X was an avid hiker, snake hunter, outdoorsman and member of his local off-road Jeep club. He was known to get down on the floor and roll around with the grandkids.

X was larger than life. That’s what his family says. And X was the sunshine and the glue that held the family together. The loss of their love, companionship, comfort, care, assistance, society, guidance, training, etc. has left two huge holes in this family. This is going to be a big verdict.

**III. Bad Faith**

California law requires liability insurers, by statute, to settle cases where the liability of the company’s insured is reasonably clear. Ins. Code §790.03(h)(5); *Moradi-Shalai v. Fireman’s Fund Ins. Companies* (1988) 46 Cal.3d 287. Insurance Codesection 790.03(h)(5) has been interpreted “as imposing upon an insurance company the duty actively to... attempt to settle a claim by making, and by accepting, reasonable settlement offers once liability has become reasonably clear.” *See Pray By & Through Pray v. Foremost Ins. Co.* (9th Cir. 1985) 767 F.2d 1329, 1330 (applying California law).

CACI 2337, applicable in bad faith litigation, has made this clear. It provides in relevant part that:

In determining whether [name of defendant] acted unreasonably or without proper cause, you may consider whether the defendant did any of the following:

\* \* \*

(e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of [name of plaintiff]'s claim after liability had become reasonably clear.

Here, it is clear from the Traffic Collision Report, the investigating officer’s findings and the statements of all of the witnesses that Mr. X was 100% at fault for causing this collision. It’s also clear that X is liable for Mr. X’s actions that day because he was in the course and scope of his employment. Liability and coverage are clear in this case.

Moreover, it is also apparent that the value of the wrongful death damages to the surviving heirs is substantial, particularly in the hands of myself as the trial lawyer. Thus, this is a clear and unequivocal demand and opportunity for the insurance company to settle these claims for the available insurance policy limits and protect its insureds from an excess verdict.

**IV. Conclusion**

If this case is tried to a jury, it’s going to be a huge verdict. This is your opportunity to settle the case before that happens.

Sincerely,

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Encl.