

# JUDGMENTS SET UP TO STING INSURERS TEXAS AND CALIFORNIA



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# JUDGMENTS SET UP TO STING INSURERS

- THE SCHEME
- THE SNAG
- THE SET UP
- THE STING
- STRATEGIC USE BY INSURER

# THE SCHEME

## CLAIMANT SEEKS TO RECOVER DEFENDANT'S INSURANCE

- Without litigating (or fully litigating) liability action
- Without personal financial risk to defendant

## THE SCHEME

### **REQUIREMENT: INSURER NOT DEFENDING ITS INSURED**

Where insurer *defending* its insured, insured cannot incur liability binding insurer without the insurer's consent or a trial

- Policy's "no action" clause
- Policy's "cooperation" clause

## THE SCHEME

### **REQUIREMENT: INSURER IS NOT DEFENDING ITS INSURED**

Where insurer *not defending* its insured, insured can incur liability binding insurer without the insurer's consent or a trial

- Texas: Full adversarial trial, either in liability or coverage action
- California: Full trial not required

## THE SCHEME

REQUIREMENT: INSURER IS NOT DEFENDING ITS INSURED

### **NO DEFENSE BECAUSE NO CONTRACTUAL OBLIGATION TO DEFEND INSURED?**

- **Indemnity only policy:** Executive Risk Indemnity, Inc. v. Jones (2009) 171 Cal.App.4th 319

since insurer had *right and opportunity to defend*, cannot relitigate the insured's liability or amount of judgment

- **SIR not satisfied** (but insurer had right and opportunity to defend):

American Safety Indemnity Co. v. Admiral Ins. Co. (2013) 220 Cal.App.4th 1,4

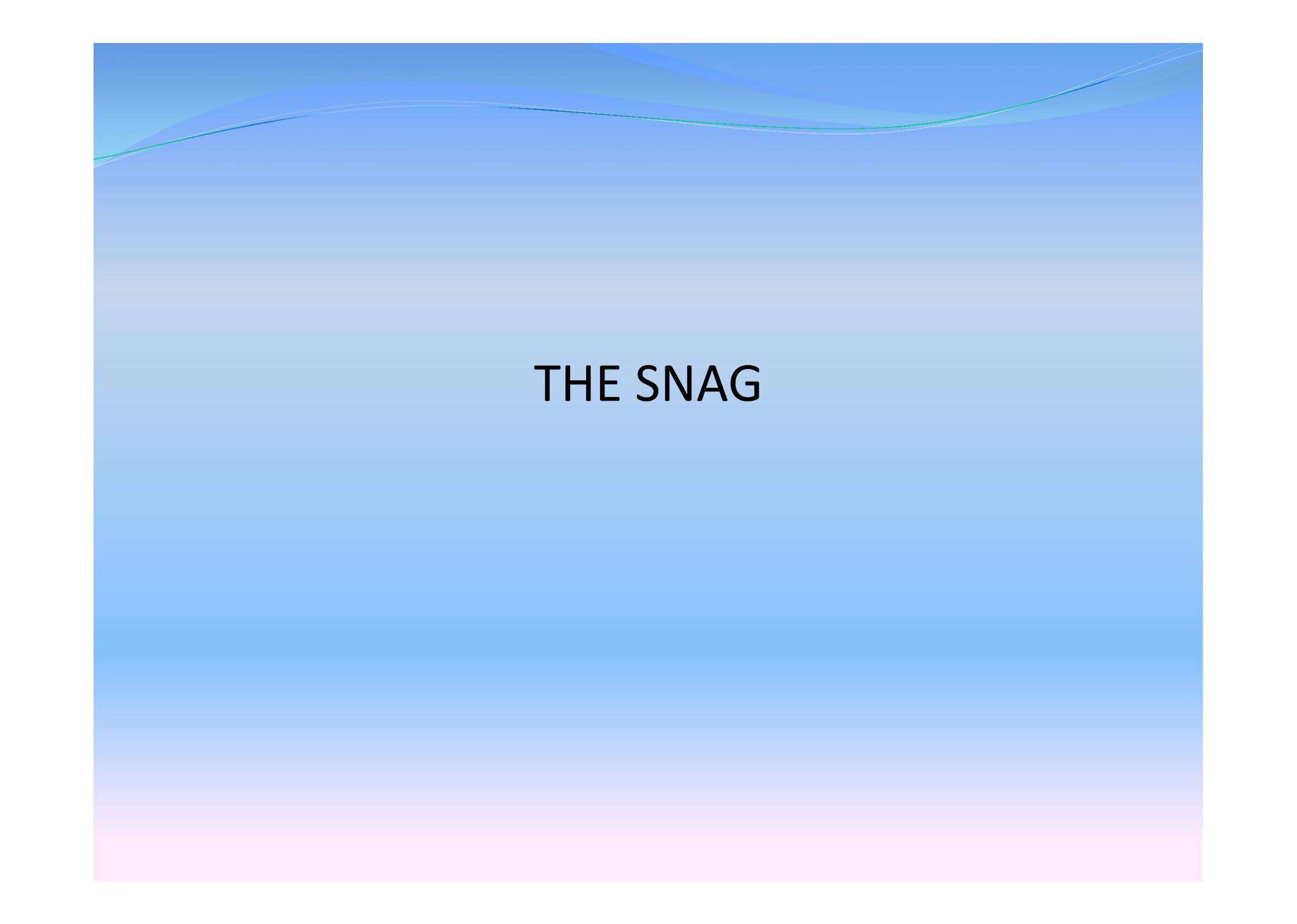
policy can make SIR obligation a condition of any obligation under the policy including the duty to defend.

## THE SCHEME

REQUIREMENT: INSURER IS NOT DEFENDING ITS INSURED

**NO FAILURE TO DEFEND IN CA BASED ON DISPUTED ADEQUACY OF THE DEFENSE:**

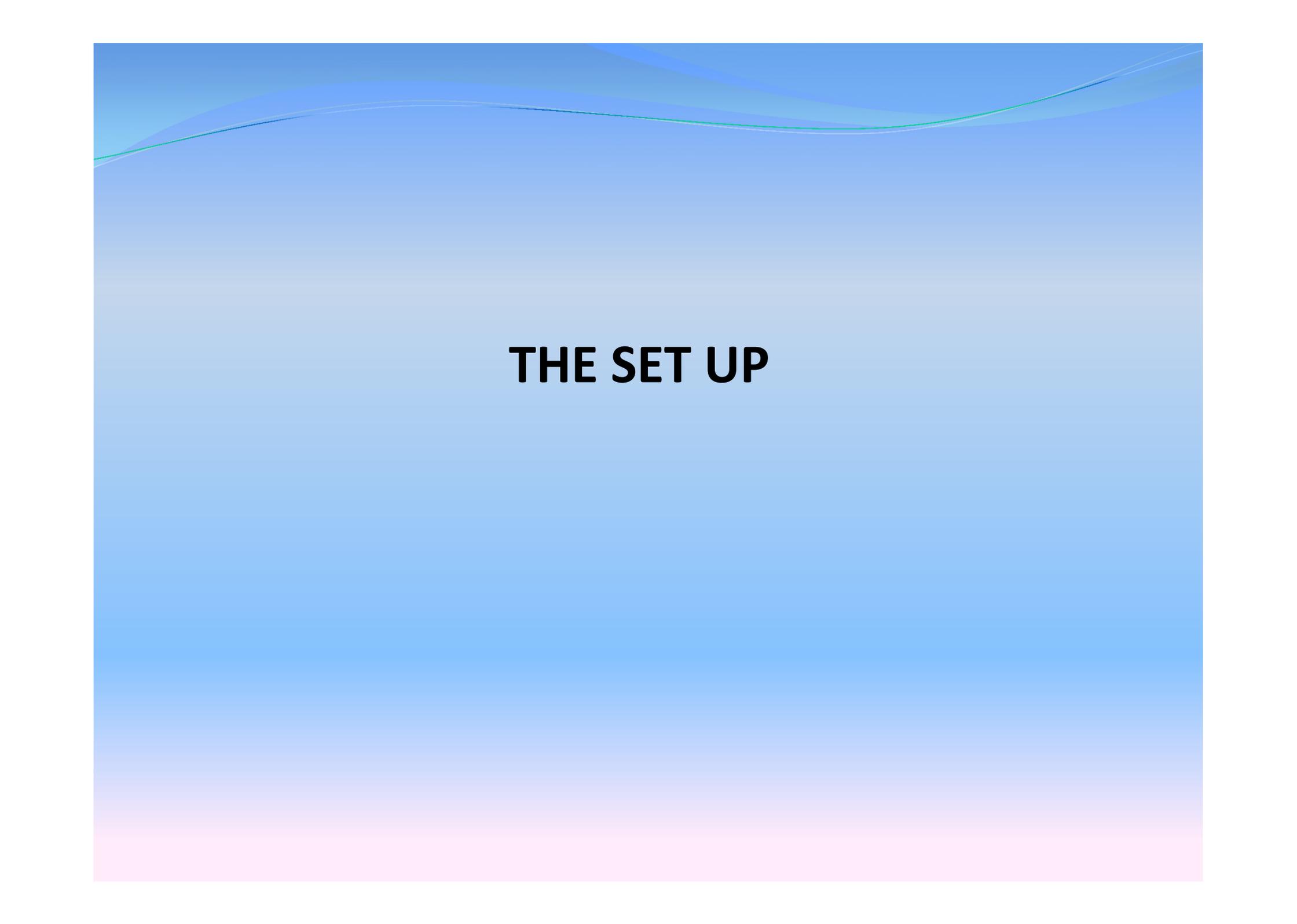
- Dispute over insurer's *reasonableness in effecting settlement*
- Dispute over insurer's providing insured *independent defense counsel*



# THE SNAG

## THE SNAG

NO DIRECT ACTION BY CLAIMANT AGAINST  
INSURER IN TEXAS OR CALIFORNIA



# THE SET UP

# THE SET UP

## **CLAIMANT AND INSURED SETTLE AND SET-UP:**

1. Insured assignment of rights to claimant;
2. claimant giving covenant not to execute against insured's assets;
3. judgment, establishing insured's liability and claimant's damages.



# **THE STING**

# THE STING

## ENFORCEMENT OF THE JUDGMENT AGAINST THE INSURER

- The “sting” not as painful for insurers in Texas as in California
  - CA – Insurance Code Section 11580, and priority of settlements
  - TX – Procedural "turn-over" statute, and priority of fair trial

# THE STING

## WHAT TYPE OF JUDGMENT?

- TX -- resulting from a contested trial
  - Judgment after actual trial policy wording means a contest of issues. Wright v. Allstate Ins. Co., 285 S.W. 2d 376, 379-380 (Tex. 1955).
  - insurer not bound by non-adversarial trial. Seger v. Yorkshire Ins. Co., 503 S.W. 3d 388 (Tex. 2016).
  - liability and damages can be re-litigated in action against insurer. Great American v. Hamel 525 S.W. 3d 655 (Tex. 2017).
- CA -- reasonable, and free from fraud or collusion
  - but contested trial not required

## THE STING

### STIPULATED JUDGMENTS IN CA -- SO, WHAT IS “FRAUD” OR “COLLUSION”?

- inherently collusive? (parties are not adverse in the set up)
- Lack of case law guidance
- *Example*: potential fraud in insured’s attorney concealing from claimant’s attorney insurer’s communication?

# THE STING

STIPULATED JUDGMENTS IN CA -- SO, WHAT IS “FRAUD” OR “COLLUSION”?

- *good faith court finding effect on stipulated judgment*

- removes concern about fraud or collusion.

Sanchez v. Truck Ins. Exchange (1994) 21 Cal.App.4th 1778.

Roman v. Unigard Ins. Group (1994) 26 Cal.App.4th 177.

- not relevant

Pruyn v. Agricultural Ins. Co. (1995) 36 Cal.App.4th 500.

## THE STING

### **CALIFORNIA “JUDICIAL PARTICIPATION” IN THE JUDGMENT = JUDGMENT REASONABLE AND FREE OF FRAUD OR COLLUSION**

- *Uncontested trial* is judicial participation
  - Determinative factor: independent adjudication of facts based on an evidentiary showing, with no indication of abuse, fraud, or collusion.

# THE STING

## Uncontested trials approved

- e.g. one hour trial, no defense evidence or cross-exam of plaintiff's witnesses.

Glenbrook v. Homeowners Assn. v. Scottsdale Ins. Co. (N.D. Cal. 1994) 858 F. Supp. 986.

- e.g. hearing of one and one-half hours with plaintiff presenting evidence of liability and damages

National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434.

- But not approved: last minute amendment of complaint to add claims arguably covered by the policy, and 25 minute perfunctory trial.

Lipson v. Jordache Enterprises, Inc. (1992) 9 Cal. App. 4th 151.

# THE STING

## THE ASSIGNMENT: WHAT TYPE, AND WHAT BENEFITS?

### 1. WHAT TYPE:

- TX – “Gandy” factors for valid assignment. State Farm v. Gandy, 925 S.W.2d 696 (Tex. 1996)
  - assignment after adjudication of claimant’s claims in underlying action;
  - insurer denied defense; and
  - insurer either:
    - denied indemnity, or
    - didn’t make good faith effort to adjudicate coverage issues

# THE STING

THE ASSIGNMENT: WHAT TYPE, AND WHAT BENEFITS?

## 2. WHAT BENEFITS:

- *extra-contractual damages*
  - CA: additional bad faith set-up - demand for payment of judgment  
Hand v. Farmers Ins. Exchange (1994) 23 Cal.App.4th 1847.
  - TX: Supreme Court has not yet decided issue.
- *attorneys fees* [CA – “Brandt” fees] [TX – TEX. CIV. PRAC. & REM. CODE ANN. §37.009]
- *no punitive damages* [CA and TX– not assignable]

## THE STING

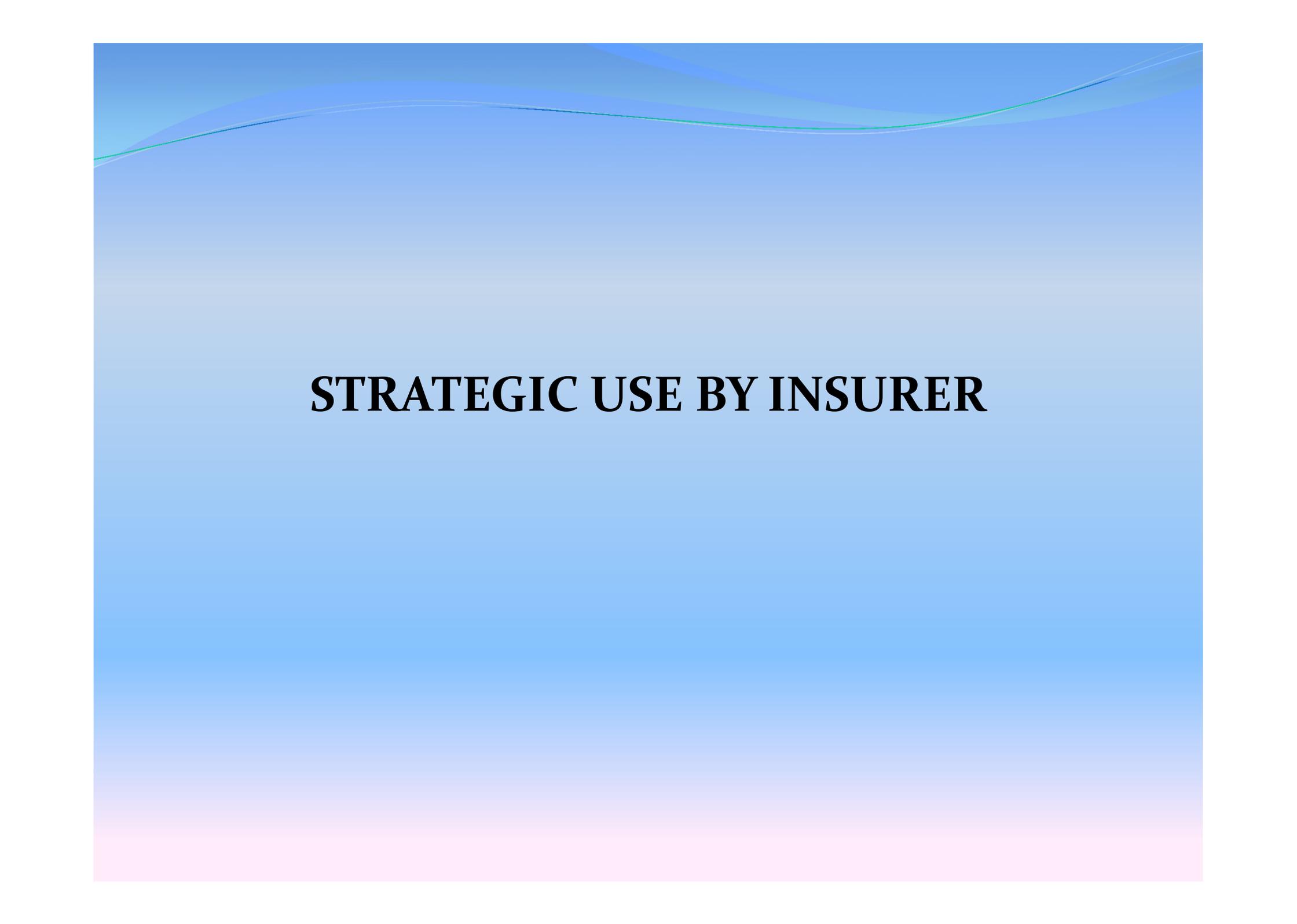
### COVERAGE DEFENSES

- **DEFENSES OF POLICY TERMS AND LIMITS ?**
  - CA bad faith failure to defend = waiver of policy limits and coverage defenses
  - TX breach duty to defend = no waiver of policy limits and coverage defenses
    - TX bad faith failure to defend - grey area

## THE STING

### COVERAGE DEFENSES

- **CA WRINKLE: NO RELITIGATION OF INSURED'S LIABILITY OR DAMAGES**
  - e.g. CD case – coverage issues: existence of property damage and amount of damages
    - context: court findings vs. undifferentiated judgment

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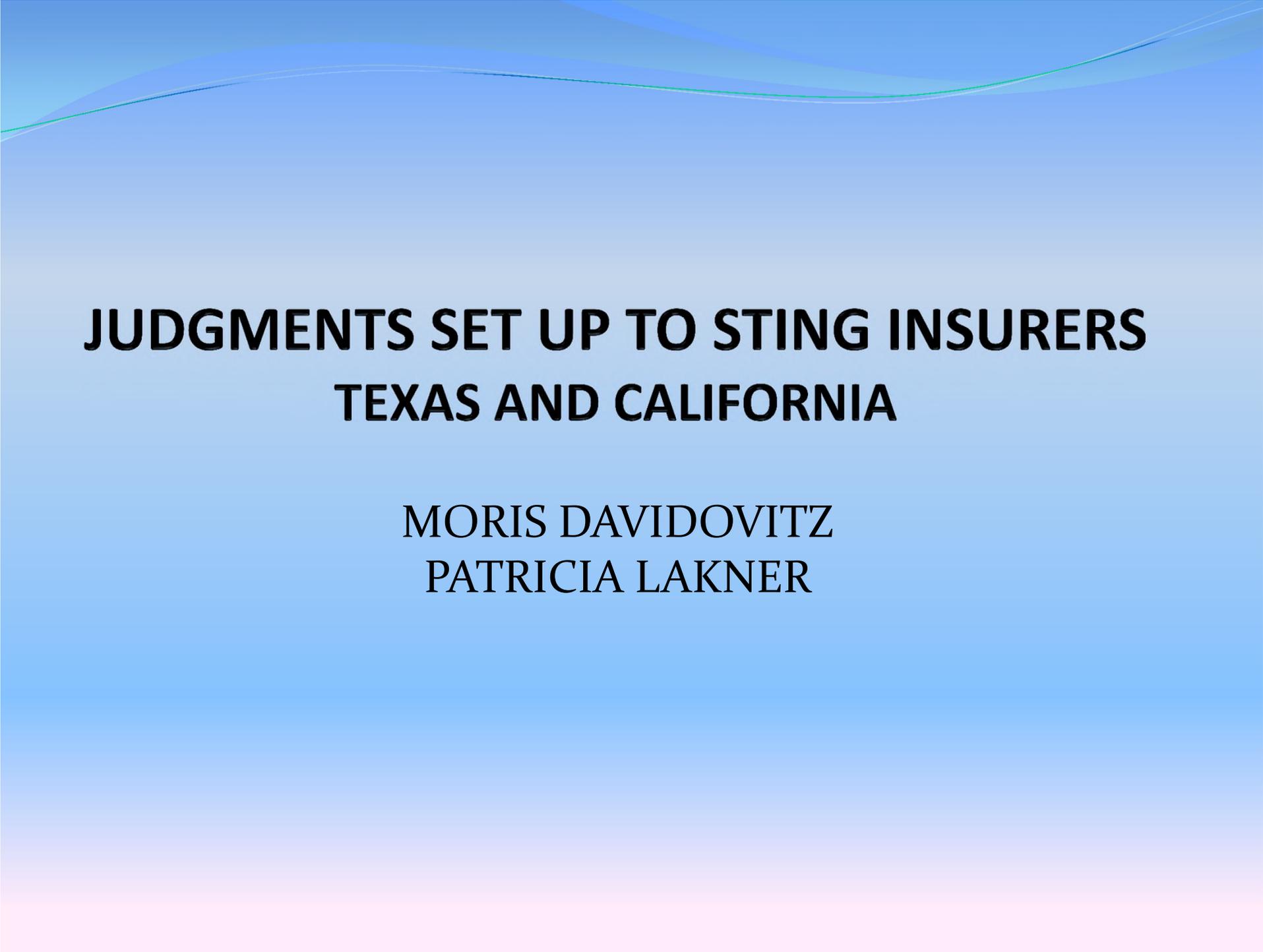
# **STRATEGIC USE BY INSURER**

## STRATEGIC USE BY INSURER

### **DEFENDING INSURER SETTLEMENT WITH CLAIMANT AND SET UP JUDGMENT AGAINST NON-DEFENDING INSURER**

Strategic consideration: potential cross-action from non-defending insurer against defending insurer:

- *Subrogation* barred from insureds' release of rights to defending insurer's policy
- *Equitable contribution* claim not barred
  - but bad faith could act to bar contribution in equity
  - but defending insurer counter-claim for share of paid settlement and defense expenses



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TEXAS AND CALIFORNIA**

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