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**Product Liability and Complex Torts
Charlotte Regional Seminar**

April 11, 2019

Protecting Your Brand with Tested Paper and Electronic Swords:

Indemnity in the Electronic Age



Presenter:

Mark A. Castleberry, Esq.

LEWIS THOMASON

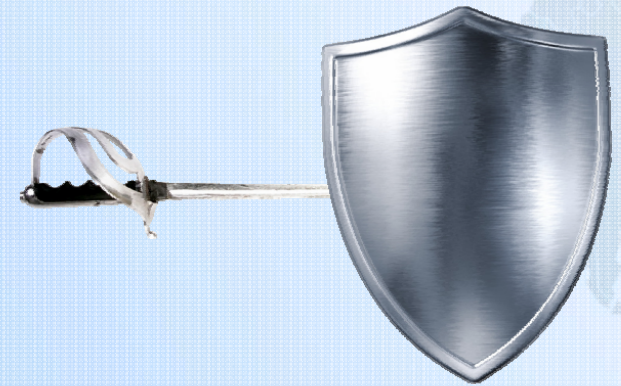
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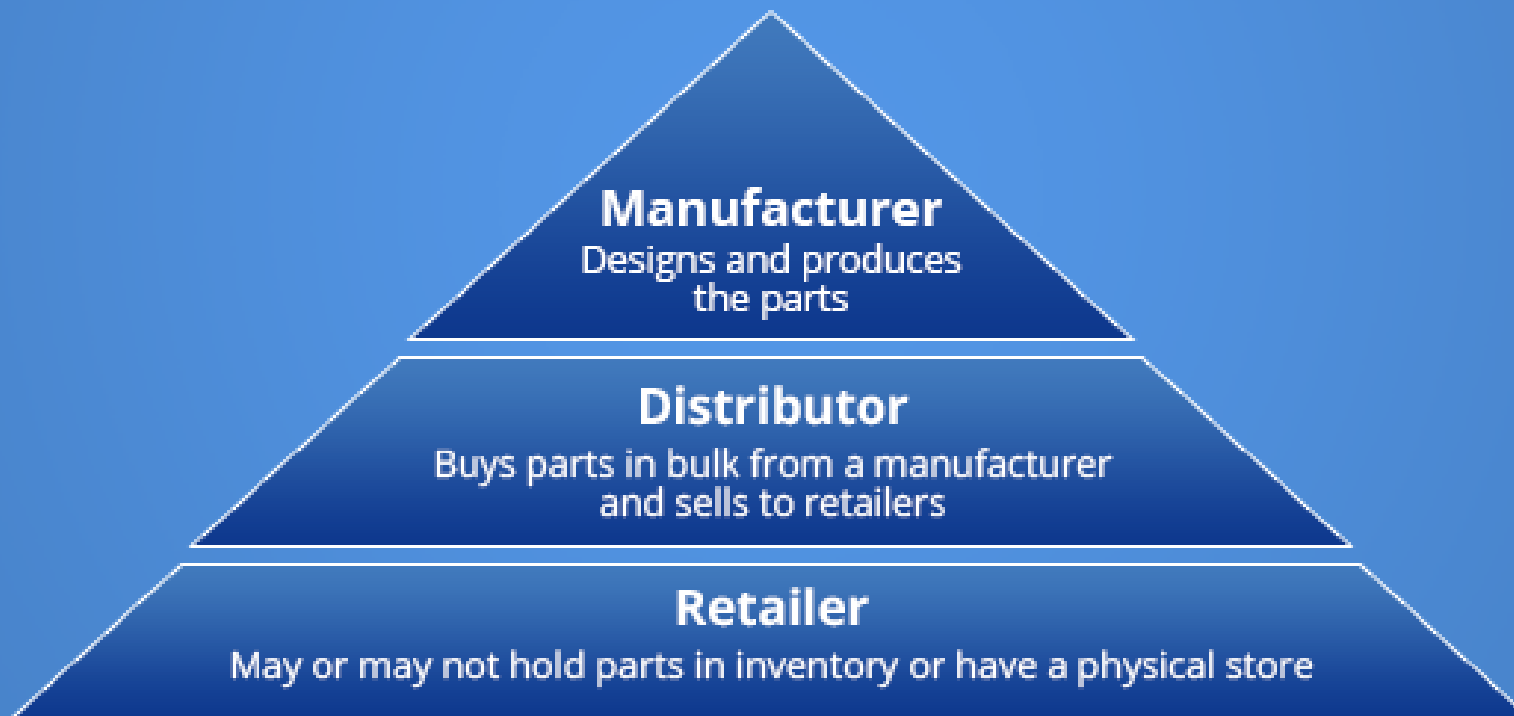
- **INDEMNITY AGREEMENTS**
- **THREE STANDARD FORMS:**
 1. **Broad**
 2. **Limited**
 3. **Intermediate**



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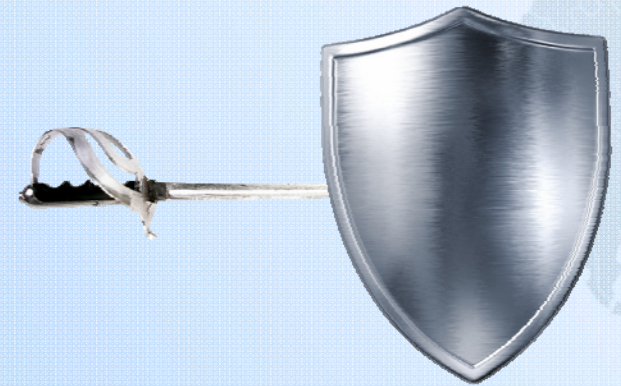
AUTO PARTS SUPPLY CHAIN



Indemnity in the Electronic Age

➤ BROAD FORM INDEMNITY PROVISION

- Unqualified
- Regardless of Fault
- Covers ALL Liability



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*“Manufacturer agrees to indemnify and hold harmless Distributor from any acts or omissions, alleged or found to constitute negligence or other fault, caused directly or indirectly or **solely by Distributor** ... or jointly by Distributor ... and Manufacturer ... **Manufacturer agrees that it is the specific intent of Manufacturer to indemnify Distributor for the negligent acts or omissions of Distributor”***



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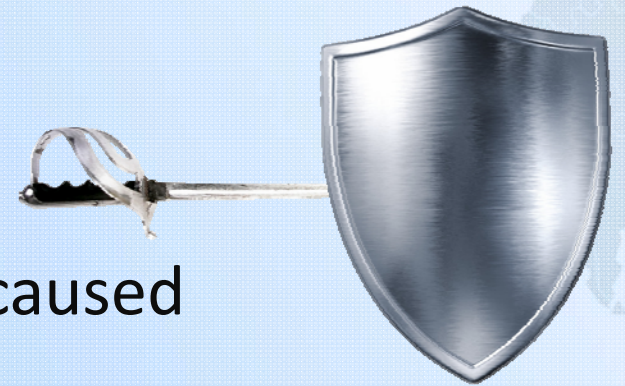
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➤ LIMITED FORM

- ONLY to the extent of indemnitor's fault
- Doesn't cover indemnitee's fault
- Indemnitor covers only those liabilities it caused



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*“To the fullest extent permitted by law, Manufacturer shall indemnify and hold harmless Distributor from and against claims, damages, losses, and expenses, including but not limited to attorney’s fees, ... **caused by any: (i) negligent acts or omissions of Manufacturer or (ii) breach of Manufacture’s representations, warranties, agreements, duties, or obligations set forth in this Agreement.**”*



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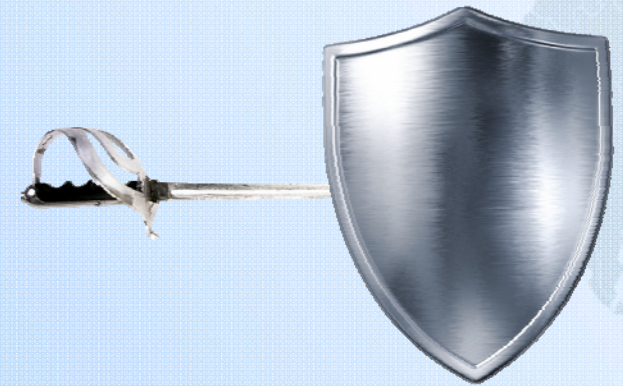
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➤ INTERMEDIATE FORM

- Relating to subject of the Agreement
- **UNLESS** Indemnitee's sole negligence
- Covers almost all liability



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“Manufacturer agrees to indemnify Distributor ... irrespective of whether Distributor was concurrently negligent ... but excepting where the liability... was caused by the sole negligence of Distributor.”



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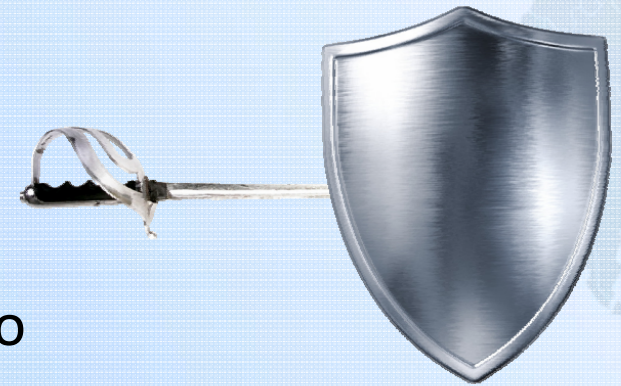
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➤ KEY CONSIDERATIONS

- Don't just copy and paste from other examples
- Must be conspicuous – same or larger font, prominent location
- Separately require duty to defend, in addition to indemnify and hold harmless



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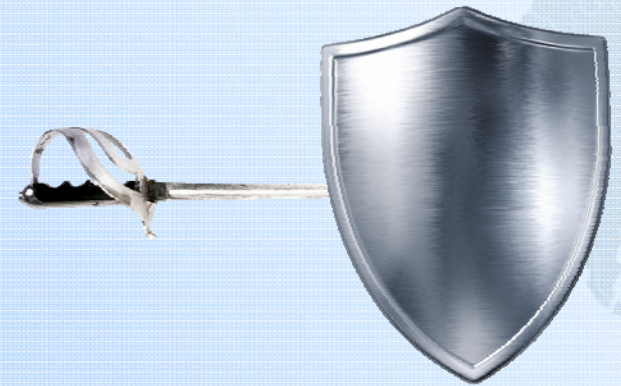
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➤ ADDITIONAL INSURANCE PROTECTION

➤ Two Types:

1. Express Endorsement
2. Blanket Endorsement



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1. Express Endorsement

- “Named Additional Insureds”
- Coverage from terms of entire policy
- Almost always greater right to coverage
- Easier to prove
- Named additional insured “expressly bargains with the *named insured* for the benefit of coverage.”



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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 15 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – VENDORS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s) (Vendor)	Your Products

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

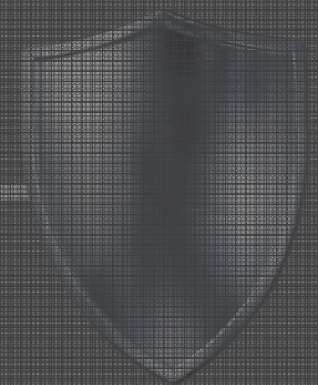
A. Section II – Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) (referred to throughout this endorsement as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business.

However:

1. The insurance afforded to such vendor only applies to the extent permitted by law; and
2. If coverage provided to the vendor is required by a contract or agreement, the insurance afforded to such vendor will not be broader than that which you are required by the contract or agreement to provide for such vendor.

B. With respect to the insurance afforded to these vendors, the following additional exclusions apply:

1. The insurance afforded the vendor does not apply to:
 - a. "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
 - b. Any express warranty unauthorized by you;
 - c. Any physical or chemical change in the product made intentionally by the vendor;
 - d. Repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the



insured for the

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2. Blanket Endorsement

- “Additional Insured”
- Coverage from terms of endorsement only
- Often limited to vicarious coverage through Named Insured
- ISO redraft – coverage for unnamed additional insured, “but only with respect to liability ... caused in whole or in part, by your acts or omissions or acts or omissions of those acting on your behalf.”



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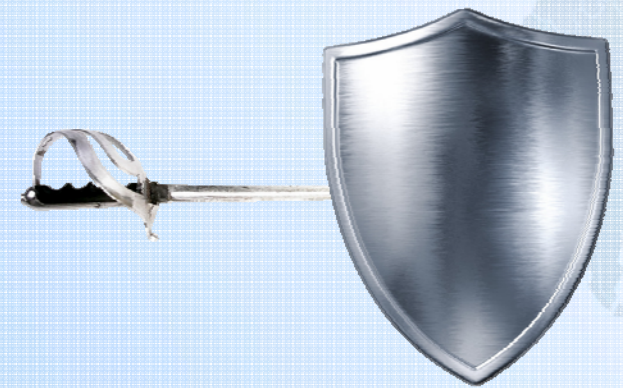
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➤ ENSURING YOU ARE AN ADDITIONAL INSURED

Insurance Certificate = “Paper Sword”

- Disclaimer
- Generally doesn't confer any rights
- Rights are limited to actual provisions of the policy
- Insist on obtaining a copy of the policy



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THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

Insist on obtaining a copy of the policy



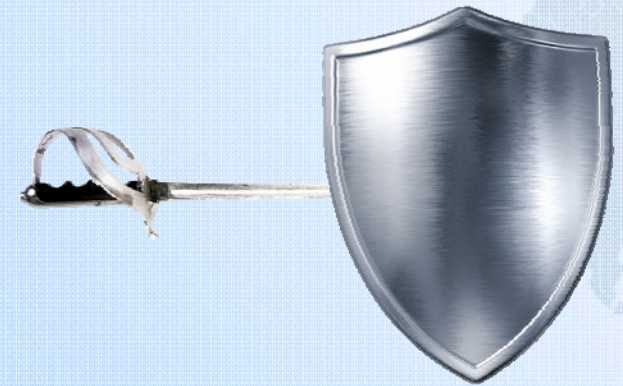
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Indemnity in the Electronic Age

➤ ELECTRONIC TERMS AND CONDITIONS

➤ Two Types of Electronic Contracts:

1. “Browse-Wrap”
2. “Click-Wrap”



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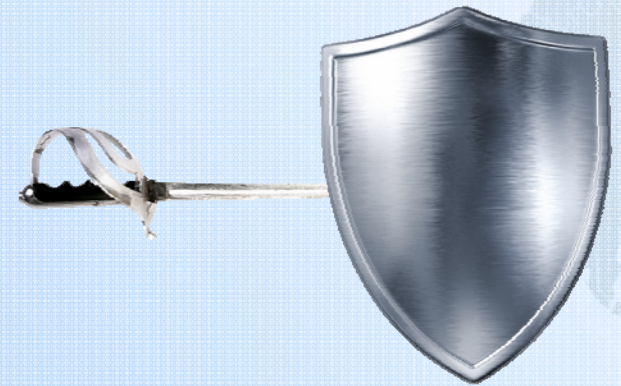
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➤ ELECTRONIC TERMS AND CONDITIONS

➤ Two Types of Electronic Contracts:

1. **Browse-Wrap:** agreements with terms and conditions of use that do not require the express agreement of a user/buyer.



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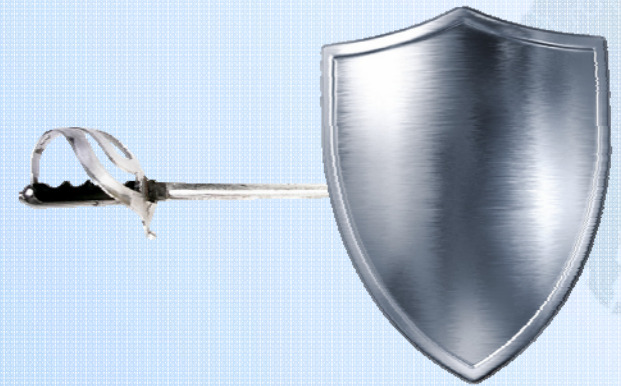
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Indemnity in the Electronic Age

➤ ELECTRONIC TERMS AND CONDITIONS

➤ **Two Types of Electronic Contracts:**

2. **Click-Wrap:** agreements requiring the buyer to affirmatively check a box expressly showing his or her assent to those terms.



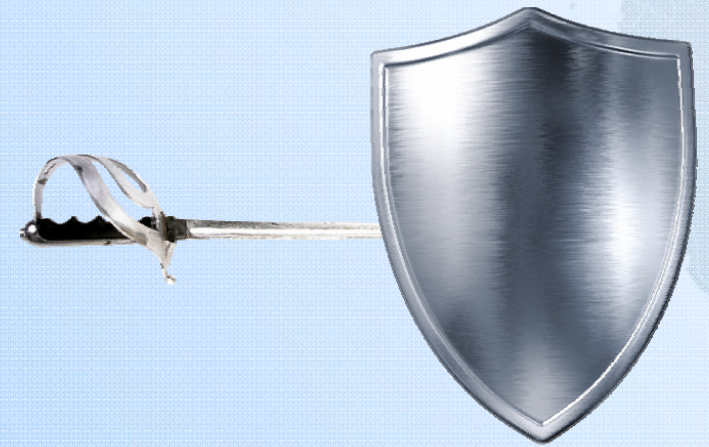
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THANK YOU



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