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# Personal Injury Settlement and Release Agreements: Confidentiality, Tax Liability, Indemnity and Other Complex Issues

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WEDNESDAY, OCTOBER 25, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Wyatt Wright, Esq., Wayne Wright LLP, St. Louis

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# Settlement Releases—You Want Me To Sign What?!

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# “Wait, we’re not done yet!”

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- Mindset is: Whew, the case settled!
- Mindset should be: There is no “downhill slide.”
- Cases should simply exist at full speed until they are complete and sent to storage.

# I. DO NOT TAKE RELEASES LIGHTLY

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Releases are powerful documents which, depending upon the issues in dispute, can shape or govern the parties' behavior for years or decades to come.

# RELEASE PREPARATION

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**Careful and thorough  
Does Not Equal  
Lengthy and wordy**



# But I Don't Want to Change My Forms!!

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- Updating forms is time consuming;
- Updating forms would be a tacit admission to their clients that the current forms are deficient in some way (even though they probably are);

# But I Don't Want to Change My Forms!! (cont.)

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- Case law has evolved to contemplate the old forms and we don't want to tinker with it;
- "Why fix what isn't broken?" (because we all have trouble admitting that what we have may indeed be broken);

# But I Don't Want to Change My Forms!! (cont.)

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- “Our clients like our forms;”
- “If it was good enough for my great-grandfather...;” and,
- “We’ve always done it this way.”

# ONE PROFESSOR HAS SAID:

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“[l]egalese renders a contract a chore to read, negotiate, interpret and use as a model....[a]nd the fog of legalese makes it more likely that a contract will contain a flaw that leads to a dispute or deprives a client of an anticipated benefit.”

## II. WHO GETS RELEASED?

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***Releasee shall mean Don Davis and all other persons, firms, corporations or entities and their agents, servants or employees in privity, to any degree, with Don Davis.***

# ONE SUPREME COURT SAID:

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“[T]he mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class. A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortious event is not in doubt.”

# Unity of Release Rule

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Applies only when one party releases another from a case which has yet to become final because other parties ostensibly remain.

# Unity of Release Rule, cont.

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Three situations:

1. Suit against two or more joint tortfeasors.



# Unity of Release Rule, cont.

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Three situations:

1. Suit against two or more joint tortfeasors.
2. Suit involving a form of derivative liability.

# Unity of Release Rule, cont.

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Three situations:

1. Suit against two or more joint tortfeasors.
2. Suit involving a form of derivative liability.
3. Suit involving a claim of vicarious liability.

# III. CONSIDERATION (HOW MUCH IS ENOUGH?)

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The binding quality of a compromise of a disputed claim does not rest upon the validity of the claim in fact, but upon the belief, in good faith, of the claimant in its validity.

Get your...

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**“Popcorn, peanuts, cold beer, indemnity clauses, confidentiality agreements, and cotton candy!”**

# TAX MATTERS

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Does it matter what the settlement money is paid for?

# TAX MATTERS, cont.

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Recoveries for personal **physical** injuries or **physical** sickness are excluded from the definition of

“GROSS INCOME”

USCA, Title 26, §104(a)(2)

So,

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This means that recoveries for  
**EVERYTHING ELSE** are  
taxable.

# U.S. Supremes tell us:

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1. Taxpayer must demonstrate that underlying COA is "...based upon tort or tort type rights...."

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Two things are required for income exclusion:

1. Taxpayer must demonstrate that underlying COA is "...based upon tort or tort type rights...."

AND

2. Taxpayer must show that damages were received "...on account of personal physical injuries, or sickness that is physical."

# Does adding this language help?

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“The parties hereto agree that all settlement proceeds herein constitute compensation for personal physical injuries as the same are contemplated by 26 USCA §104(a)(2).”

# Maybe not...

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- BECAUSE: if it is contradictory on its face—i.e.- there is a confidentiality or indemnity provision, then it fails.
- That is why a blanket statement fails—the consideration for *each product sold* must be articulated individually.

# This creates a “Dennis Rodman” problem

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## Amos v. Commissioner

Tax Court Memo. 2003-329,  
Docket No. 13391-01,  
Filed Dec. 1, 2003

# Lessons Learned: ONE

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It is the *nature and character* of the claim settled that determines whether the payment is excludable from gross income, not the validity of the claim.

# TWO

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The best way to determine the nature and character of each claim settled is to look at the express language of the written settlement agreement itself.

***(This is why what our releases say is SO important.)***



# ...and...THREE

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In the absence of such language in the settlement agreement, it is *the intent of the payor* which determines the issue.

...SO...

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Confidentiality clauses should  
necessitate separate  
consideration in the agreement.

...SO...

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Confidentiality clauses should  
necessitate separate  
consideration in the agreement.

Either:

...SO...

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Confidentiality clauses should  
necessitate separate  
consideration in the agreement.

Either:

New money

...SO...

---

Confidentiality clauses should  
necessitate separate  
consideration in the agreement.

Either:

New money

--or—

...SO...

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Confidentiality clauses should necessitate separate consideration in the agreement.

Either:

New money

--or--

Carved out money

# Indemnity

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All the rules are the same.

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Indemnity is NOT “on account of personal physical injuries.”



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Should we wait for a case to tell us that the analysis is identical?

# Indemnity

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All the rules are the same.

Indemnity is NOT “on account of personal physical injuries.”

Should we wait for a case to tell us that the analysis is identical?

**NO!**

# Example of carved out \$

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*Defendant has paid the total sum of \$100,000 unto Plaintiff. Defendant specifically intends, and Plaintiff agrees, that: \$99,000 of these funds were negotiated for and are being specifically paid in exchange for the release of claims for personal physical injuries; \$500 of these funds were negotiated for and are being specifically paid in exchange for the confidentiality agreed to herein; and \$500 of these funds were negotiated for and are being specifically paid in exchange for the indemnity agreed to herein.*

# Alternative...

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## The Mutually Mirror Obligation

# V. CONFIDENTIALITY CLAUSES

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Or...

**Don't talk to the barber!**

# CONFIDENTIALITY CLAUSES

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- is contrary to our nation's open courts mindset;
- stifles the evolution of the common law;
- hinders the application of *stare decisis*;

# CONFIDENTIALITY CLAUSES

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- hinders future settlement of similar cases;
- suppresses the trends of tortfeasors;
- interferes with the legitimate advance and improvement of consumer products and services;

# CONFIDENTIALITY CLAUSES

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- interferes with the debate over questions of public policy; and,
- inhibits legitimate interest in the conduct of judicial proceedings.



# Confidentiality, cont.

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If you must agree, watch out for:

- Confidentiality covering entire controversy, not just the settlement amount.
- Overbroad language that is impossible for your client to comply with.
- Liquidated damages provision for a breach.
- Unilateral nature of the provision.

## How to deal with these:

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- Only the amounts are confidential
- Ok to talk to family, confidants, legal/tax advisors
- Damages as proven, not liquidated
- If defendant talks, so can plaintiff

# INDEMNITY

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HEREBY INDEMNIFIES  
VS.  
SHALL INDEMNIFY

# OVERUSE OF “HOLD HARMLESS”

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The standard phrase:

“...hereby indemnify and hold harmless....”

is outdated and problematic.

# USE THIS INSTEAD:

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*Party A shall indemnify  
Party B against both  
losses and liabilities.*

# INDEMNITY CLAUSES

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- Avoid whenever possible. Too often this is agreed to without thought.
- Usually overly broad.
- Should require more money.

# I add this:

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- "By, through and under" language (of the Plaintiff, not the incident).
- Precondition to tender defense of claims to Plaintiff.
- Cap on indemnity to amount paid for indemnity (or at least to the settlement amount).

# CALCULUS OF NEGLIGENCE

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Applying some creative license to

$$\mathbf{B < PL}$$

A plaintiff should never agree to an indemnity in which the likelihood of an indemnification situation (P), multiplied by the level of possible exposure (L), exceeds the initial benefit to the plaintiff in agreeing to the indemnification provision (B).



# AVOIDING CIRCULAR INDEMNITY

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--Semi-Circular Indemnity

--Circular Indemnity

**BOTH ARE EASILY AVOIDED**

# CIRCULAR & SEMI-CIRCULAR INDEMNITY

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Plaintiff indemnifies Defendant for his liabilities *which arise out of the automobile collision made the subject of this lawsuit*

# SEMI-CIRCULAR INDEMNITY

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Car 1 ( $\Pi 1$ )

Car 2 ( $\Delta 1$ )

Car 3 ( $\Pi 2$ )

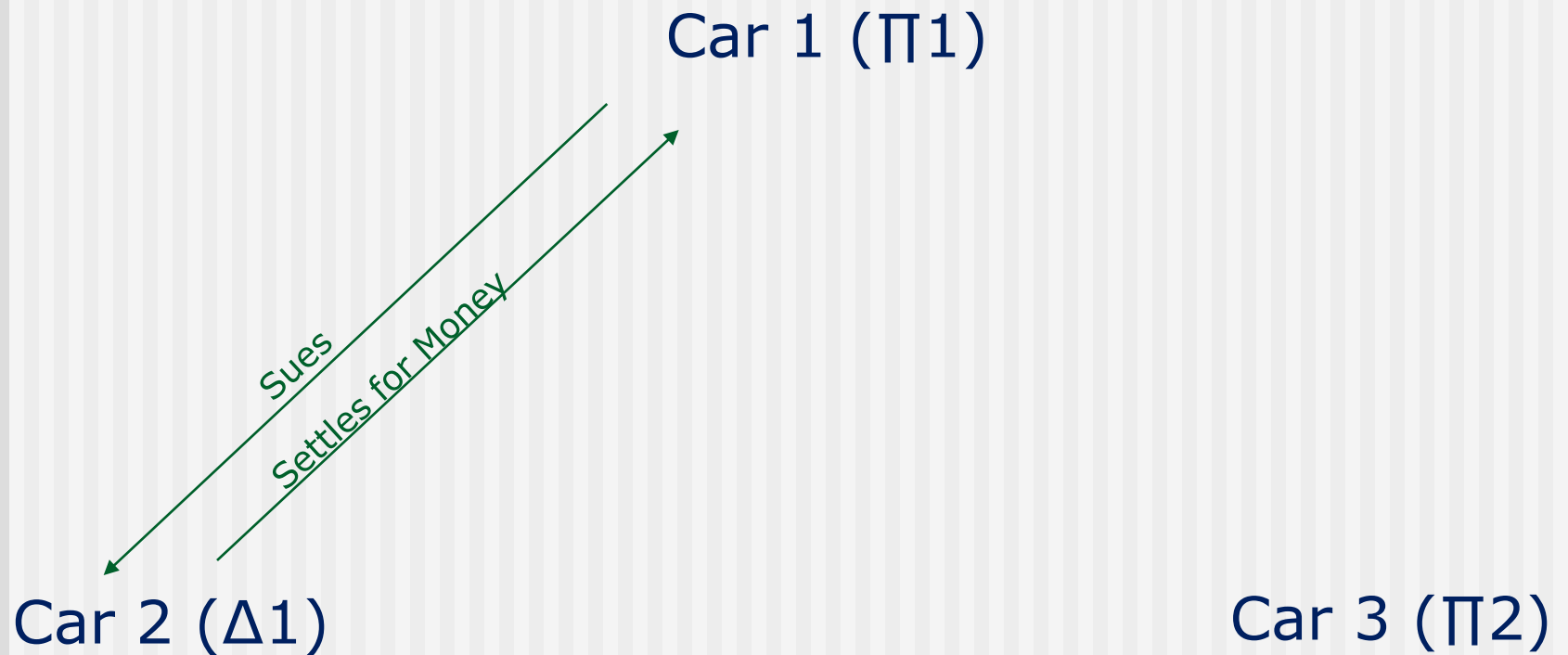
# SEMI-CIRCULAR INDEMNITY

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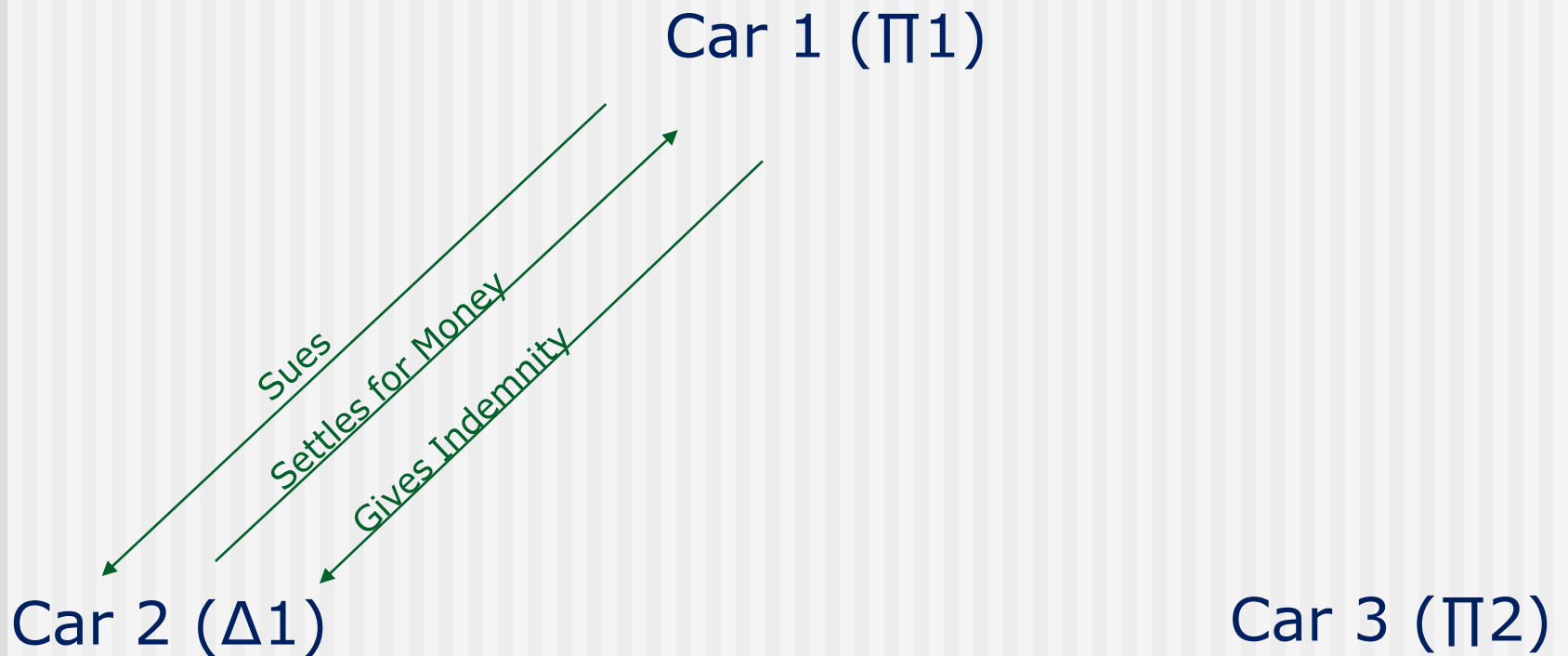
# SEMI-CIRCULAR INDEMNITY

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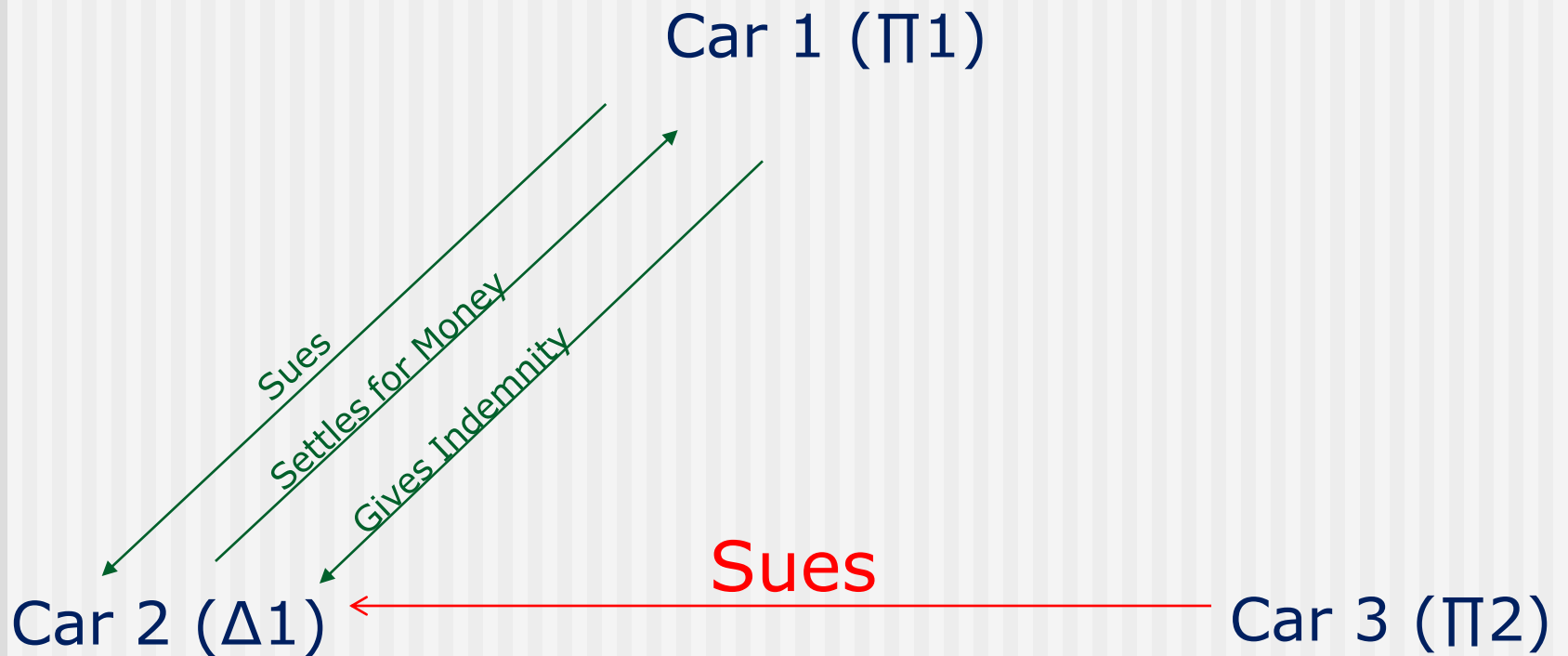
# SEMI-CIRCULAR INDEMNITY

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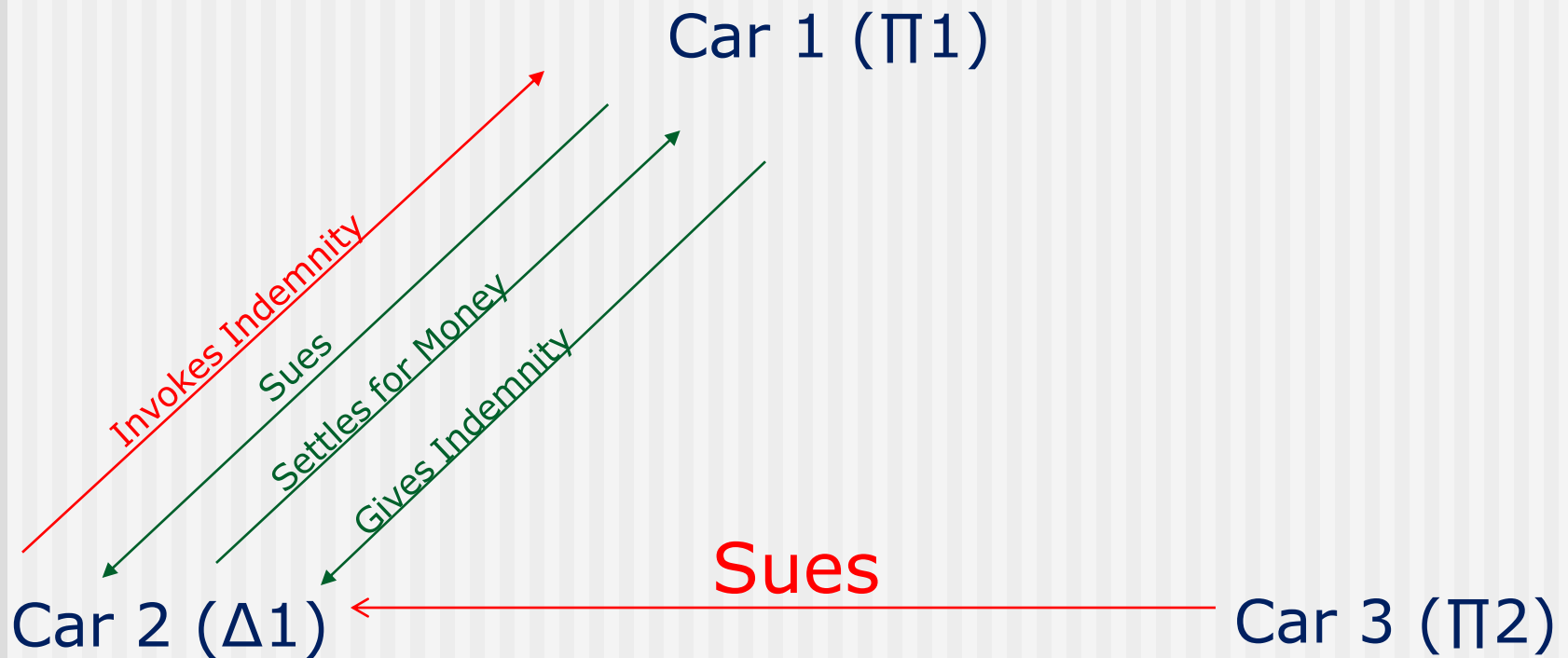
# SEMI-CIRCULAR INDEMNITY

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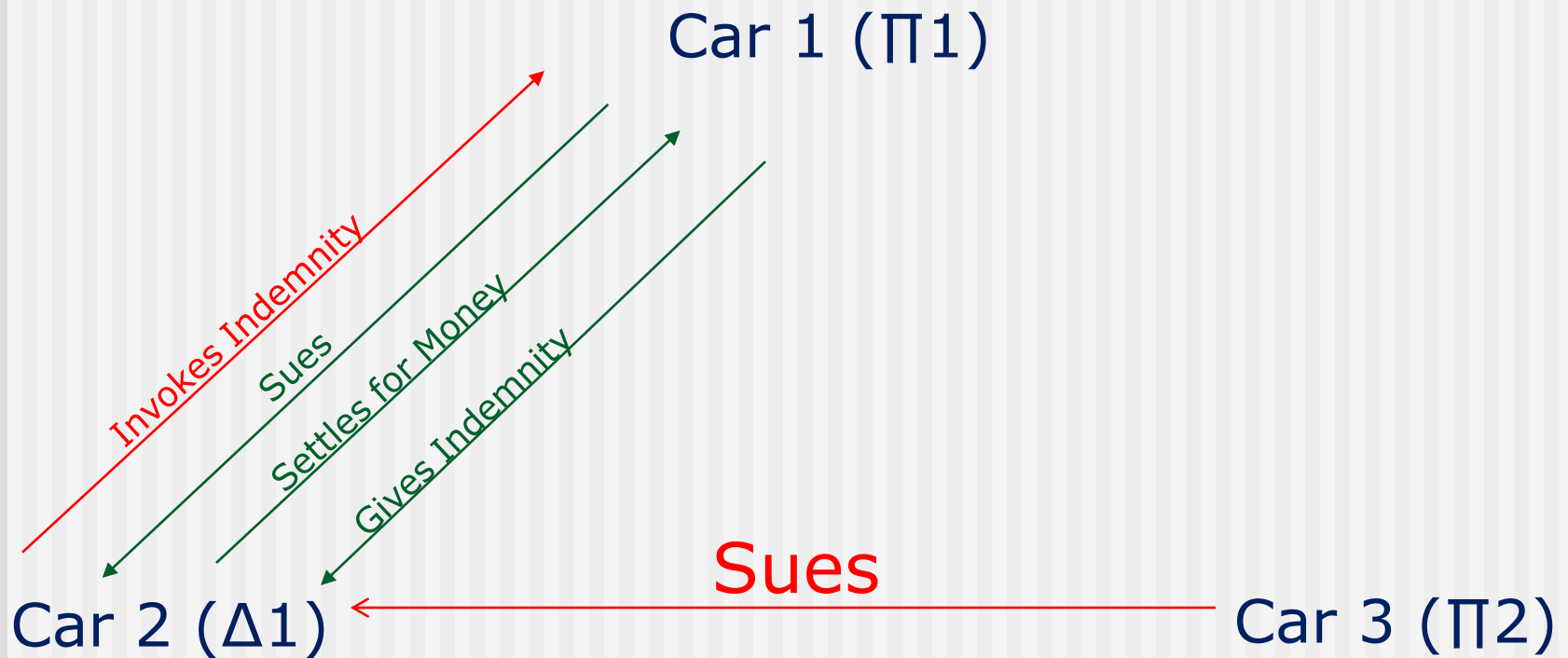
# SEMI-CIRCULAR INDEMNITY

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# SEMI-CIRCULAR INDEMNITY



Your client paying for another plaintiff's damages.

# CIRCULAR INDEMNITY

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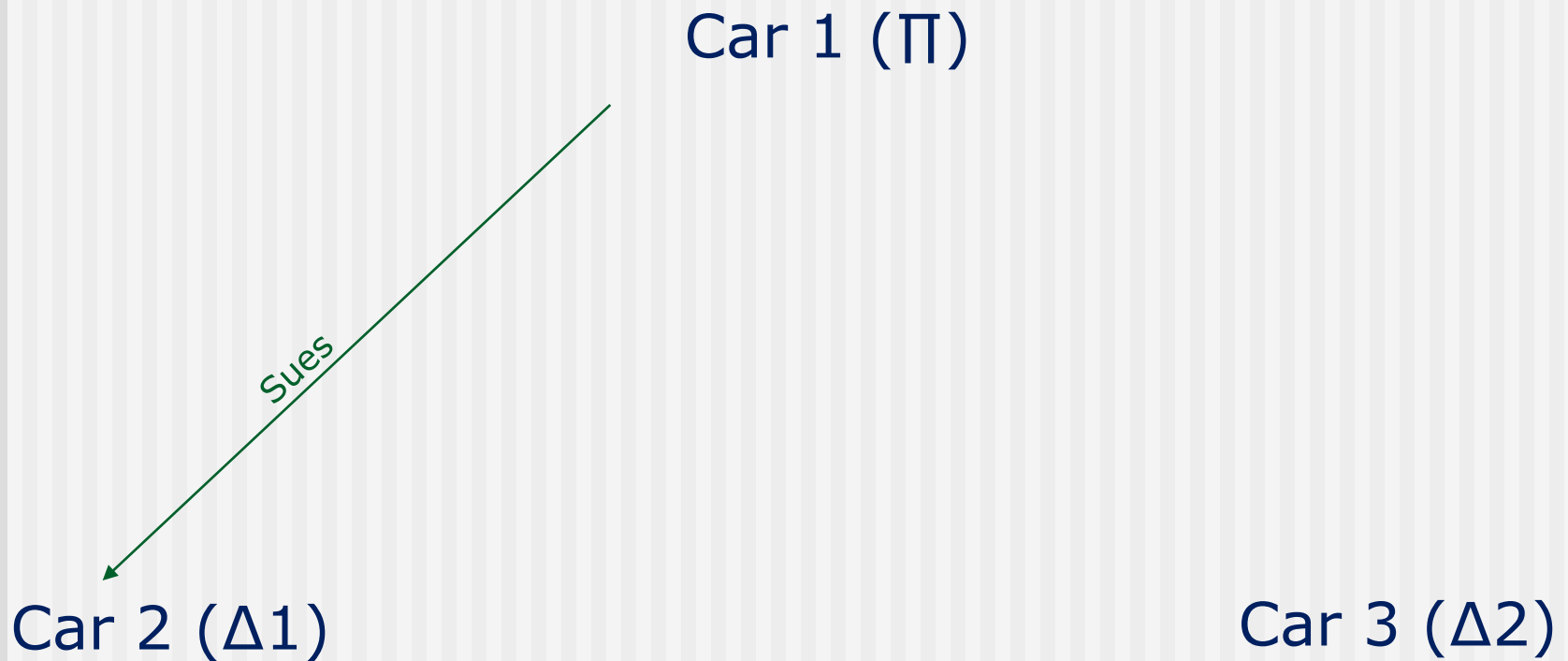
Car 1 ( $\Pi$ )

Car 2 ( $\Delta 1$ )

Car 3 ( $\Delta 2$ )

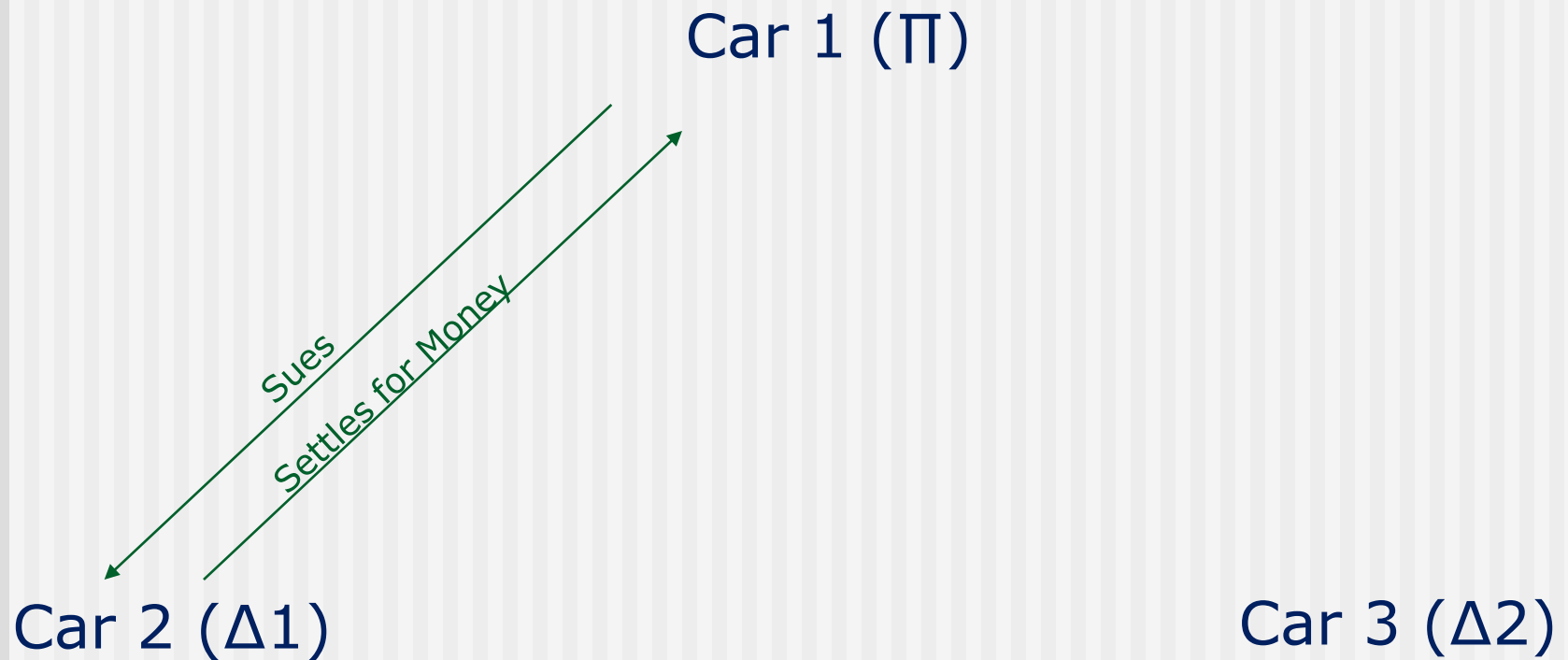
# CIRCULAR INDEMNITY

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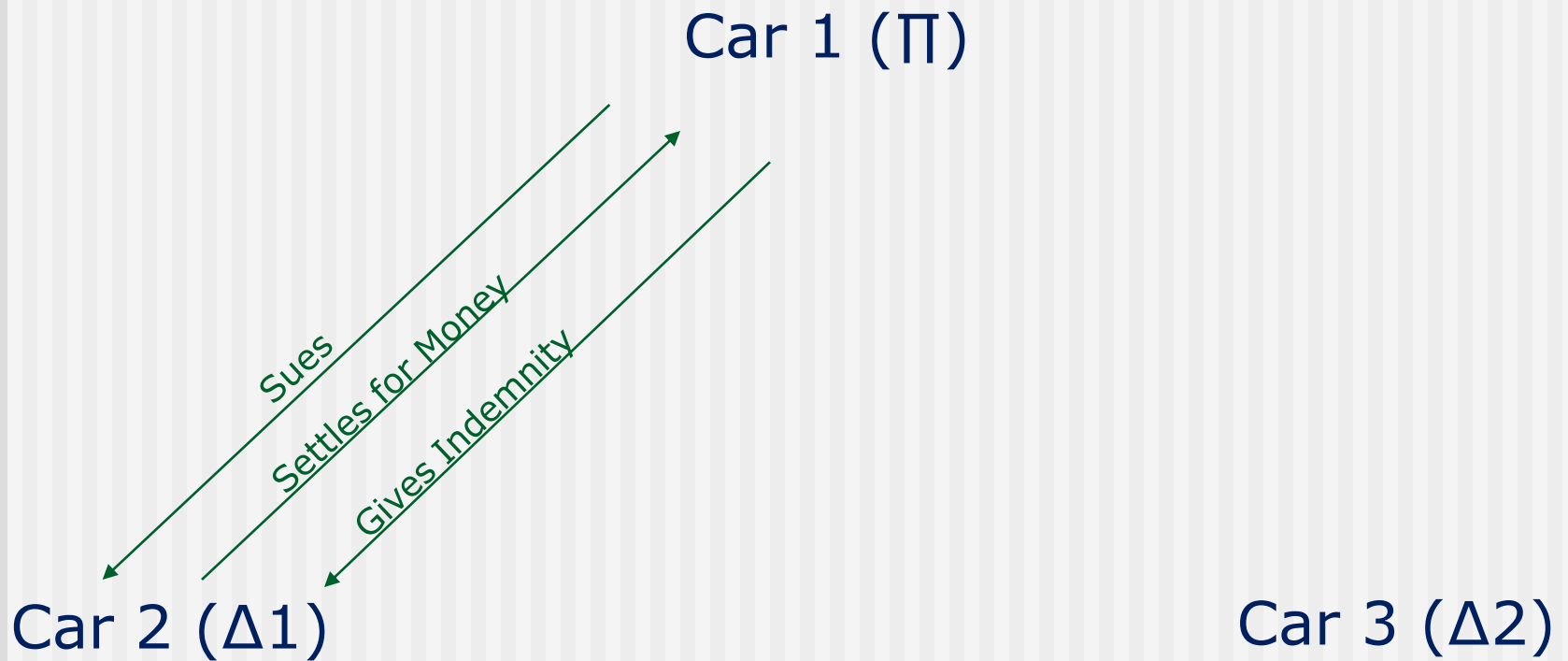
# CIRCULAR INDEMNITY

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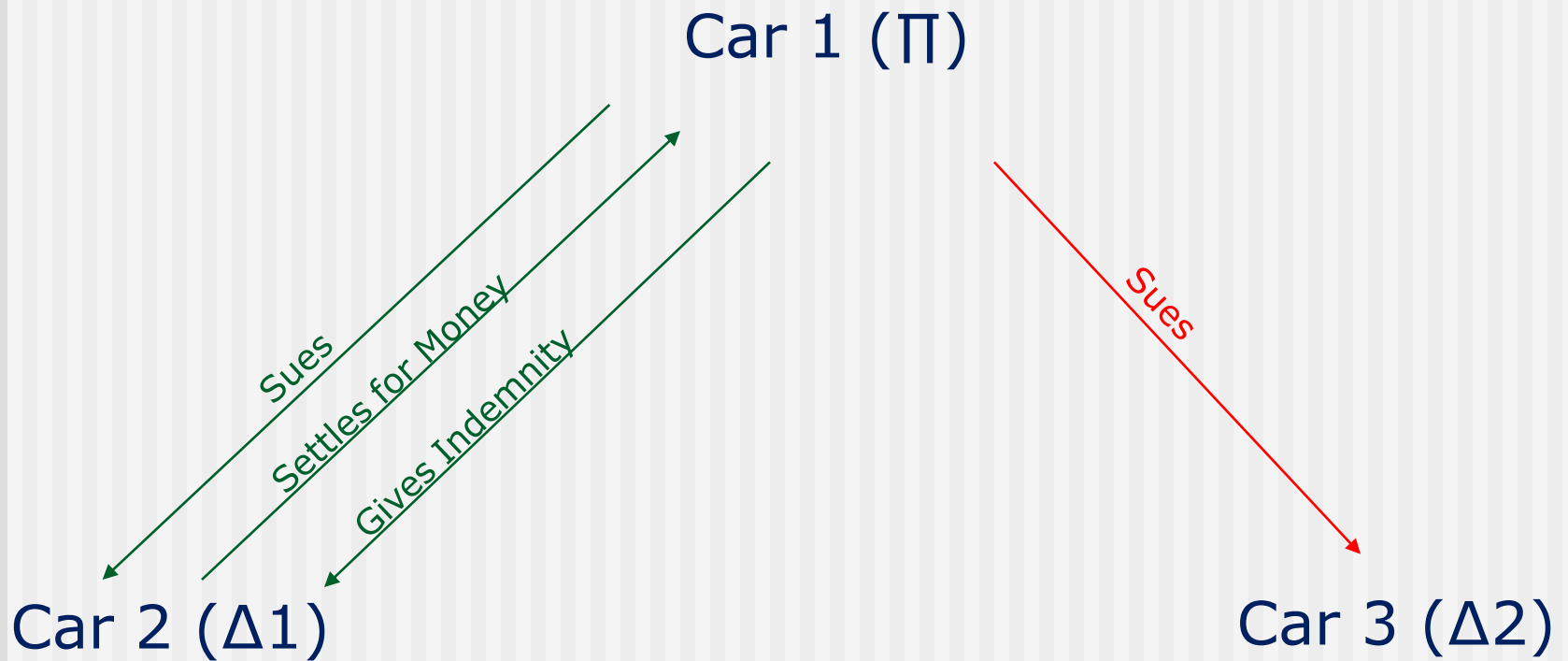
# CIRCULAR INDEMNITY

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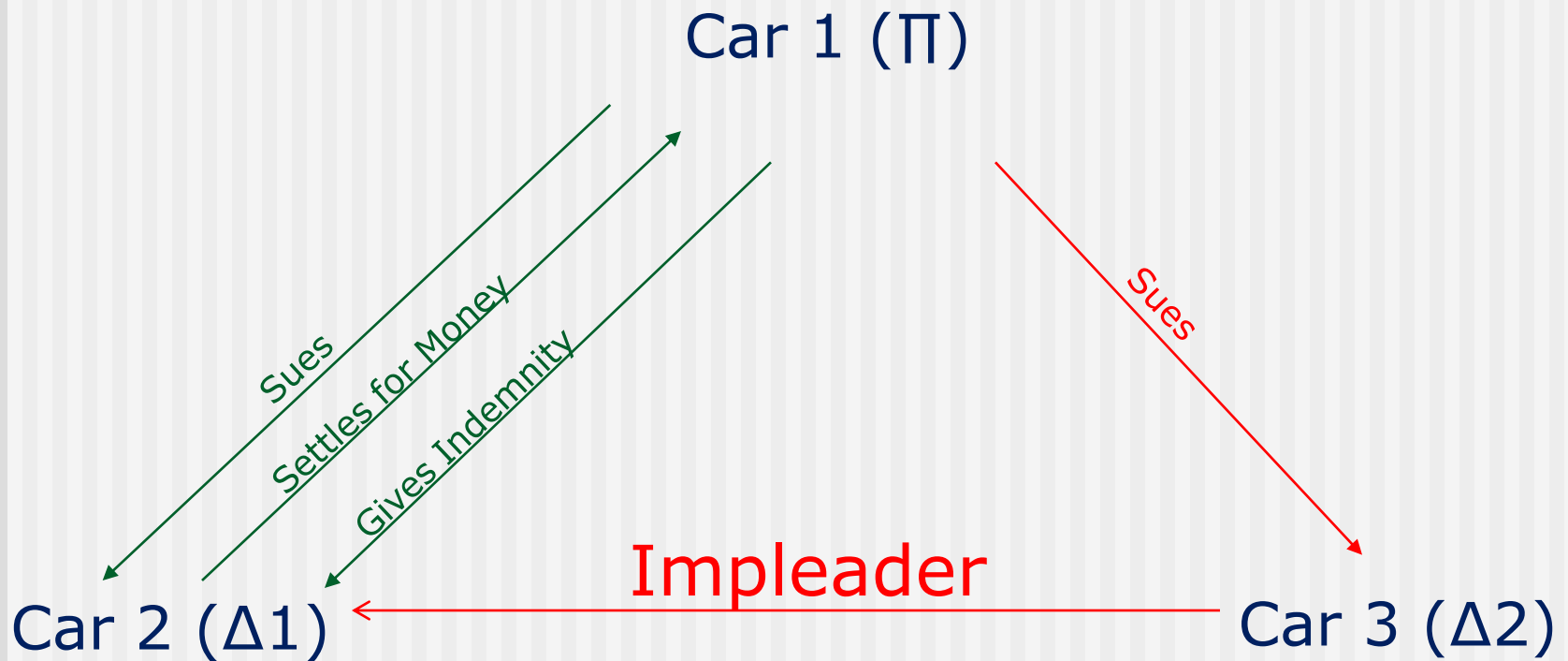


# CIRCULAR INDEMNITY

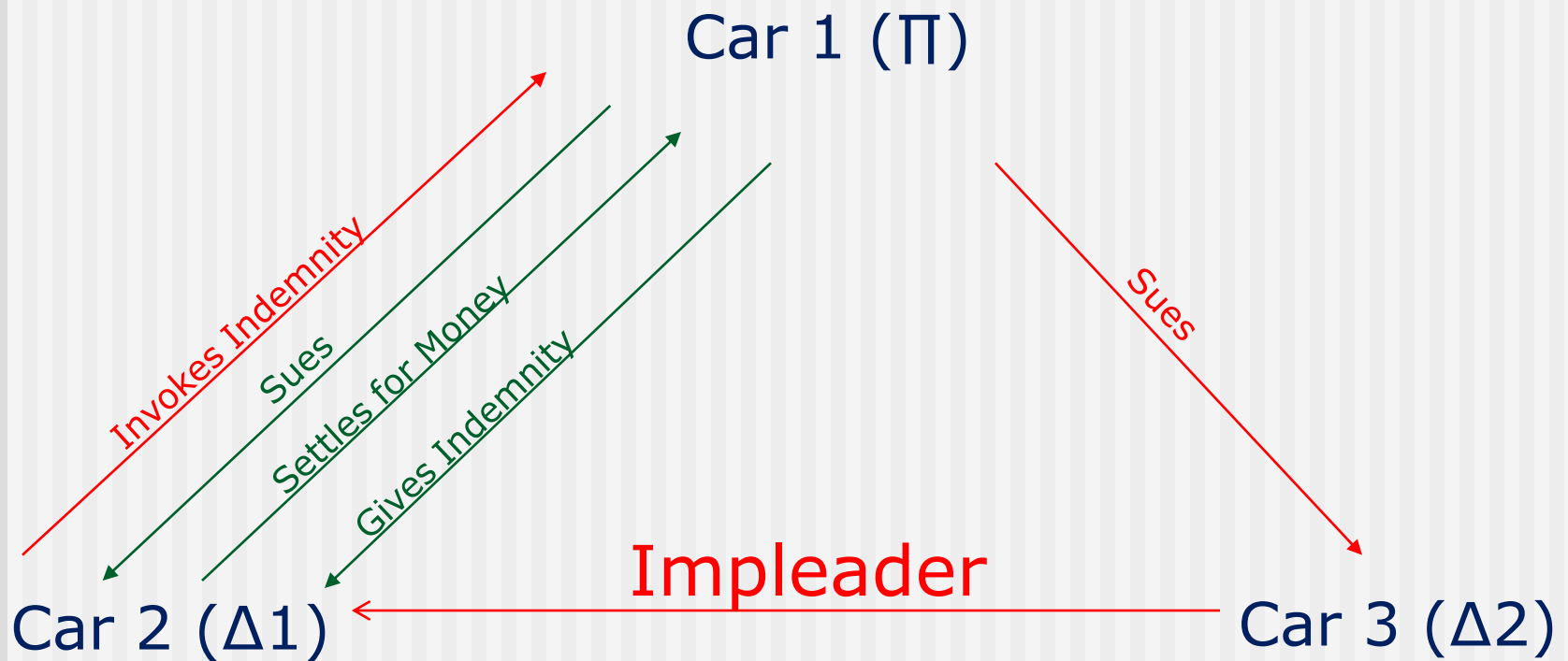
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# CIRCULAR INDEMNITY

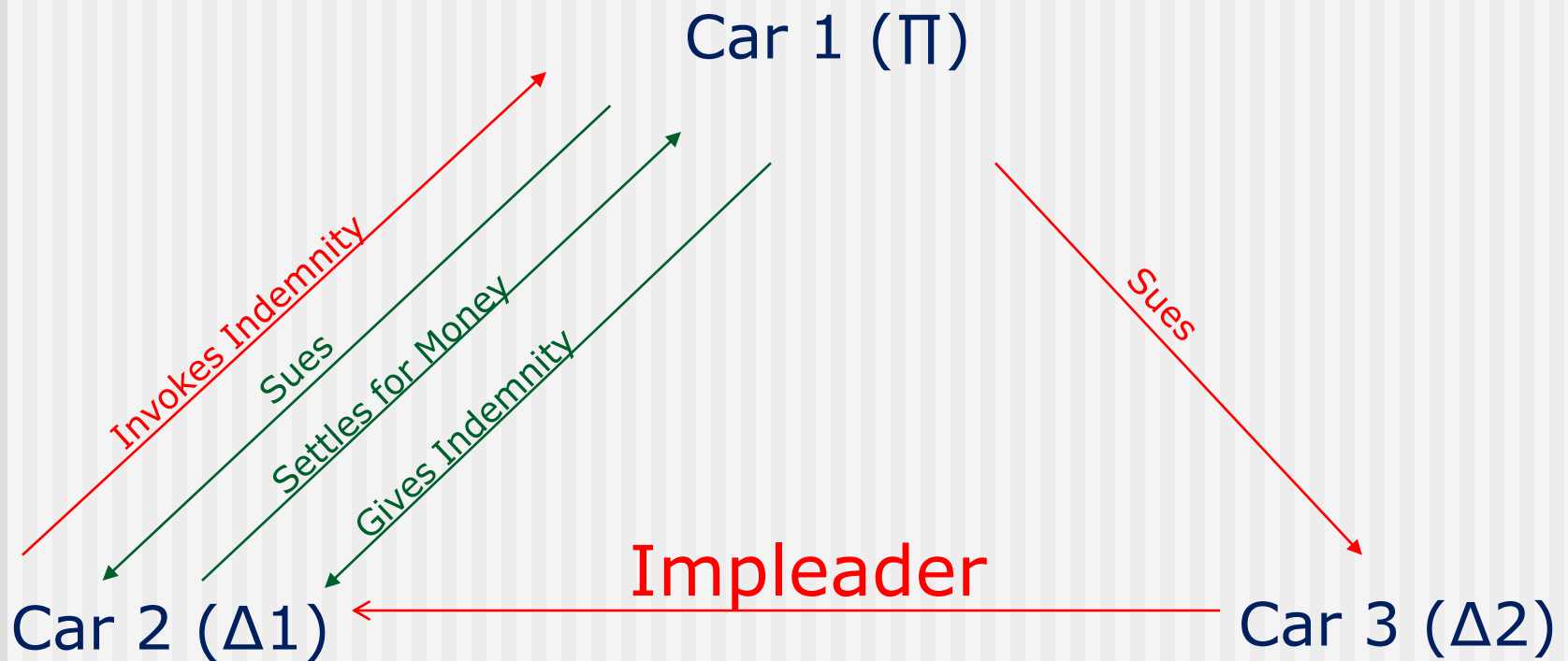


# CIRCULAR INDEMNITY





# CIRCULAR INDEMNITY



Your client bearing his own damages.

## VII. ATTORNEYS SIGNING RELEASES

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**DO NOT SIGN RELEASE  
AGREEMENTS**

# What to do if asked to sign:

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Dear Defense Attorney:

Please take note that our firm's policy prohibits our attorneys from signing release documents, as our firm is not a party to this claim or suit. Therefore, I will not be signing same.

# VIII. IS THIS TRULY A RECEIPT?

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The standard phrase:

*...the receipt and sufficiency of which is hereby acknowledged and confessed...*

# IX. JOINT DRAFTERS

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“Both parties have drafted this agreement and no one party shall be construed to be the drafter.”

Or...

**“...and a special thanks goes to King John for helping us to draft the Magna Carta.”**

# X. ACKNOWLEDGEMENTS VS. JURATS

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**Acknowledgement is proper.**

**Jurat (affidavit under oath) is  
not proper.**

# XI. IS A RELEASE EVEN WARRANTED?

## **RELEASES IN 1<sup>st</sup> PARTY CASES:**

- **Oftentimes we get so caught up in the “usual practice” that we forget to ask this basic question.**
- **Payment by the insurance company in such cases is simply the performance of their end of the contract.**

# RELEASES IN FRIENDLY SUITS

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- The purpose of a release is to offer protection to defendant against a later suit.
- “Friendly suits” are lawsuits, and once judgment is entered is *res judicata* that defendant may rely upon.



# Structure companies

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To make clear that you have the right to choose your own structure company, insert:

“...defendant will pay to Plaintiff, or Plaintiff’s designee, as Plaintiff directs, the sum of....”

# XII. RELEASE OF CLAIMS VS. SATISFACTION OF DAMAGES

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**Ending a claim against one  
vs.  
Ending a claim against all**

# Reservation of Claims

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This is being used with more frequency:

“The release expressly reserves unto Releasee his rights to pursue his legal remedies, if any, against Releasor.”

# FRAUD WARNING LANGUAGE

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This appears in many releases:

“THE FOLLOWING APPEARS FOR YOUR PROTECTION: The law provides that any person who knowingly presents a false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison.”

# “Doubtful” Claims

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Here’s the standard language:

**“It is understood and agreed that this settlement is full compromise of a doubtful and disputed claim, as to both liability and the nature and extent of any damages.”**

# “Doubtful” Claims

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Dictionary definition of Doubtful:

“Giving rise to doubt or suspicion; of questionable reputation. Implies strong uncertainty as to the probability, value honesty, validity, etc. of something.”

# Closing Pleadings

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- a.** Motion for (or notice of) Nonsuit
- b.** Agreed Take Nothing Judgment
- c.** Timing

# ASSET CONSENT FORM

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- Preserves client consent to take policy limits with full knowledge that non-exempt assets might exist.
- Affirms that this is a business decision based upon a “risk vs. reward” analysis, and is one that only the client can make.



# Other Helpful Forms

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- Settlement Computations Form
- Financial Planning Form
- Ltr of Rep to 3<sup>rd</sup> Party Adjuster
- Ltr of Rep to 1<sup>st</sup> Party Adjuster
- Ltrs dealing with UIM Release

“But that’s the way we’ve  
always done it!”

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-or-

“Don’t change the status quo.”