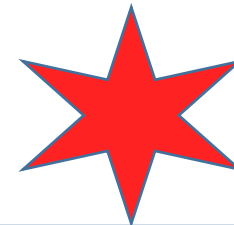
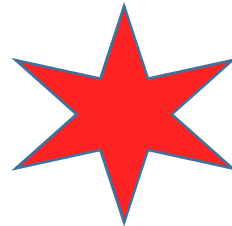
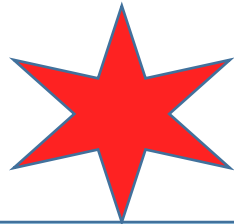
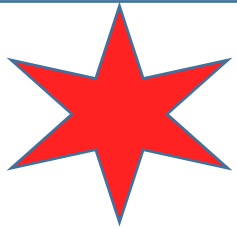


ALFA INTERNATIONAL HOSPITALITY & RETAIL PRACTICE GROUP

2019 CHICAGO MINI-REGIONAL SEMINAR



ARE YOU COVERED?

PANELISTS



ADAM RUSS

LORANCE THOMPSON, P.C.

Houston, Texas



CRYSTAL UEBELHER

SECURA INSURANCE

Appleton, Wisconsin

CGL COVERAGE: THE ISO STANDARD FORM

“We will pay those sums that the insured becomes legally obligated to pay as damages because of... ‘property damage’...”

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

CGL COVERAGE: THE ISO STANDARD FORM

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- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

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(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

CGL COVERAGE: THE ISO STANDARD FORM

SECTION I – COVERAGES

- **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
- **COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY**
- **COVERAGE C – MEDICAL PAYMENTS**
- **SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**

CGL COVERAGE: THE ISO STANDARD FORM

EXCLUSIONS

“Damage to Property”

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or

(b) The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

CGL COVERAGE: THE ISO STANDARD FORM

EXCLUSIONS

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CGL COVERAGE: THE ISO STANDARD FORM

EXCLUSIONS

- “Damage To Your Product”
- “Damage To Your Work”
- “Recall of Products, Work Or Impaired Property”

- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
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- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

CGL COVERAGE: THE ISO STANDARD FORM

EXCLUSIONS

- “Damage To Your Product”
- “Damage To Your Work”
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- (4) Personal property in the care, custody or control of the insured;
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WHY DOES THIS MATTER FOR RETAILERS?

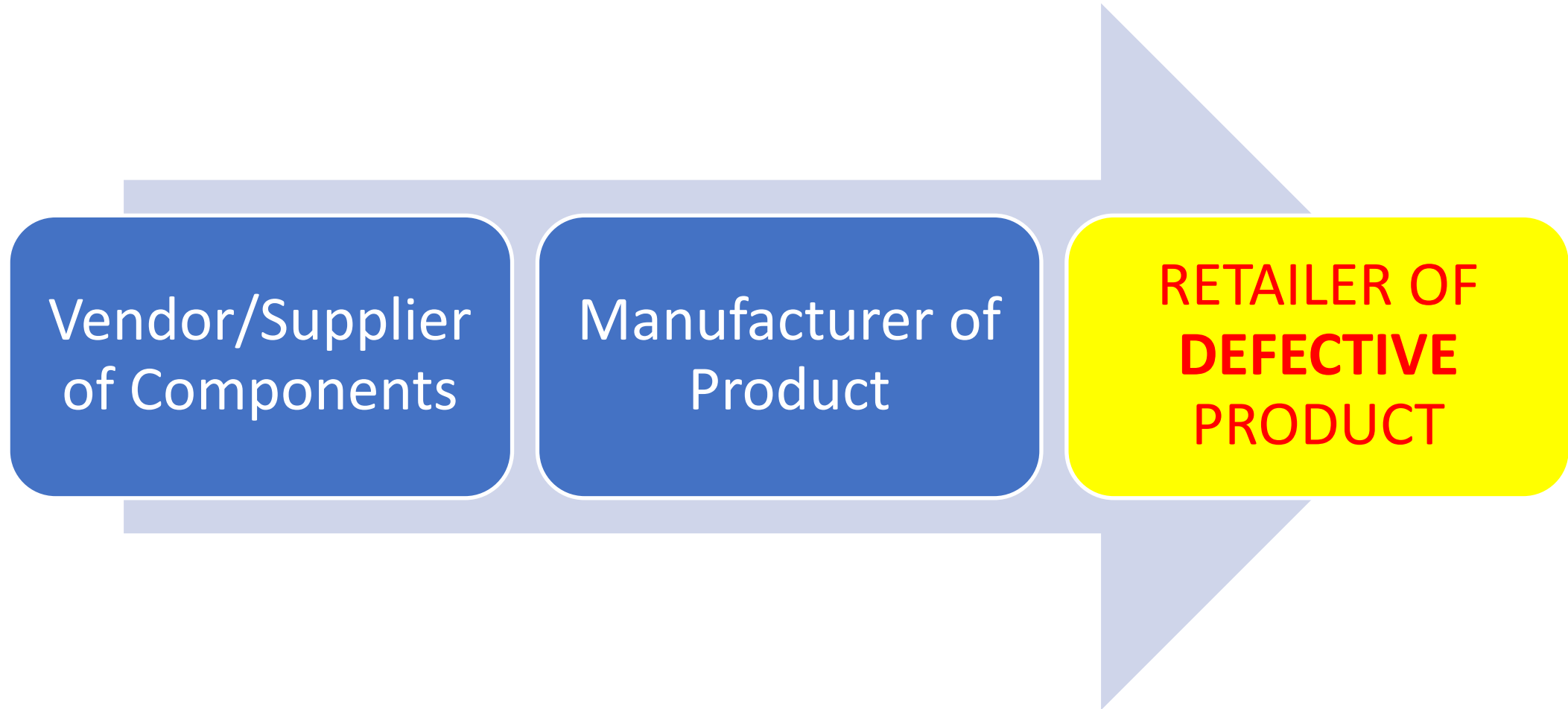


**Vendor/Supplier
of Components**

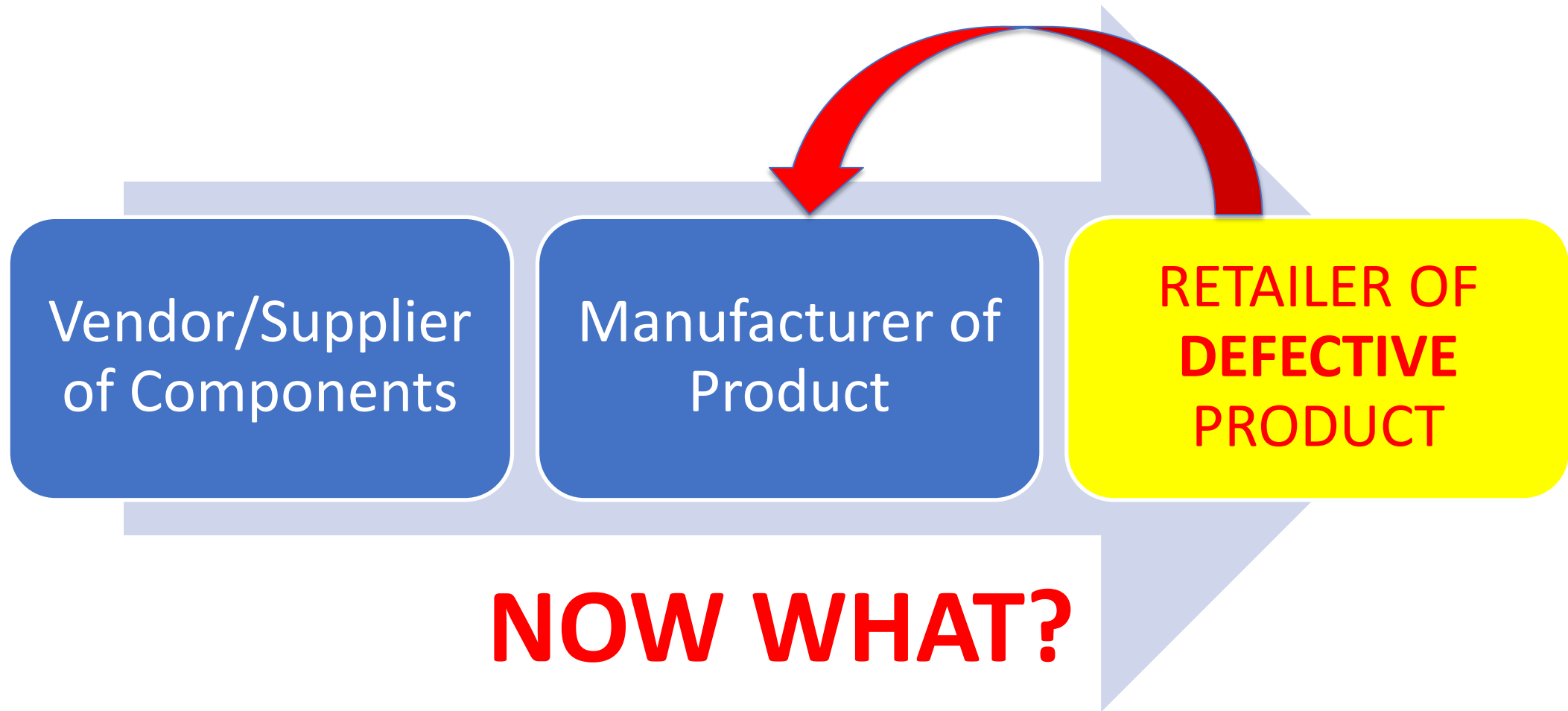
**Manufacturer of
Product**

**Retailer of
Product**

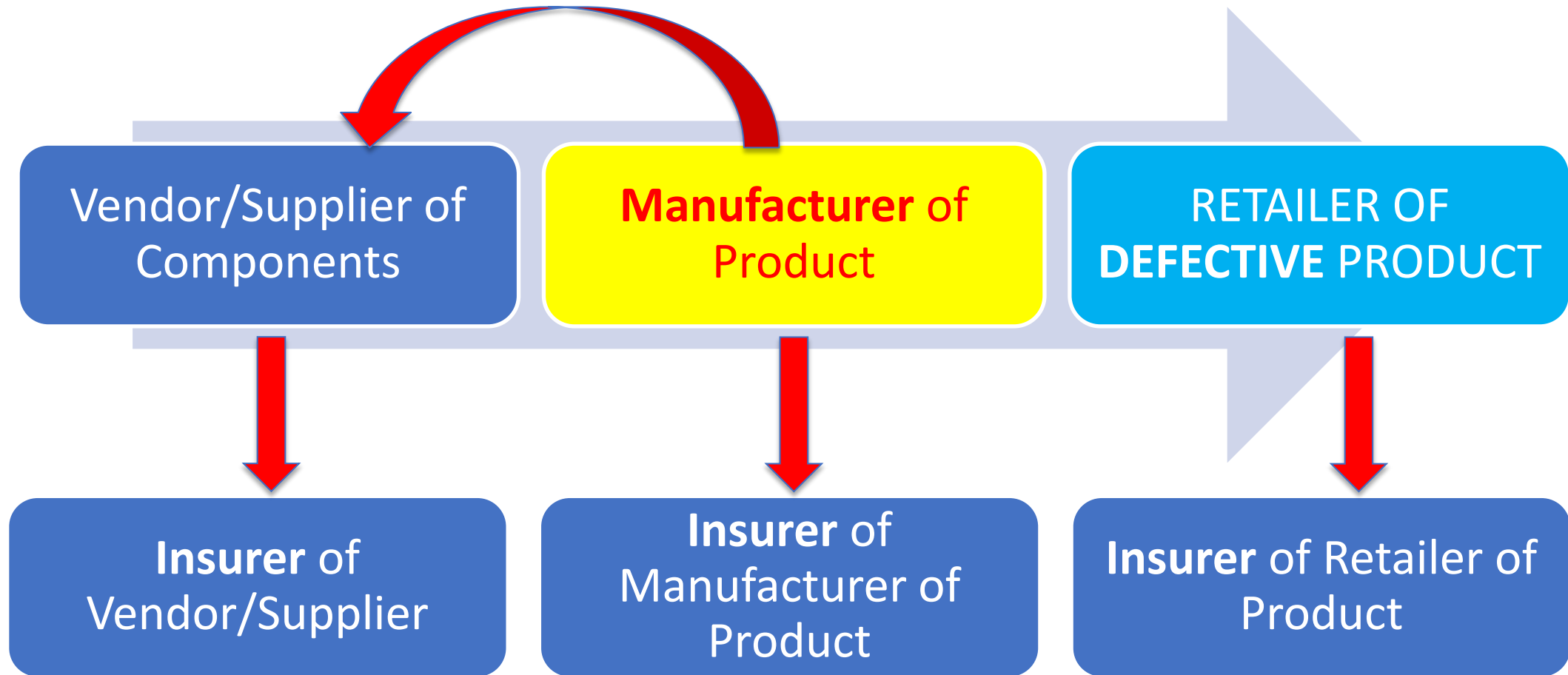
WHY DOES THIS MATTER FOR RETAILERS?



WHY DOES THIS MATTER FOR RETAILERS?



WHY DOES THIS MATTER FOR RETAILERS?



ARE YOU COVERED?

EXAMINING THE INSURANCE IMPLICATIONS

ISSUES

- What is the scope of coverage available?
- What is the “property damage”?

CONSIDERATIONS

- Is there damage to “product” or is it “other than” insured’s own product?
- How does the economic loss doctrine affect tort recovery?
- Can the final product be repaired vs. worthless?

WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

CONTRACT: PHARMACAL CONTRACTED WITH NMS FOR PROBIOTIC, *LACTOBACILLUS RHAMNOSUS*



WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

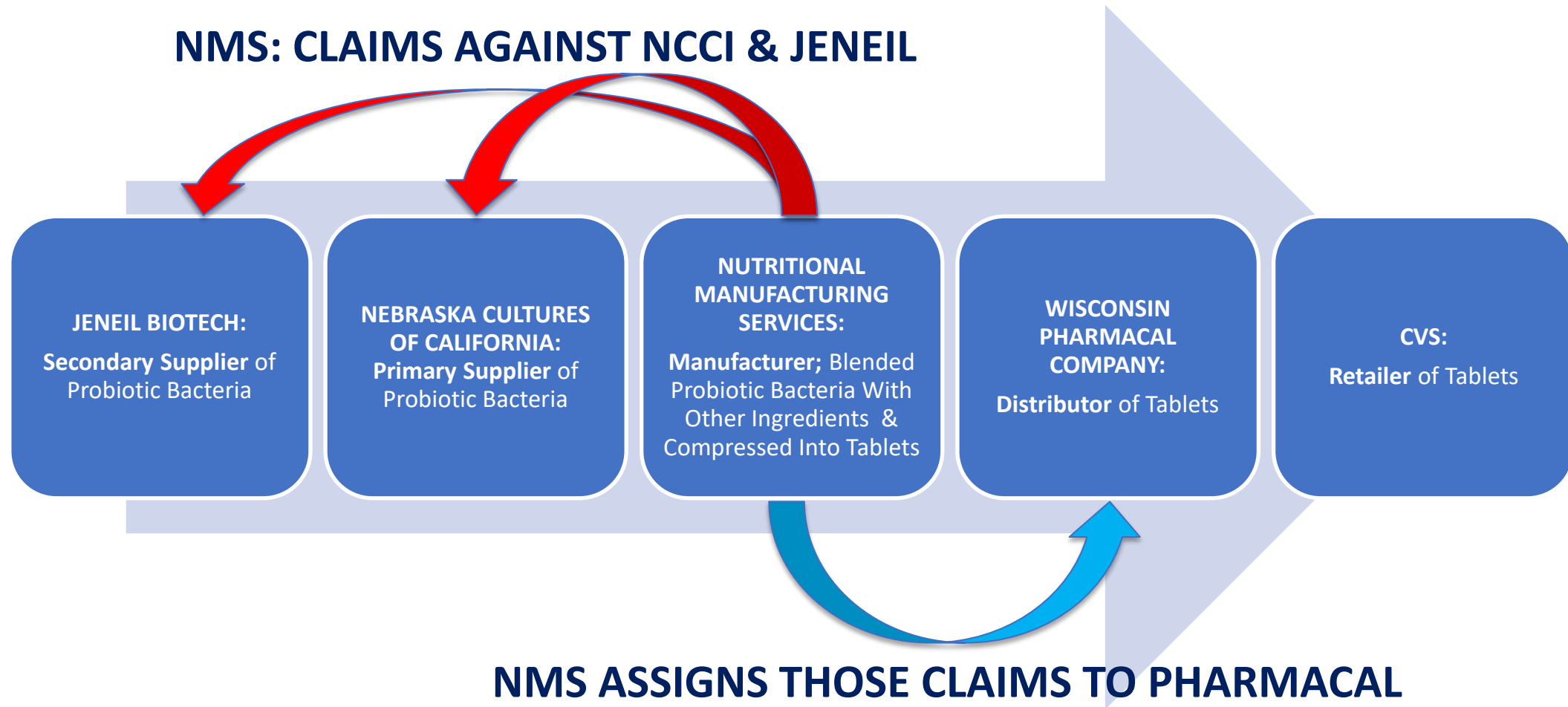
PROBLEM: TABLETS CONTAINED *LACTOBACILLUS ACIDOPHILUS*, A DIFFERENT BACTERIA



RESULT: CVS **RECALLED** TABLETS, CANCELLED ORDERS FROM PHARMACAL
PHARMACAL DESTROYED THE TABLETS

WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

NMS: CLAIMS AGAINST NCCI & JENEIL



WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

PHARMACAL: Files suit against **Biotech** and **NCCI** and their insurers [**Netherlands Ins. Co. & Evanston Ins. Co.**]

- Breach of contract claims:
 - NCCI provided incorrect species of probiotic bacteria
 - Tort claims also alleged; dismissed by Circuit Court
- Alleged tablets were unmerchantable + required recall
 - None of ingredients could be separated once manufactured

WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

**NETHERLANDS
& EVANSTON**

**Moved to bifurcate
and stay merits
pending coverage
determination**

**Moved for
summary judgment
– lack of duty to
defend**

**OZAUKEE COUNTY
CIRCUIT COURT:
granted MSJ to
insurers**

WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

COVERAGE ISSUES

- **INSURANCE COMPANIES:** alleged no coverage, no trigger of duty to defend
- **CIRCUIT COURT:** held no “**property damage**” caused by an “**occurrence**”
 - Incorporation of defective probiotic into tablet did not qualify
 - Harm was only to product itself, as an “**integrated system**”
 - Property damage was defined as “**physical injury or destruction or tangible property or lose of use of tangible property.**”

WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

COURT OF APPEALS: **REVERSED**

- **Held:** policies provided coverage
- **Integrated system rule:** not relevant to the coverage dispute
- **Incorporation of a defective ingredient** constituted “property damage” to the product (**tablets**) caused by an **occurrence** under the policies' language
- **No exclusion** negated coverage

WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

WISCONSIN SUPREME COURT

- **ISSUE**: whether incorporation of defective probiotic from Jeneil into the tablets constitutes “**physical injury**” to tangible property “**other than**” the probiotic itself?
- Does supplement tablet form an “**integrated system**”?

INTEGRATED SYSTEM ANALYSIS

- If components cannot be separated from the finished product, then all components are part of an **integrated system**
- In Wisconsin, **integrated system** doctrine may provide exception to **economic loss doctrine**
 - *i.e.*, tort theories may *permit* recovery of purely economic losses otherwise limited by ELD to contract

WISCONSIN PHARMACAL CO., LLC V. NEBRASKA CULTURES OF CALIFORNIA, INC.

WISCONSIN SUPREME COURT: 3-2-MAJORITY RULING

- **HELD:** “incorporation of a defective ingredient into the supplement tablets did not damage other property” under the policies
- “We conclude that there is no ‘property damage’ caused by an ‘occurrence’ because the incorporation of a defective ingredient into the supplement tablets did not damage other property and did not result in loss of use of property”

EFFECT OF *PHARMACAL* ON CGL COVERAGE

POST-PHARMACAL: Provides insurers with avenue to deny coverage under insuring agreement because it inserts “other property” analysis into definition of property damage

Burden of proof rests **on the insured**

PRE-PHARMACAL: analysis of damage to insured’s product vs. damage to “other property” was analyzed under policy’s exclusions

Burden **on the insurer**

INTEGRATED SYSTEM ANALYSIS ELSEWHERE

- BY END OF 2015 -

12 STATE HIGH COURTS: considered “integrated system” incorporation relative to “property damage” in CGL policy

- FIVE** REJECTED THE THEORY EXPLICITLY
- FIVE** REJECTED IT IMPLICITLY
- TWO** FOLLOWED THE THEORY

Various lower courts have considered the theory in a host of differing factual circumstances

TAKEAWAYS

PRODUCT RECALL LOSSES CAN BE SIGNIFICANT IN THE RETAIL/HOSPITALITY INDUSTRY

DO NOT ASSUME THAT A PRODUCT RECALL WILL BE COVERED UNDER CGL POLICY

- May depend both on policy language and jurisdiction
- Consider a product recall expense endorsement to a CGL policy if otherwise covered by standard exclusion

IDENTIFY THE “PRODUCT DAMAGE”:

I.E., WHAT IS DEFECTIVE – A COMPONENT OR THE “PRODUCT” ITSELF?

- Consider the effect of the economic loss doctrine and integrated systems analysis

UNDERSTAND AND REVIEW D&I AGREEMENTS WITH CRITICAL VENDORS AND SUPPLIERS

- Can you shift the burden and expense downstream?

THANK YOU

