Application and Interpretation of the Vendor’s Endorsement: A History and Chronological Survey of the Law

John C. Bonnie
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
Atlanta, Georgia

LouAnn Kelleher
Kardaras & Kelleher LLP
New York, New York
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I. Introduction And Historical Background

At the turn of the 20th Century, consumers generally could not recover from manufacturers for injuries caused by defective products due to the requirement of privity. While consumers could assert claims against vendors, negligence was difficult to prove in the case of an innocent vendor. Over time, the requirement of privity of contract was abolished by courts (see MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)), and courts and legal scholars began addressing the concept of liability for manufacturers and sellers of products, without the necessity of demonstrating negligence or privity. See Restatement (Second) of Torts § 402A (1965), Comment b.; Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (Cal. 1944)(Justice Traynor, concurring opinion). Eventually, strict products liability became the accepted doctrine nationwide, whereby liability was imposed upon the manufacturer and the innocent vendors of defective products causing injury to third parties irrespective of negligence or privity. See Restatement (Second) of Torts § 402A (1965); Michael Sean Quinn and Nicole Chaput, Tort Liability and Reinsurance Contracts, Environmental Claims Journal, Volume 8, No. 1 (Autumn 1995).

Vendor’s endorsements were thereafter developed as “an outgrowth of modern products liability law.” Mitchell v. Stop & Shop Companies, Inc., 672 N.E.2d 544, 545-546 (Mass. App. 1996); See also Dominick’s Finer Foods, Inc. v. American Mfrs. Mut. Ins. Co., 516 N.E.2d 544 (Ill. App. 1987)(“the extension of a manufacturer’s insurance coverage to the distributor and retailer of his products occurred as a result of the imposition of strict product liability”); Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 833 N.E.2d 232 (N.Y. 2005)(“The vendor’s endorsement has its genesis in products liability law”); Fujico Co., Ltd. v. Yasuda Fire and Marine Ins. Co. of America, 1996 WL 480364 (N.D. Ill. 1996)(“The extension of coverage under a vendor’s endorsement occurred as a direct result of the imposition of strict products liability”). These endorsements are seen to play a “natural role” and serve purposes in light of the intricacies of products liability law. See American White Cross Laboratories, Inc. v. Continental Ins. Co., 495 A.2d 152, 155-156 (N.J. App. 1985)(“It is in this complex of the facts of merchandising life and the imposition of strict liability at law that the vendor’s endorsement has its natural role and serves specific purpose”).

For example, a vendor who acts as a mere conduit for the sale of a product “may then normally sue the manufacturer of the defective product for indemnification.” Mitchell v. Stop & Shop, supra, at 545-546. “Because the liability trail in such cases leads back to the manufacturer of the defective product, it has generally been concluded that the purpose of the vendor’s broad form endorsement is to curtail that circuitry of action by extending the insurance coverage of the manufacturer down the line to the distributor and the retailer of the product.” Id. See also Dominick’s, supra (noting that a vendor’s endorsement “alleviates the need for repetitious litigation”). In addition, the provision of insurance coverage by the manufacturer’s carrier presumably encourages vendors to market the product of the insured. See Fujico Co., Ltd., supra; Dominick’s, supra.

The language included within various vendor’s endorsements has changed over many years, and courts have taken widely different approaches in their interpretation of the breadth of coverage afforded by such endorsements. Consistent with the apparent history behind the introduction of vendor’s coverage, many courts have found such coverage inapplicable where the vendor does not face exposure because of strict liability and is itself negligent. Relying on the language of the vendor’s endorsement itself, many other courts found on the other hand found vendor’s coverage even where the vendor is itself negligent. Based upon these divergent approaches to the application of the insuring agreement of vendor’s endorsements,
the case law is equally inconsistent respecting the meaning and application of various exclusions within the endorsement.

This paper outlines the common vendor’s endorsement language the subject of much of the reported case law, surveys chronologically that case law, and summarizes briefly the discussion and outcome of each case.

II. The Common Vendor’s Endorsement Form

A majority of the modern cases addressing vendor’s endorsements involve policies substantially following the language of the “Additional Insured – Vendors” Endorsement issued by the Insurance Services Office, Inc., copyrighted in 1985. The form provides:

WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (referred to below 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, subject to the following additional exclusions:

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, unless unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;
   e. Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
   f. Demonstration, installation, servicing or repair operations, except such operations performed at the vendor’s premises in connection with the sale of the product;
   g. Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.

2. This insurance does not apply to any insured person or organization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products.

Insurance Services Office, Inc., Form CG 20 15 11 88 (slightly revising Form CG 20 15 11 85).
In 2004, ISO modified the form, and while the 2004 language substantially tracks the predecessor form, there is one material change. In addition to the prior exclusions applicable to vendor’s coverage, the 2004 form adds exclusion 1.h., which provides that there is no coverage for:

h. “Bodily injury” or “property damage” arising out of the sole negligence of the vendor for its own acts omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:

(1) The exceptions contained in Subparagraphs d or f.; or

(2) Such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.


While there appears to be no reported case to date applying the 2004 ISO form, the additional exclusion within the form will likely have a profound effect upon the limitations of coverage afforded to vendors under manufacturer policies. As addressed in the cases surveyed below, a prevalent issue which has arisen in the case law is the extent to which the vendor’s own negligence should limit and/or preclude coverage under the manufacturer’s policy – either by virtue of damages being deemed to not “arise out of” the product, or by virtue of exclusions for certain conduct by the vendors. Inclusion of the new exclusion within a policy may resolve this issue to a certain extent in cases where the damages clearly “arise out of” the “sole negligence” of the vendor, with certain exceptions as delineated within the exclusion.

III. Early Vendor’s Endorsement Cases

In an early effort by Sears, Roebuck & Co. to establish coverage under a policy issued to a furnace manufacturer affording vendors coverage, the Sixth Circuit concluded that Sears was arguably entitled to coverage (and therefore a defense) where Sears was alleged to be independently negligent and to have breached a warranty after a purchaser died of asphyxiation due to gas leaking from the furnace. In American Indemnity v. Sears, the vendors coverage did not apply to liability arising from the negligence of Sears or to any express warranty unauthorized by the manufacturer. The Sixth Circuit concluded that the dual claims by the underlying Plaintiff – one for non-covered negligence, and for covered breach of a warranty – gave rise to a duty to defend. American Indemnity v. Sears was favorably cited six years later by the Seventh Circuit. In Sears v. Travelers, coverage was excluded for “liability arising from the negligence of [the vendor],” and for unauthorized warranties, like the policy in American Indemnity v. Sears. The policy also contained an exclusion which would ultimately appear in the ISO vendor’s endorsement form: no coverage was afforded “to any person or organization from whom the named insured has acquired any such goods or products, or any ingredient, part or container, entering into, accompanying or containing any such goods or products.”

The dispute in Sears v. Travelers was coverage under a vendor’s endorsement in a policy issued to the manufacturer of a chair sold by Sears, arising from the collapse of a display model chair in a Sears store. It was alleged that Sears knew or should have known that the chair was in a defective condition and not fit for its intended use. Travelers initially agreed to defend but withdrew after a motion for summary judgment by Sears was denied. Sears ultimately prevailed at trial and sought reimbursement of defense

1 American Indemnity Co. v. Sears, Roebuck & Co., 195 F.2d 353 (6th Cir. 1952).

2 Sears Roebuck & Co. v. Travelers Ins. Co., 261 F.2d 774 (7th Cir. 1958).
fees. The trial court concluded that a defense obligation existed unless the liability of Sears was predicated upon a defect in the chair caused solely by the negligence or Sears, or upon an express warranty of Sears not authorized by the chair manufacturer.\(^3\)

The Seventh Circuit agreed, noting that the actual condition of the goods determined the existence of coverage rather than the theory of liability advanced against the vendor. According to the court, notwithstanding the allegations of negligence against Sears, the chair collapse could also have been the result of a product defect or other non-excluded cause. Travelers was obligated to defend the suit until it could confine the claim to a recovery that the endorsement clearly did not cover, and not merely identify a recovery which it might not cover.

A duty to defend was thereafter found on the same basis when Sears sought a defense under a Vendor’s Endorsement issued to the manufacturer of lawnmower sold by Sears after Sears and the manufacturer were sued by a purchaser.\(^4\) In *Sears v. Liberty*, the court concluded that the defect in the lawnmower was ultimately traceable to the manufacturer and that the absence of an express allegation of a defect existing when the product left the manufacturer’s hands was irrelevant since “by the same token, the complaint does not allege that it was not then defective.”\(^5\) There was no discussion by the court of exclusions which may have existed in the policy.

An Ohio federal court reached the same conclusion in a case involving the failure of a gas line with an allegedly defective valve which exploded.\(^6\) Addressing the same exclusions at issue in *Sears v. Travelers*, the court in *Stephenson v. Duriron* found no unauthorized warranty and that the end manufacturer was free of negligence proximately contributing to the defect in a valve manufactured by another entity. A duty to defend consequently existed on the part of the carrier for the valve manufacturer.

### IV. Early Appearance of the Modern Vendor’s Endorsement Wording and Exclusions

In the first case to identify and interpret exclusions which would ultimately appear in the ISO form vendor’s endorsement, an Illinois Federal court found inapplicable exclusions for physical change in the product, repackaging, and demonstration/installation/servicing.\(^7\) In *Great Atlantic v. Pepsi*, a Pepsi bottle exploded in an A&P grocery store for reasons unexplained, leaving a glass shard embedded in a customer’s eye. The court readily dismissed the application of an exclusion for vendor changes to the product and for demonstration, installation, servicing or repair operations, and turned to the exclusion for repackaging. The court acknowledged evidence that store customers on occasion transferred bottles from one carton to another or mixed bottles of one beverage in cartons belonging to another beverage. The court concluded that this could constitute repackaging “if one’s imagination were stretched to the utmost,”\(^8\) but ultimately noted the absence of evidence that the incident involved any repackaging. The

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\(^3\) The determination that the exclusion reached only sole negligence on the part of the vendor would prove to be prophetic in a way: although the common ISO form of the vendor’s endorsement contained no similar exclusion in the case of vendor negligence, the most recent iteration does, but limits the exclusion to injury or damage arising out of the sole negligence of the vendor. ISO Form CG 20 15 07 04.


\(^5\) *Id.* at 771.


\(^8\) *Id.* at 632.
court thereby implicitly held that the conduct identified in the exclusion had to bear a relationship to the claimed injury in order to apply.

V. **Cases Applying the Modern Vendor’s Coverage Wording**

By the 1970’s, versions of the vendor’s endorsement which would resemble the later ISO form were in active use and the subject of extensive litigation. The focus of these early cases was on the application of policy exclusions, rather than the application of the insuring agreement of the endorsements. This included exclusions in substantially the same form as in the ISO form for physical/chemical changes in the product; repackaging; failure to make required inspections, adjustments, tests or servicing, demonstration; and labeling/relabeling.

In *Mattocks v. Daylin, Inc.*,§ Dan River manufactured cotton material supplied to Sullcraft for sale as boys’ flannel pajamas. A pair of pajamas caught fire after sale and Sullcraft was sued; it was ultimately absolved of liability. Sullcraft sought reimbursement of defense fees from Dan River’s carrier pursuant to a vendor’s endorsement. The carrier invoked exclusions for Dan River materials which were physically changed and became a component or integral part of products manufactured by Sullcraft. Unlike the later ISO form, the exclusions applied to claimed injury or damage “arising out of” the excluded conduct. In this context, the court acknowledged Sullcraft’s cutting and tailoring of the Dan River fabric into pajamas, but concluded that the ignition of the injured child’s pajamas could not be said to have arisen out of the changes to the fabric by Sullcraft. There was in fact no claim that the physical changes caused the injury. Rather, the theory of liability was the unreasonably dangerous nature of the pajamas being constructed with non-flame retardant cotton. According to the court, the changes in form by a vendor must cause the claimed injuries before the vendor is excluded from coverage.

The court similarly rejected application of the relabeling exclusion despite the labeling by Sullcraft, finding that it would be unreasonable to preclude coverage except in the narrow circumstances of a Dan River vendor selling fabric under the Dan River label. This was particularly true “in view of the usual impetus for securing products hazard liability insurance, i.e., to encourage vendors to purchase and sell products of the party securing the insurance.”

The same rationale was applied three years later in a factually similar case decided by the Seventh Circuit. In *Sears v. Reliance*, fabric manufactured by Riegel was sold to Sears but sent to Rollic to be measured, cut, sewn, labeled and packaged for Sears. Girls’ slacks sold by Sears caught fire, killing the plaintiff’s daughter. Sears sought vendor’s coverage under policies issued to Riegel and Rollic. Riegel’s carrier denied on the ground that the fabric was “changed” when made into slacks; Rollic’s carrier denied on the ground that Sears “provided” the fabric to Rollic. It was alleged by the underlying plaintiffs that the fabric was inherently and unreasonably flammable and that the final slacks were defective (aside from any defect in the fabric) because they were defectively produced and manufactured.

As in *Stephenson v. Duriron* and *Mattocks v. Daylin*, the exclusions in the two policies applied only to claimed injury or damage “arising out of” the excluded conduct. Acknowledging the carrier’s contentions that the fabric was “changed” by being cut and sewn and having an elastic waist band added; that it was “repackaged” since it was removed from its original container; and was labeled to say “Sears”, the court found the exclusions inapplicable, citing *Mattocks*. Specifically, the claimed injuries arose from the fabric itself, and did not “arise out of” any change made in the fabric or in any repacking. According to the court, the exclusions required a “nexus” between the changes and the injuries.

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Id. at 516.

Id. at 494.

Addressing the specific argument of Reigel’s carrier (Commercial Union) that the labeling exclusion did not require the demonstration of a “nexus” between the vendor’s actions and the injury, the court concluded that if mere labeling could defeat coverage for a defect in the fabric itself, then the vendor’s insurance covering Sears “could not have been worth the piece of paper on which it was printed.”12 Specifically, the court determined that acceptance of the carrier’s positions would render the coverage a nullity.

The court then turned to Rollic’s policy with Reliance, which (similar to Exclusion 2. in the ISO form) excludes coverage to “any person or organization, as insured, from whom the named insured has acquired such products or any ingredient . . .” Reliance argued that since Sears provided the fabric to Rollic, Sears was not afforded coverage. The court rejected Reliance’s position on several grounds. The court found that since Exclusion 2. did not reference “vendors” (like Exclusion 1), it was not applicable to Sears. According to the court, Sears became a “named insured” by virtue of the Vendor’s Endorsement, and while Exclusion 2 may preclude coverage to other persons from whom Sears (as “named insured”) acquired products (e.g., Reigel), it does not preclude Sears’ coverage when it supplies a product to others (e.g., Rollic).

The court also concluded that Sears did not in any event supply a “product” to Rollic as contemplated by Exclusion 2. According to the court, the underlying plaintiff’s claim against Rollic was related to its defective design and manufacture of the slacks. The “product” relevant to that claim was Rollic’s “design and workmanship,” not the original allegedly defective fabric supplied by Sears. The court determined that since Sears did not supply the “product” relevant to its liability for Rollic’s negligent design and manufacture, Exclusion 2 was inapplicable to the claim. Finally, the court determined that if it applied Exclusion 2, Reliance would be able to escape liability in any case alleging defective design or workmanship where another vendor supplied the fabric or arranged to have the fabric supplied. According to the court, “such a position would render the vendor’s endorsement a nullity for any vendor such as Sears which designated the fabric.”13

The same outcome was reached by a Pennsylvania federal court, but on different bases. In Liberty Mutual Ins. Co. v. Home Ins. Co.,14 the carrier for the seller of pajamas which caught on fire causing injury to a child sought recovery from the carrier for the manufacturer of the fabric (Home) pursuant to a vendor’s endorsement. The underlying plaintiffs claimed that the end manufacturer of the pajamas and the seller were liable for failing to warn of the flammable properties of the fabric, and also claimed liability against the fabric manufacturer for defective fabric. Home invoked an exclusion for labeling after sale of the fabric, relying upon the contention that both the pajama manufacturer and the seller had failed to label the pajamas with a warning about the flammable properties of the fabric. The court found the exclusion ambiguous and found it implausible to apportion coverage between the covered portion of the claim alleging a defect in the fabric, and the allegedly non-covered portion of the claim alleging failure to warn. The court noted that allegations of defective products are frequently joined with claims of failure to warn, and that the view of the exclusion advanced by Home “would result in substantially less coverage in those situations.”

In Ervin v. Sears, Roebuck and Company,15 the court was confronted with non-standard vendor’s endorsement wording involving thermal underwear purchased by Sears from a manufacturer (Flagg) and sold by Sears under a Sears label which caught fire. The underlying Complaint alleged that the underwear was purchased from Sears during a time Flagg supplied Sears with such products. The court

12 Id. at 498.
13 Id. at 501.
determined that the allegations of the complaint controlled the duty to defend, notwithstanding evidence that the underwear was not a Flagg product.

In still another Sears case – one involving the sale of an operating manual for a Sears radial arm saw – an Illinois federal court was called upon to interpret and apply the same exclusions at issue in Stephenson v. Duriron, Mattocks v. Daylin, and Sears v. Reliance.\(^\text{16}\) In Sears v. Wausau, the saw operation manual was drafted and copyrighted by Midwest Technical Publications and sold to Sears for resale in its stores. There was evidence that a technical advisor for Sears reviewed the content, but that it was written by Midwest. Sears sought vendor’s coverage under a policy issued to Midwest by Wausau.

In its first defense to coverage, Wausau contended that the insuring agreement of the vendor’s endorsement was not triggered because the injury did not involve the product distributed by Midwest (the physical manual) and instead involved its intellectual content. Specifically, it was contended that the physical manual alone was not claimed to be unsafe, but only the instructions and warnings contained within it. According to the court, however, the named insured’s product as defined in the policy was the manual, and the policy made no distinction between the physical manual and its intellectual content.

Turning to the carrier’s reliance upon an exclusion for any physical change in the condition of the product by Sears, the court cited Sears v. Reliance to hold that the injury at issue must arise out of the claimed change in the condition of the product. The court noted that there was no evidence of any change in the manual by Sears, and further noted that for the exclusion to apply, any relevant change would have to have been made by Sears after the product left the hands of Midwest. As to the carrier’s reliance upon the exclusion for products which after sale by the named insured are used as a part or ingredient in any other thing, the court called the contention “frivolous.” The carrier had argued that the manual became a part or ingredient of the radial arm saw to which the instructions and warning applied when it was sold to the customer for use in connection with the saw. The court also rejected the carrier’s reliance upon Exclusion 2 despite Sears’ supply of information and material which was included in the manual, also citing Sears v. Reliance.

An Illinois appellate court thereafter agreed that the vendor’s (Sears’) participation in decision making about the content of a product did not preclude access to coverage under a vendor’s endorsement where the product (a tent which subsequently caught on fire injuring two children inside) was sold in the exact same condition in which it was received from the manufacturer.\(^\text{17}\) In Continental v. Sears, there was evidence that the manufacturer could have used fire retardant material, and that Sears had not specified fire retardant material. The court found the exclusion for physical changes to the product inapplicable, however, since the intention of the exclusion was to apply to physical changes made after the product leaves the manufacturer’s control. In this regard, the court cited as support the decision in Sears v. Reliance and Sears v. Wausau.

In 1984, the Third Circuit decided a case applying a policy like that in Stephenson v. Duriron, Mattocks v. Daylin, Sears v. Reliance, and Sears v. Wausau in which it was determined that a vendor’s endorsement did not afford coverage for the vendor.\(^\text{18}\) In Charter Oak v. Sumitomo, Yamaha and its authorized dealer Wodarski were sued for injuries on a snowmobile manufactured by Yamaha which allegedly contained a defective throttle mechanism. The evidence revealed that the snowmobile was delivered to Wodarski in a non-defective condition, but that Wodarski disassembled the throttle and improperly reassembled it.

Wodarski’s carrier claimed a wrongful denial of a defense by the carrier for Yamaha pursuant to a vendor’s endorsement on the policy issued to Yamaha. As in the prior discussed cases, the endorsement contained an exclusion for injury “arising out of” physical changes in the product, and an exclusion for injury arising out of servicing or repair operations. Nothing that Yamaha was dismissed from the underlying case within two months of the denial of coverage by Yamaha’s carrier, the court determined that exclusion for changes in the product by Wodarski applied, and that there was no wrongful denial of a defense obligation under the vendor’s endorsement.

The following year, a New Jersey appellate court decided *American White Cross Laboratories, Inc. v. Continental Ins. Co.*, which became a bellwether case in a later split in authority as to the intended reach of the vendor’s endorsement. In *American White Cross*, Absorbent Cotton Co. sold cotton in bulk rolls packed in cases to American White Cross. Absorbent Cotton was insured by Continental under a policy with a vendor’s endorsement. American sterilized and cut the cotton into smaller units, weighed, wrapped, and separately placed the cotton in a box, which it designed and labeled. A purchaser of American’s cotton product made a costume by wrapping her body in the cotton which was accidentally ignited by a match or cigarette, causing severe burns. The injured plaintiff claimed that the cotton was highly flammable and defective absent proper product instructions, and contended that the product was defectively packaged and labeled.

The vendor’s endorsement contained exclusions for “any act of the vendor which changes the condition of the products” and an exclusion for products labeled or relabeled by the vendor after distribution or sale by the named insured. Noting the decisions in *Mattocks v. Daylin* and *Sears v. Reliance*, the New Jersey appellate court accepted the reasoning of both cases, but noted that neither involved a claim that the product was defective because of a failure to warn, and concluded that neither applied. In this regard, the court first addressed the purpose of the vendor’s endorsement:

> The question here presented requires analysis of the intended purpose of a vendor’s endorsement, viewing realistically its nature and its place not only in the commercial marketplace but within the world of insurance from which it springs. Although the question here involved is one of intended coverage, in such analysis the law of strict liability in tort as it affects the product chain from manufacturer to distributor to retailer and eventually to the ultimate consumer cannot be ignored because it illustrates the underlying reasons for the existence of the vendor’s endorsement.20

The court explained that ordinarily, a distributor who sells another’s product is merely a conduit in the stream of commerce which ends at the consumer. To the extent there is a manufacturing or design defect in which the vendor had no creative role, the defect is in existence when the vendor receives the product, and is merely a nonculpable accessory in the eventual sale.21 In this regard, the court made the “fair inference” that the cost of the vendor’s coverage did not approach the premium charged for the liability policy issued to the named insured. The court concluded that the vendor receives a more limited form of coverage which does not protect it against its own acts proximately related to the consumer’s injury. The court rejected the trial judge’s conclusion that when American (which had its own liability insurance coverage) bought Absorbent’s cotton, it was also buying Absorbent’s coverage.

Turning to exclusions in the vendor’s endorsement for injury arising out of vendor acts which change the condition of the products; for “any failure to maintain the product in merchantable condition;” and for failure to make inspections, the court found each one unambiguous. According to the court, the

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20  Id. at 155.
21  Id. at 156.
exclusions were directed to circumstances where an act of the vendor affects the product, causing injury. Repeating again the commercial basis for vendor’s coverage, the court stated that the insurance was clearly designed to cover the vendor when he is only a conduit of the product in the stream of commerce, but not when he is the instrumentality causing the injury.

The court found the exclusion for labeling similarly unambiguous. Since the underlying plaintiff’s claims were premised on a failure to warn defect in American’s eventual product, which was produced from bulk, raw material sold by Absorbent, rewrapped, repackaged, and labeled with language of American’s choosing, coverage was clearly excluded. On this basis, the court distinguished the holdings in Maddocks v. Daylin and Sears v. Reliance. Notwithstanding the court’s determination that the vendor’s endorsement would afford no coverage for indemnity, a fact question as to the duty to defend potentially existed.

Relying on American White Cross, the Third Circuit concluded the following year that the vendor’s endorsement was generally intended to protect entities which are only secondarily liable for the manufacturer’s failure to provide a safe product, and inapplicable if the vendor’s act of negligence is the cause of the injury. In Cooper v. International, the court remanded the matter for determination of that factual issue. Also at issue before the court was the question of who it can be said are engaged in “sale” or “distribution” of a product. Cooper manufactured a drug given to an infant causing permanent injury. It was alleged that hospital physicians negligently prescribed excessive dosages of the drug and that the hospital pharmacist was negligent in filling the prescription. Cooper was alleged to have used a misleading product label which failed to identify difference in potency between two similarly named drugs. Cooper was insured under a policy issued by ISLIC containing a vendor’s endorsement, and the question of coverage for the hospital and physicians under the vendor’s endorsement arose.

The evidence revealed that the physicians did not purchase the drug for resale, hold it on consignment, or even had it in their possession before it was administered. They did not sell it to their patients, and there was no argument that the doctor’s distributed the drug. Consequently, the physicians were outside the insuring agreement of the vendor’s endorsement. As for the hospital, however, it purchased the drug and kept it in its pharmacy, and billed the patient for the drug. Consequently, the hospital was a vendor and within the coverage of the endorsement.

Despite the foregoing string of cases, numerous others addressing endorsement containing exclusions for injury or damage “arising out of” enumerated conduct of the vendor concluded that coverage existed or potentially existed for the claimed liability of the vendor because the excluded conduct was not the cause of the injury. In Industrial Chemical & Fiberglass Corp. v. Hartford Accident & Indemnity Co., two employees of a contractor died while repairing cracks inside a fiberglass storage tank with a chemical compound which decomposed and erupted into flames. The chemical was manufactured by Reichold (insured by Hartford) and was distributed by Industrial Chemical. The Hartford policy contained a vendor’s endorsement with exclusions for injury or damage arising out of repair operations. Answering a certified question from the Alabama federal court, the Alabama Supreme Court determined that the exclusion did not reach all repair operations, but only repair to the product itself. Since the two individuals killed by the fire were not performing repair operations on the chemical sold by the named insured, the exclusion had no application.

The court alternatively concluded said that it was “fair” to hold the manufacturer and its insurer liable for injury caused by a defect in the product even where the product is changed if the injury is not caused by

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23 475 So.2d 472 (Ala. 1985).
the change, and also “fair” to hold the manufacturer or carrier liable for injury caused by a defect in the product even if it is undergoing installation, if the injury is not caused by the installation. Consequently, even if the exclusion was not limited to repair operations on the product itself, it had no application to this case injury did not arise out of the repair operation.

A California court of appeal reached the same conclusion in Oliver Machinery Co. v. United States Fidelity and Guar. Co. where the manufacturer’s insurer denied coverage under a vendor’s endorsement with an exclusion for injury arising out of a product labeled by the vendor after sale. The facts revealed that the vendor (Oliver) placed its own label on a woodworking machine after purchase from the manufacturer. Citing Sears v. Reliance, the court concluded that the exclusion had no application because the Oliver label had nothing to do with the injury, and that to conclude otherwise would render the coverage a nullity.

In Gamble Skogmo, Inc. v. Aetna Cas. And Surety Co., the court concluded that independent negligence by the vendor was outside the scope of coverage of the vendor's endorsement but that coverage existed based on other theories of liability and because such negligence was not established at trial. In that case, a gas water heater manufactured by Jim Walter Corporation with a valve manufactured by Honeywell and sold by Gamble exploded causing injury to the owner. Gamble sought vendor’s coverage under a policy issued to Jim Walter for a suit claiming strict liability, breach of warranty, and negligence. The alleged negligence was in the distribution of the water heater to the Gamble store where the heater was purchased. Since the vendor’s endorsement covered vendors engaged in distribution of Jim Walter’s products, the insuring agreement was triggered because the claims were related to sale or distribution of the heater. The claim for breach of warranty was also within the coverage of the endorsement. The court concluded that an independent tort on the part of Gamble would have been outside the reach of the policy but that such a claim was never established at trial. Consequently, the carrier was liable for breach of the duty to defend.

In another case which would be repeatedly cited for the limitation on the scope of coverage afforded by a vendor’s endorsement, an Illinois appellate court considered the applicability of a vendor’s endorsement on a policy issued to Coca-Cola Bottling Co. where a Coca-Cola employee slipped and fell on a loading dock while making a delivery of Coke products to a Dominick’s food store. In Dominick’s Finer Foods, Inc. v. American Manufacturers Mut., the court stated that the extension of a manufacturer’s insurance coverage to a distributor and retailer of the manufacturer’s product was as a result of the imposition of strict liability on the distributor/retailer. In this context, vendor’s coverage alleviates the need for repetitious litigation and encourages vendors to market the product of the insured manufacturer.

With this background, the court in Dominick’s v. American concluded that the vendor’s endorsement did not provide the same scope of coverage to Dominick’s as it did Coca-Cola, noting that coverage only applied on a limited basis: “with respect to the distribution and sale” of the named insured’s product. In this regard, the court concluded that the endorsement only covered the vendor for injuries caused by the product it has allowed into its store. In contrast, the injured Coca-Cola employee’s injuries were caused by a dangerous and slippery condition respecting Dominick’s loading dock. Because the injury did not arise out of the product, the court determined that the carrier owed no duty to defend Dominick’s.

In SDR Co., Inc. v. Federal Ins. Co., SDR marketed and sold liquid drain cleaner comprised of sulfuric acid and bought bottles from Arroyo with labels printed at SDR’s request and instruction. A consumer of

25 390 N.W.2d 343 (Minn. App. 1986).
the drain cleaner suffered burns when a bottle of the product erupted, and sued Arroyo, SDR and others claiming that the labeling was confusing and unclear and that the product was dangerous when used per the provided instructions. SDR sought coverage under a policy issued to Arroyo by Federal.

The court first found the language of the endorsement to be clear and unambiguous. Citing Sears v. Reliance with favor, the court concluded that some coverage was afforded by the endorsement or else it would be a nullity. The pertinent question according to the court was how far that coverage extended. Citing the exclusion for products which after sale by then named insured have been “used as a container”, the court found it clear that no coverage was afforded for the bottles sold by Arroyo which were used as containers by SDR for purposes of holding sulfuric acid. Again citing Sears v. Reliance, the court found that the analysis of a nexus between the injuries and the vendor's conduct was appropriate. But having made that analysis, the court stated that the injuries were caused by the conduct of SDR and not by Arroyo's bottle, such that no vendor's coverage existed.

An Illinois federal court concluded that at least a defense obligation existed on the same basis articulated in Murray v. Continental, where the manufacturer of a bicycle (Murray) tendered its defense to the insurer of the company which supplied the bike’s brake mechanism in connection with an injury arising out of a bike accident. The vendor’s endorsement on the policy issued to the brake manufacturer contained an exclusion for injury arising out of products which after sale by the named insured are used as part of any other thing. The court found the exclusion inapplicable unless the installation of the brake by Murray (as opposed to the brake itself) caused the injury, and rejected as “utterly unreasonable” the carrier’s contention that the exclusion applied even where the named insured’s product was put to its intended use and properly attached: “There is no purpose to be served by providing full coverage, in one clause, for products whose only use is as part of another product and then removing all coverage, in another clause, if it is so used.”

Similarly finding a fact question respecting vendor’s coverage where Murray manufactured a lawnmower using an engine manufactured by Briggs, an Illinois federal court concluded that Murray was owed a defense under a vendor’s endorsement by Briggs’s carrier. In Murray v. Royal, the carrier had relied among other provisions upon the exclusion for injury arising out of products which after sale are used by the vendor as a part or ingredient of any other thing. The court noted that Murray attached the engine: to a lawn mower deck; a blade to the engine component’s crank shaft; four wheel assemblies to the mower deck; a handle assembly; a chute deflector and trailing guard; a throttle control and bail or “deadman” handle; a brake control cable; and warning labels as to the application of an exclusion for injury arising out of the attachment. A fact question existed as to whether the underlying plaintiff’s injuries arose out of a lawnmower engine which after sale by Briggs was used as a part or ingredient of another thing.

In one of the earliest cases deciding application of a vendor’s endorsement on the basis of the insuring agreement rather than an exclusion, a Louisiana appellate court concluded that coverage clearly applied to a supermarket (Giant) sued for selling a hot dog manufactured by the named insured to a customer which later became sick from eating it. In Griffin v. Giant, there was no discussion of negligence on the part of Giant, although Giant was ultimately absolved of liability to the plaintiff. The court found a breach of the duty to defend based on the coverage of the vendor’s endorsement.

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29 Id. at 444.
In *North River Ins. Co. v. Sears, Roebuck & Co.*, Singer manufactured a chain saw sold by Sears. After an initial sale, the saw was returned to Sears by the customer. It was “reconditioned” by Sears, and then resold to the decedent of the plaintiff in an underlying case, who died while using the product. When sold, the reconditioned saw did not come in its original packaging or with the original product manual or literature. Sears sought coverage under a policy issued by North River to Singer containing a vendor’s endorsement. North River settled Sears’ liability and sought reimbursement of costs incurred to defend and indemnify.

Addressing non-standard endorsement language which extended coverage with respect to the distribution or sale of a product and then excluded any vendor who “changes the condition of the products,” “repacks such products,” or “performs . . . servicing or repair operations,” the trial court found an absence of coverage since Sears had “repacked” Singer’s product. The Ninth Circuit reversed, finding that the reconditioning of the product and sale without manuals and without the original packaging did not constitute “repackaging” as contemplated by the exclusion. Sears had alternatively argued that the exclusion was inapplicable unless the injury was connected to Sears’ own acts. In this regard, the Court noted that the exclusions in the policy did not contain the “arising out of” language at issue *Sears v. Reliance* and *Sears v. Wausau*, where the courts found that a nexus between the vendor’s conduct and injury was necessary for the exclusions to apply. Imploded, had the exclusion for “repacked” product been applicable, it would not have been defeated even if the repackaging did not cause or contribute to the injury.

A Louisiana appellate court found no vendor’s coverage where a death caused by a tipping crane resulted from negligent training by the seller of the crane. In *Eastern v. Chevron*, the court cited *American White Cross* and *Dominick’s*, and concluded that an independently negligent vendor is not entitled to the same coverage as the manufacturer. Rather, the vendor has coverage only if the vendor is strictly liable for simply selling the product. Since the theory of liability on which the seller was held liable was its negligent training of the crane personnel, there was no vendor’s coverage.

An Illinois Appellate court concluded the very opposite, however, in *Sportmart, Inc. v. Daisy Manuf. Co.*, which would ultimately be widely cited by courts rejecting the line of cases narrowly applying the language of the vendor’s endorsement. In *Sportmart v. Daisy*, a 15 year old boy bought BB gun pellets from Sportmart and thereafter suffered partial blindness from the ricochet of one of the pellets. It was alleged that Sportmart and its employees were negligent in selling ammunition to someone under 21 in violation of state law and to someone under 16 in violation of company policy. Sportmart tendered its defense in the personal injury action to the manufacturer of the BB gun (Daisy) and its carrier (Continental) which issued a policy containing a vendor’s endorsement. Sportmart contended that the vendor’s coverage applied to injuries resulting from the Daisy product; Continental contended that the coverage for Sportmart extended only to claims for defects in the product, and not Sportmart’s own fault.

The court noted that the vendor’s endorsement coverage applied to injury or damage arising out of Daisy’s products distributed or sold in the normal course of the vendor’s business, and that the term “arising out of” was widely recognized as being both broad and vague. According to the court, it encompassed injury “growing out of” or “resulting from” Daisy’s product, because “indisputably,” the plaintiff’s injury would not have occurred but for his use of the pellets. Contrary to Continental’s contention, the court found nothing in the policy limiting coverage to claims alleging a product defect. According to the *Sportmart* court, so long as the product is sold in the same condition as when it left Daisy’s control, coverage applies and no exclusion reaches injuries directly caused by the product which may also be attributed to the negligence of another party, including the vendor.

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33 *Easton v. Chevron Indus., Inc.*, 602 So.2d 1032 (4th Cir. 1992).
34 645 N.E.2d 360 (III. App. 1994).
The Court expressly distinguished its earlier decision in *Dominick’s v. American*, noting that in that case, there was no causal link between the product and the injury; rather, the injury stemmed from the condition of the vendor’s loading dock. In contrast, the plaintiff’s blindness resulted from the use of the product and also the vendor’s negligence, and *Dominick’s* is therefore not determinative.

Addressing the alternative contention of Continental that the exclusion for failure to make “inspections” applied, the court concluded that there was no evidence Sportmart agreed to verify the ages of prospective purchasers, that Sportmart had a policy of verifying the age of its customers, or that verification was a condition of coverage. According to the court, there was no restriction in the vendor’s endorsement for the vendor’s failure to adhere to laws regarding the sale of the Daisy product.

In *Travelers v. Freightliner Corp*, an Illinois court considered the availability of vendor’s coverage for Freightliner in its manufacturing and assembly of trailer truck cabs utilizing seats purchased from National Seating Company as a result of suits against Freightliner by truck drivers claiming injuries sustained while driving Freightliner cabs with National seats. The plaintiffs alleged that the injuries were caused by an unreasonably dangerous condition in the seats which existed when they left the hands of National.

Freightliner claimed error in the trial court’s conclusion that mere installation of the National seats in Freightliner’s product triggered the exclusion for use of the product as part of another thing because the seats had become part of the cabs. Freightliner contended that application of the exclusion was inappropriate if the injuries arose from a defect in the product which was used as a part or ingredient, as opposed to arising from something the vendor did in incorporating the part or ingredient into its finished product. Citing the allegations of the underlying complaints that the injuries arose out of a defective or unreasonably dangerous condition in the seats when they left National’s control, Freightliner claimed the exclusion did not apply because the injuries did not “arise out of” the conduct of Freightliner, but instead out of the defect in the National product.

The court disagreed. First, having noted that National distributes seats to vendors who sell them directly, “off the rack” as replacement parts, the court concluded that the vendor’s endorsement insured only vendors that sold National’s seats in this manner, and that this was made clear by the endorsement which expressly excluded the risk that a purchaser of seats who then use the seats as a component part of their own finished product. Second, the court found the holdings in *Sears v. Reliance* and *Murray v. Continental* to be persuasive authority for the position that the exclusion for use of the product in something else is not applicable where injuries arise out of the component part itself, rather than its installation as part of another product. According to the *Freightliner* court, the outcomes in those cases rested upon the putative insureds being named in the policies, which Freightliner was not. Also unlike the circumstances in *Sears v. Reliance* and *Murray v. Continental*, application of the exclusion would have rendered the vendor’s endorsement a nullity which is not was not the case under the policy issued to National which would afford vendor’s coverage to the majority of National’s customers that sell seats “off the rack.”

Importantly, the court concluded that the “arising out of language” at issue in *Sears v. Reliance* and *Murray v. Continental* was misconstrued inasmuch as the exclusion applied to injury arising out of products used as part of another thing, rather than applying only to injuries that arise out of a defect in the product. According to the court, the exclusion applies strictly to all products which are used as parts, without regard to how the injury or damage arises.

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In *Hartford Accident and Indemnity Co. v. Bennett*, Joe Bennett visited a Scotty’s store to buy a garden shed. He approached a demonstration model of a shed and opened the door. The model tipped over and struck him. Bennett sued Scotty’s alleging the manner in which Scotty's displayed the model created an unreasonable risk of harm. The demonstration model was manufactured by Marco Wood Products, which also made storage building kits. The model were full size replicas of the facade of the actual storage buildings. Marco was insured by Hartford under a policy with a vendor’s endorsement, and Scotty’s sought coverage under the Hartford policy.

The court concluded that Scotty’s was not an insured under the vendor’s endorsement because it was only an insured for injury resulting from Marco products distributed or sold in the regular course of Scotty’s business. The injury at issue, however, did not result from a full size storage building purchased by Scotty's for resale, but was instead caused by a display model which Scotty's did not distribute or sell.

According to the court, the word “distributor” in the vendor’s endorsement clearly referred to those distributors (wholesalers) to which Marco sells its products intended for the consumer market. The court said that to interpret that term as also referring to a retailer who purchases models not intended for sale to the public but who “distributes” them to its various stores creates new coverage not intended by the policy terms.

In *Standard Artificial Limb, Inc. v. Allianz Ins. Co.*, the Missouri Court of Appeals found no coverage for a manufacturer of artificial limbs (Standard) under a vendor’s endorsement on a policy issued to a component supplier (Bock) where the allegation of the underlying plaintiff was the failure by Standard to properly cement a screw which was part of the Bock-supplied component. The vendor’s endorsement contained an exclusion for injury arising out of “any act of the vendor which changes the condition of the products” and the form vendor’s endorsement exclusion for failure to make adjustments or servicing as the vendor agreed to make in connection with its sale of the product. Since the failure to use cement on the screws was in direct contravention of the manufacturer’s recommendations and requirements, no coverage applied. In support of its conclusion, the court cited *American White Cross*.

The holding in *Sportmart* was shortly followed by the decision of the New Jersey appellate court in *Pep Boys v. Cigna Indem. Ins. Co. of North America*, which expressly distinguished its prior holding in *American White Cross*. In *Pep Boys*, an auto supply retailer was sued for its sale of a Freon product to a minor who died after intentionally inhaling the product, and sought a defense and indemnity from the carrier of the manufacturer, Cigna. The *Pep Boys* court rejected the claim that the vendor’s coverage was limited to claims of manufacturing or design defects or failure to warn, and furthermore rejected the contention that the vendor’s endorsement was inapplicable merely because the injuries from the product are also attributable to the negligence of the vendor. Noting like the *Sportmart* court that the term “arising out of” in the insuring agreement of the vendor’s endorsement was broad as well as vague, the court concluded that the language had to be construed against the carrier and in favor of the insured. The court acknowledged the liability of Pep Boys for its negligence in selling the Freon, but concluded that the product was the death causing substance. According to the court “arising out of” Freon is not ambiguous, and although the Freon product was misused, it is what killed the plaintiff. The court further noted that even if the term was ambiguous, it would have to be construed against the carrier. According to the court, if the intention was to limit coverage to claims involving product defects or to exclude coverage where the vendor has some independent culpability, the endorsement should have expressed this.

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36 651 So.2d 806 (Fla. App. 1995).
37 895 S.W.2d 285 (Mo. App. 1995).
Distinguishing its earlier decision in *American White Cross*, the court noted that the language of the endorsement in that case extended vendor’s coverage “with respect to” the distribution or sale of the named insured’s products, whereas the instant endorsement extended coverage for injury “arising out of” the named insured’s products distributed or sold in the course of the vendor’s business. The court also noted that the decision in *American White Cross* turned on application of certain exclusion in the policy, whereas the *Pep Boys* case did not. The court also retreated from its discussion of the presumed role of vendor’s endorsements in the *American White Cross* case: “The extensive analysis in the *American* opinion of the role of the endorsement was dictum. The only issue was whether the exclusion applied…. *American*’s broad statements regarding the endorsement’s boundaries, though related to the underlying claim of a product defect, were unnecessary to *American*’s holding.” 39 The court found both a defense and indemnity obligation owed by Cigna to Pep Boys.

In *Mitchell v. Stop & Shop Companies*,40 the court found that no vendor’s coverage was afforded to Stop & Shop under a policy issued to Continental Baking Co. for injury sustained by a Continental employee injured at a Stop & Shop loading dock while making a delivery of Continental products. Citing *Oliver v. United.*, *SDR v. Federal*, and *Dominick’s v. American*, the court concluded that the vendor’s endorsement applies only to injuries that arise out of the product itself.

The exclusions from coverage are interpreted as an attempt to define the boundary between those instances in which the retailer’s exposure to liability arises purely from its role as a conduct, and those in which, by altering or repairing or repackaging the product, it – the retailer – may itself have caused or contributed to the injuries.41

The court found that the injuries to the Continental employee were not caused by the product and did not arise in the distribution or sale of Stop & Shop’s business of Continental’s baking products, but instead arose from the distribution in the regular course of Continental’s business of its products to a vendor. The court rejected the contention of Stop & Shop that an exception to the exclusion for “installation or servicing operations performed at the vendor’s premises in connection with the sale of the product” applied. Because there was no coverage in the first instance, an exception to an exclusion was irrelevant.

The same was true in *Hulsey v. Sears, Roebuck and Co.*,42 in which a Sears’ customer was injured on a treadmill during a product demonstration after the speed of the treadmill suddenly increased as a result of a Sears’ employee placing his arm across the top of the treadmill console. The plaintiff claimed that Sears failed to properly train its employee in the use of the treadmill, and Sears sought defense and indemnification under a vendor’s endorsement on a policy issued to the treadmill manufacturer. The jury found in favor of Sears; the court concluded that the treadmill manufacturer was without liability. Citing *Dominick’s* and *American White Cross*, the court noted that the reported decisions involving the vendor’s endorsement considered claims which arose from the product itself, and that the proper interpretation of the exception to the exclusion for demonstration, installation, servicing or repair operations was that it applied to injuries during a sales demonstrations on the vendor’s premises as a result of a defect in the product itself. Here, the treadmill performed in the manner it was intended, and the trial court correctly found no coverage.

In *Berwind Medical, Inc. v. Invatection Ins. Co.*,43 the underlying plaintiff was electrocuted while using a hand held control to a hospital bed supplied by the vendor, Berwind. Plaintiff asserted a claim against

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39 Id. at 552.
41 Id. at 546.
42 705 So.2d 1173 (La. App. 1997).
Berwind, who ultimately settled with the plaintiff. Berwind thereafter pursued a claim against the manufacturer’s insurer, claiming it was covered by virtue of a vendor’s endorsement in the hospital bed manufacturer’s policy. The language of the policy was not included within the opinion.

Berwind conceded that pursuant to Charter Oak v. Sumitomo, judgment in the insurer’s favor was warranted based upon a res judicata issue, but argued that the case was wrongly decided. The court disagreed, and then noted, in dicta, that in any event the vendor’s endorsement appeared to be inapplicable. The court stated that “[u]nder any view of the matter,” there was no coverage since the underlying litigation “conclusively established” that the accident was caused by improper servicing and repair of the product for which the vendor Berwind was solely responsible. The court also noted that while initially in the underlying litigation there may have been a duty to defend “until such time as non-coverage was clear,” the court found that “this obligation certainly did not extend to the full amount of defense costs now being sought by plaintiff Berwind.”

Ebert Constr., Inc. v. Liberty Mut. Ins. Co.,44 raised the question of whether a building contractor (Ebert) which bought a building product from a distributor (Dufey) and then installed it on the home of the underlying plaintiffs was entitled to vendor’s coverage as the seller or distributor of the product. The court concluded that Ebert purchased the product and transferred it to another by sale in the regular course of its business, which was all that was required to trigger the coverage of the endorsement.

Insured status was also the issue in Fujico Co., Ltd. v. Yasuda Fire and Marine Ins. Co. of America,45 with the court determining that a manufacturer does not get the benefit of vendor’s coverage under the policy of another. There, Fujico manufactured a mold grinding machine. Okura serviced a licensing agreement for the benefit of Valley Mold, which operated as Fujico's licensee in North America selling equipment designed and manufactured by Fujico. In an action naming Fujico and Okura, Fujico sought vendor’s coverage under a policy issued to Okura. Fujico admitted that it never sold or distributed any products for Okura, and that Okura did not manufacture the mold grinding machine at issue. The court noted that the claim for coverage was by a manufacturer of the product from its own distributor. Although the term “vendor” was not defined in the policy, the court found it unambiguous in light of the purpose of vendor’s coverage. Citing dictionary definitions of the word, the court said that a manufacturer is not a vendor, and Fujico consequently did not have coverage under the vendor’s endorsement. The court found consideration of various exclusions unnecessary since there was no coverage triggered to begin with.

In Texas Medical Liability Trust v. Zurich Ins. Co.,46 the issue was in the insured status of physicians under a vendor’s endorsement for their alleged liability in connection with breast implant litigation. Because the doctors were not sellers of the breast implants, they were not vendors and outside the coverage of the endorsement.47

Vendors coverage was also found to exist in Kmart Corp v. Fireman’s Fund Ins. Co.,48 where Kmart employees or contractors assembled patio furniture sets for demonstration and display at Kmart stores as a result of which multiple claims of injury were made by customers due to collapse of the display chairs. The Consumer Product Safety Commission attributed the chair failures to improper assembly in failing to follow precisely the assembly directions. Kmart sought vendor’s coverage under a policy issued to the

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46 945 S.W.2d 839 (Tex. App. 1997).
47 In Texas Medical Liability Trust v. Hartford Acc. and Indem. Co., 151 S.W.3d 706 (Tex. App. 2004), the opposite conclusion was reached where the underlying complaint expressly alleged that the physicians were sellers of the breast implant devices.
manufacturer of the furniture (Compex). The carrier contended that the coverage applied only for product defects, and not to instances of active negligence on the part of the vendor.

The Michigan federal court disagreed, noting that by its terms, the vendor’s coverage applied to injury or damage “arising out of” Compex’s products. The court noted that “arising out of” was broad, and means “originating from,” “having its origin in,” “growing out of,” or “flowing from.” In the absence of an express limitation, the court determined that the phrase “arising out of” as used in the policy should be construed and interpreted in favor of coverage. The court disagreed that the language of the vendor’s endorsement made the coverage applicable only where the vendor is a mere conduit of the product, or that it was inapplicable where the vendor is the cause of the injury. The court further rejected the carrier’s simultaneous claim that the vendor’s endorsement was unambiguous, while attempting to rely upon parole evidence about the purpose behind the vendor’s endorsement. Finally, the court found applicable the exception to exclusion for “demonstration” “performed at the vendor’s premises in connection with the sale of the products.” Even assuming application of exclusion e., then the provisions of exclusions e. and f. conflict, and the more specific provision applies.

In Shade Foods, Inc. v. Innovative Products Sale & Marketing, Inc.,

vendor’s coverage was also found to exist. There, a wholesale food manufacturer (Shade) making ingredients for food product companies like General Mills obtained processed almonds from IPS which Shade processed into nut clusters for cereal. IPS was insured by Northbrook under a policy with a vendor’s endorsement. Wood particles were found in nuts supplied by IPS to Shade, resulting in a claim by General Mills for contaminated product which had to be destroyed. Shade sought vendor's coverage under the policy issued to IPS. The jury found IPS liable to Shade for negligence, breach of contract, and breach of warranty, and found Shade liable to General Mills for breach of warranty.

Northbrook claimed that no vendor’s coverage existed for Shade based on exclusions c. (physical or chemical change in product) and g. (labeled or relabeled products) of the form vendor’s endorsement in as much as the IPC supplied nuts were ultimately made into another product sold to General Mills. The court disagreed, finding that there was no logical reason to treat changes in the product or its subsequent use as an ingredient in another product as excluded, unless the changes or subsequent use cause the injury to the third-party claimant. The court concluded that the exclusions apply only if there is a nexus or causal connection between the vendor’s action and the claimant's injuries, citing Sears v. Reliance, SDR v. Federal, and Oliver v. United. According to the court, the damage at issue was caused by a defect in the product of IPC (the almonds) that were contaminated with wood splinters, and that Shade’s later processing and later incorporation into cereal created no new risk or introduce a distinct defect which caused the damage to General Mills. The court found that adopting Northbrook’s reasoning would nullify the coverage of the policy, which it would not do.

In Sears Roebuck and Company v. National Union Fire Ins. Co. of Pittsburgh, Pa., the New Jersey appellate court distinguished its decision in Pep Boys (which as noted had in turn distinguished its prior holding in American White Cross). There, Sears sought vendors coverage under policies issued to the suppliers of brake pads and calipers utilized by Sears in its auto servicing business after a claim by a customer that the car lost control because of the service performed by Sears. Citing its decision in Pep Boys, and distinguishing the facts presented there, the court stated that the critical element triggering coverage is causation in fact between the injury for which coverage is sought and the named insured’s product distributed by the vendor. According to the court, the vendor’s endorsement neither excluded claims which are the proximate cause of the vendor’s negligence, nor limited coverage to claims arising from a defect in the insured’s product. The trial court concluded that the product claims “may” have a

causal link to the accident, but the appellate court found no evidence that the accident was caused by the brake pads or calipers. Rather, the product liability claims were dismissed as unfounded at the time the case was settled, at which time only the claim against Sears remained. According to the court, to trigger vendor’s coverage, Sears had to establish that the negligence claims against it embodied actual products supplied or manufactured by the named insureds, which it could not do.

The same outcome was reached in Salerno v. Atlantic Mut. Ins. Co., where a school district sought vendor’s coverage under a policy issued to a schoolbook fair operator (Scholastic) when a visitor fell while attending the fair. The plaintiff alleged that the school had negligently arranged the fair in an area with a lowered floor and failed to warn of the change in floor level. She also claimed that her attention was distracted by the colorful books. The carrier for Scholastic claimed that the injuries arose from the school’s premises and not from the products of Scholastic. The court concluded that for coverage to apply, the books must have caused and produced the injury which did not occur here. Rather, the books at most facilitated the plaintiff’s injury by attracting her attention, but this was not the cause of her injury. According to the court, the drop in the floor and failure to warn was the cause. In support of its conclusion, the court cited Dominick’s v. American and Hartford v. Bennett. The court further noted that the school district’s reliance on Pep Boys and Sportmart actually supported its ruling because they stand for the proposition that for coverage to apply, the product must cause the injury. Finally, the court rejected the holding in Kmart v. Fireman’s Fund that the exception to the demonstration exclusion could afford coverage because there the Michigan court interpreted the exclusion without first determining whether there was coverage in the first instance.

The Seventh Circuit addressed the scope and application of the vendor’s endorsement under California law in an often cited opinion which focused on the rationale for the coverage. In Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co., the liability carrier (Hartford) for a distributor of a diet drug (Team Up) sought to establish coverage for Team Up under a vendor’s endorsement on a policy issued to the pill manufacturer (Wiedner) by St. Paul after a user of the diet medication suffered a stroke, allegedly attributable to the product. The facts revealed that Team Up was not just a distributor, but had supplied the predecessor to Wiedner with the formula for the drug, and had designed the contents of the product label and the product warnings. The injured plaintiff claimed among other things that the labels had failed to warn adequately of the risks created by the product. The suit was settled by Hartford on behalf of Team Up. The district court concluded that coverage was not afforded to Team Up and granted summary judgment in favor of St. Paul.

In addressing the question of coverage for Team Up under the St. Paul vendor’s endorsement, the court began with a lengthy discussion of the rationale for the vendor’s endorsement and the liability of a vendor for strict liability in tort for its sale of a product. In this context, the court noted that as a matter of common sense and fair dealing, the manufacturer’s product coverage should extend to the distributor, and that the insurance of the distributor should extend to the retailer. The court stated that this analysis presumes, however, that the vendor’s role in the distribution of the product is passive, since a manufacturer would be unlikely to insure the vendor against defects introduced by the vendor himself. In this regard, the court noted an express exception to the vendor’s coverage for claims of product liability based on labeling or relabeling of product by the vendor. Citing Mitchell v. Stop & Shop, Senco v. Continental, and SDR v. Federal, the court further stated that the majority of courts hold that the vendor’s endorsement is inapplicable if the vendor “may be” responsible for the defect out of which the product liability arises, by participating in the creation of the product or by altering or repairing it.

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52 280 F.3d 744 (7th Cir. 2002).
In this regard, the court stated that the majority view is not based upon the language of the vendor’s endorsement – which does not define “vendor” – or upon the ordinary meaning of the word – which does not distinguish between active and passive vendors. Instead, the majority view is based upon “the improbability of supposing that the manufacturer’s insurer intends to protect others against the risks that the others create.”53 The court also noted that the vendor’s endorsement is a “cheap add-on” to products liability policies “and their cheapness makes the most sense if they’re limited to the case in which the vendor, being completely passive in relation to the harm giving rise to liability... would be entitled to indemnity from the manufacturer in the event that...(the vendor) was sued and held liable.”54

The court said it previously commended cases which interpret contracts to make economic sense “since people usually don’t pay a price for a good or serve that is wildly in excess of its market value, or sell a good or service ... for a price hugely less than its market value, which would be the case if the cheap vendor’s endorsement bought the kind of coverage that Hartford contends it buys.” The court consequently concluded that Team Up was not a passive vendor, and because the underlying products suit arose in part from label content furnished by Team Up came within an exclusion in the vendor’s endorsement, the coverage of vendor’s endorsement did not apply.

An absence of vendor’s coverage was again found for the negligent vendor in McGill v. Cochran-Sysco Foods.55 There, the manufacturer of a tea dispenser (Jet Spray) sold the dispenser to Sysco, which in turn loaned it to a hospital in connection with a contract for the purchase of beverage supplies. At the point in time the dispenser was loaned to Sysco it was broken, and a Sysco employee showed an employee of the hospital how to make it functional by putting a wrench inside the top lid and pressing down on an interior receptacle to make the dispenser operable. A hospital employee suffered an electrical shock making the directed adjustment. The trial court found no fault on the part of Jet Spray and that the negligent acts of the Sysco employee were the cause of the plaintiff’s injuries.

Sysco sought vendor’s coverage under a policy issued to Jet Spray. Citing Hulsey v. Sears and Easton v. Chevron, the Louisiana appellate court concluded that the vendor’s endorsement was not applicable where the vendor is independently negligent. Rather, the coverage applies only where the vendor is found strictly liable for selling a defective product. The court also determined that if the coverage applied, it would be excluded by exclusion f. (servicing or repair operations).

In a case of first impression in Kansas, a federal court found vendor’s coverage available to Home Depot for its liability to a customer injured when the frame of a storm door display came loose from the store’s steel shelving beams as she looked at the display door.56 In Atlantic v. Home Depot, the carrier (Atlantic) for the door manufacturer (Larson) denied coverage, claiming that the display system which injured the customer was not sold “in the regular course” of Home Depot’s business as required for application of the vendor’s coverage in the first instance. Specifically, Atlantic contended that the display unit which injured the customer was not for sale, and was a “used” item.

The court determined that the display system causing the injury included a Larson product. Although the door was on display rather than for sale at the time, Home Depot’s inventory included identical doors distributed or sold in the regular course of Home Depot’s business. Noting that the term “arising out of” should be interpreted broadly, the court concluded that the customer’s injuries “arise out of” the product because they originated or flowed from the Larson storm door which was a central component in the display system. The court further noted that even if the display system and storm door were not then for

53 Id. at 747.
54 Id.
55 818 So.2d 301 (La. App. 2002).
sale in the regular course of Home Depot’s business, the customer suffered injury arising from a Larson product, which Home Depot distributed or sold in the regular course of its business. According to the court, Larson’s decision to pull one product specimen from its inventory for display purposes did not divest the door of its membership in the universe of Larson doors distributed or sold in the regular course of Home Depot’s business. The court cited the holding in Sportmart as persuasive, and rejected Atlantic’s reliance upon Hartford v. Bennett, Dominick’s v. American, Mitchell v. Stop & Shop, and Salerno v. Atlantic Mutual. Addressing Hartford v. Bennett in particular, the court noted that the present facts involved a full size door rather than a replica or model. The court furthermore distinguished the case on the basis that it did not address a situation where the actual product of the manufacturer is incorporated into the display.

In a similar holding, a Texas federal court found that vendor’s coverage extended to Home Depot for injuries to a customer from a falling rug display cabinet. In Home Depot v. Federal, the facts revealed that the particular rugs on display were samples and were not for sale. The carrier for the manufacturer (Federal) contended that the injury forming the basis of the litigation was not caused by a “product” of the insured within the meaning of the endorsement. Noting that the terms “distribution” and “sale” were undefined, the court concluded that the injuries arose out of the distribution and sale of the manufacturer’s products inasmuch as the display cabinet was placed in the store to entice customers to purchase the manufacturer’s rugs. The fact that the display rugs themselves were samples only and not actually for sale was irrelevant.

The court rejected application of another policy provision excluding from the definition of “product” “vending machine[s] or other property rented to or located for the use of others but not sold,” noting that the purpose of the rack was to promote the manufacturer’s products. The court also rejected claimed application of exclusion e. for failure to make inspections, adjustments or servicing based upon Home Depot’s failure to bolt the rug display unit, finding no evidence that Home Depot had ever agreed to make or undertake such actions in connection with the product as required for the exclusion to apply. Although the complaint alleged that Home Depot had failed to make inspections, tests or adjustments to ensure that the store was safe, the complaint also alleged that Home Depot failed to properly secure the display cabinet and failed to warn its customers about the dangers of the display cabinet. Because these allegations were unrelated to inspections or testing, the exclusion did not apply.

In another case involving injury from a product on display at a retailer’s store, an Illinois federal court similarly found vendor’s coverage to apply. In Ohio Cas. Ins. Co. v. Petsmart, Inc., a child was injured at a Petsmart store when a cat scratching pole manufactured by CAI and being sold by Petsmart fell from a store shelf. Petsmart tendered defense of the suit against it and CAI by the injured plaintiff to the carrier for CAI (Ohio Casualty) under a vendor’s endorsement on the policy issued to CAI. Ohio Casualty denied coverage, claiming that the liability did not arise out of the product of CAI and that no coverage was afforded for the negligence of Petsmart.

The court rejected the arguments, for which it found no support in the text of the vendor’s endorsement. According to the court, the injury merely had to “arise out of” the product, and the scratching pole had injured the plaintiff. There was no dispute that the scratching pole was sold in the regular course of Petsmart’s business. Respecting the decision in Sportmart, the court rejected the contention of Ohio Casualty that the holding there applied only to injuries arising from use of the product. Rather, the term “arising out of” must be strictly construed against the carrier. The court distinguished the holdings in Dominick’s and Salerno, noting that those cases did not involve injuries caused by the product of the manufacturer. Further distinguishing SDR v. Federal and American White Cross, the court stated that

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these cases involved vendor acts expressly excluded from coverage, whereas no exclusion was at issue in this case.

In still another product display case, a Massachusetts court found vendor’s coverage applicable to a retailer whose negligence in setting up a display of the manufacturer’s product was the sole cause of injuries to a customer. In *Makrigiannis v. Nintendo of America, Inc.*, a retailer of Nintendo products (Lechmeres) received a large interactive Game Boy display unit which was assembled in the store. A child was injured when the display collapsed. Lechmere sought vendor’s coverage under a policy issued to Nintendo by Sumitomo Marine. At trial, Nintendo was found to be without liability, while Lechmere was found 100 percent negligent, with its actions the proximate cause of injury. The facts revealed that the game unit on display was not itself for sale and was for promotional purposes only.

The court found this irrelevant, noting that it was part of the operations and activities involved in promoting and selling Nintendo’s goods and services. Noting that the policy did not define “distribution” or “sale,” the court found that “distribution” included marketing and merchandising, and that “sale” included the “opportunity of selling or being sold.” The product on display was intended to stimulate sale of Nintendo’s Game Boy products. The court found inapplicable exclusion f. for “demonstration” operations, noting the exception to the exclusion for demonstration operations performed at the vendor’s premises in connection with the sale of the product.

The *Makrigiannis* court distinguished the holding in *Mitchell v. Stop & Shop*, noting that there was no connection between the products of the manufacturer (bakery goods) and the plaintiff's injuries. It distinguished *Dominick’s* on the same basis. The court cited *Sportmart* and *Pep Boys* for the contention that coverage exists where there is a nexus between the named insured's product and the injury. The court rejected the contention that coverage exists only in the case of a product defect, and the contention that vendor’s coverage is excluded in the case of negligence on the part of the vendor. The language of the endorsement supported neither position.

Injury from a display was also at issue in *Fireman’s Fund Ins. Co. v. Twin City Fire Ins.* There, a child was killed by a falling shelving unit manufactured by Trendline and on display at a J.C. Penney outlet store. Vendor’s coverage was sought by J.C. Penney under vendor’s endorsements in various policies issued to Trendlines. According to the court, the vendor’s endorsements covered injury “arising out of” Trendlines’ products sold by J.C. Penney, and “arising out of” is a broad, general and comprehensive term. It was undisputed that the injuries arose out of the Trendlines shelving unit, and the vendor’s coverage consequently applied. The court rejected the carriers’ contentions that vendors coverage does not apply to the active negligence of the vendor or its employees, noting that (unidentified) cases not containing the “arising out of” language of the form endorsement were inapposite. The court cited *Makrigiannis v. Nintendo, Kmart v. Fireman’s Fund, Pep Boys, and Sportmart* as sound decision in line with Florida law.

Vendor’s coverage was found absent in *Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* There, a vendor of sideloaders (Arbor) sold two devices to Ryerson & Son for installation in its facility. While awaiting the ability to deliver the product to Ryerson, Arbor found a sideloader for Ryerson’s use as a rental, and agreed to service both the rented sideloader and an existing sideloader in the possession of Ryerson. Arbor technicians were involved in the assembly of the rented sideloader at Ryerson’s facility, and at this time it was determined that the device did not fit certain guide rollers within the rails at Ryerson’s facility. The device was installed anyway. A Ryerson employee was injured while

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60 200 Fed. Appx. 953 (11th Cir. 2006).
operating the sideloader and sought recovery for his injuries. It was stipulated that Arbor’s negligence was the cause of the injury and not any defect in Raymond’s product.

Raymond sought to establish vendor’s coverage for Arbor under a policy issued to it by National Union, based upon a vendor’s endorsement contained on the policy. The trial court determined that the vendor’s coverage to Arbor applied only to injury arising out of a product defect. The New Jersey appellate division reversed, concluding that the coverage extended to claims arising out of the vendor’s negligence. The New York Court of Appeals disagreed, however, concluding that the language of the vendor’s endorsement extending coverage to bodily injury “arising out of [Raymond’s products]” means injury arising out of defects in the products, rather than arising out of the vendor’s negligence. Turning to the language of the vendor’s endorsement referencing products “which are distributed, sold, repaired, serviced, demonstrated, installed or rented to others”, the court found that this language describes Arbor’s activities respecting Raymond’s products, and was not an effort to indemnify Arbor for its negligent performance of those activities. Citing Hartford v. St. Paul, the court found that the vendor’s coverage was not applicable to Arbor.

A Kentucky federal court had the first occasion to address the vendor’s endorsement under Kentucky law in Trek Bicycle Corp. v. Mitsui Sumitomo Ins. Co.62 The case arose out of Trek’s sale of a bicycle containing brake components supplied by two entities – Diacomp and Diateck, which entities were insured by MSI under a policy containing a vendor’s endorsement. A user of the Trek bicycle was injured and sued Trek, claiming that the injuries occurred because of the brakes. Trek sought coverage from MSI under the vendor’s endorsement.

MSI contended that the coverage of the vendor’s endorsement applies only where the injury is caused by the product of MSI’s insured, and not where the injury is caused by the vendor. The court noted that such a rule had been adopted by several jurisdictions, and expressed the view that Kentucky courts would do the same. The court noted the decisions in Sears v. National Union, SDR v. Federal and Hartford v. St. Paul, in which the courts stated that a nexus between the product and occurrence of the accident was required to trigger vendor’s endorsement coverage, and determined that Kentucky’s view of product liability law was consistent with these holdings. Specifically, the court noted that the suppliers of the brake components could not have been liable under a theory of strict liability absent evidence that the brake levers were themselves defective, and these manufacturers were dismissed from the case. The court concluded that the vendor’s coverage extended to injuries caused by defects in the brakes, but that the brake levers were not defective as designed or manufactured. The court noted that the bike may have been defective because it utilized the type of brake involved, but there was no defect in the brakes themselves, and consequently no vendor’s coverage.

Coverage was found to exist in Alpha Holdings, Inc. v. Travelers Indem. Co.63 There, Alpha assembled inlet hoses for washing machines from hosing purchased from Dayco. Alpha supplied the finished hoses to Whirlpool for its use in washing machines. The facts revealed that Alpha made no change in the chemical composition of the hose obtained from Dayco. It made physical changes however - cutting the hoses to lengths specified by Whirlpool, attached coupling assemblies, and stamping the hoses with the Whirlpool trademark. Claims were made for property damage from defective Whirlpool washing machine hoses. Specifically, it was contended that Dayco incorrectly used rayon in the manufacturing of the hoses. In one underlying matter, a jury found no negligence on the part of Alpha in the way the hosing was cut and the couplings attached. Alpha sought vendor's coverage under policies issued to Dayco’s parent company and the carrier’s relied upon exclusions for physical change, repackaging, and labeling/relabeling/use of product as part of any other thing to deny coverage.

The court noted the decision of the Seventh Circuit in *Hartford v. St. Paul* (applying California law), as well as the California decisions *Oliver v. United*, *SDR v. Federal*, and *Shade Foods*. Citing *Shade Foods*, the court rejected the claim that the physical change and use in another thing exclusions applied because there was no evidence the change or subsequent use caused the injury to the third party claimant. The court determined that there must be a nexus or causal connection between the vendor's action and the claimant's injuries. There was no evidence of a causal act of cutting, crimping and stamping caused the hose leaks.

The court rejected a claim by one carrier that *Shade Foods* was incorrectly decided because there is no requirement within the language of the form vendor’s endorsement for the injuries to “arise out of” the conduct identified in the exclusions. According to the court, the nexus requirement of the insuring agreement extended to the application of the exclusions. The court cited *Murray v. Continental* in support of this determination.

But coverage was absent in *Brookshire Bros. Holding, Inc. v. Total Containment, Inc.* where a gas station owner claimed that flexible pipes utilized in an underground storage tank system leaked, and sought recovery from the pipe manufacturer, TCI. A third party claim was asserted against the designer and installer of the tank and pipe system (Pump Masters). Pump Masters sought coverage from TCI’s insurer pursuant to a vendor’s endorsement on the policy, claiming that some of the design functions it performed were part of its distribution and sale of TCI products as contemplated by the vendor’s endorsement. The carrier contended that Pump Masters was not a distributor or retailer but instead an end-user of the hose since it incorporated the hose into Pump Master’s underground storage tank system. The carrier also argued that the endorsement was inapplicable to Pump Master’s own negligence. Citing *Hulsey v. Sears*, and *Easton v. Chevron*, the court concluded that vendor’s coverage arises where the vendor is found strictly liable for selling a defective product, and does not apply where the vendor is found independently negligent. On this basis no coverage existed for the design claims. As for claims regarding installation and maintenance against Pump Master, the court found applicable an apparent exclusion in the policy for the installation, construction and repair of the gasoline and delivery system.

The purchaser of an amusement park water ride was found to be outside the coverage of a vendor’s endorsement in *Six Flags, Inc. v. Steadfast Ins. Co.* In that case, Six Flags was sued for a near-drowning incident at one of the parks it operated arising out of a ride purchased from a manufacturer (Hopkins). Six Flags sought coverage under a vendor’s endorsement on a policy issued by Steadfast to the manufacturer. Although “distribution” and “sale” were not defined in the policy, the court concluded that Six Flags had done neither. Although both parties relied upon the decision in *Makigiannis v. Nintendo*, the court found the case inapplicable inasmuch as the alleged insured there was a retail store in the business of selling Nintendo products. In contrast, Six Flags was not a seller of the product manufactured by Hopkins.

The presence of vendor’s coverage was also rejected in *General Security Indem. Co. v. Great Northern Ins. Co.* There, Syncro manufactured an electronic brake controller which it sold to Hayes Lemmerz, which in turn sold it to an independent distributor (Henderson Wheel and Supply), which in turn sold the device to Maple Grove RV, a recreational vehicle retail parts and service company. Maple Grove installed the brake controller in a truck, which thereafter raced out of control, killing on passenger and injuring three others. Plaintiffs sued, and Maple Grove tendered the suit to Syncro’s insurer, Great Northern. The question before the court was the availability of vendor’s coverage to Maple Grove under the policy issued by Great Northern to Syncro. Maple Grove claimed it was a vendor entitled to coverage.

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and that there was ambiguity as to the application of the exclusion for installation because such installation could also constitute excepted “adjustment and testing” under the exclusion for failure to make inspections.

The Idaho federal court began its analysis with acknowledgement of two lines of cases on the issue: one finding coverage afforded only to the extent the vendor is held strictly liable and without fault of its own; and the second finding coverage afforded so long as the injury claims arise out of the distribution or sale of the products in the vendor’s business. The court concluded that the vendor’s coverage was not applicable since an insurance company insuring a manufacturer like Syncro would not intend to insure a vendor for injuries caused by the vendor’s own negligence. The court furthermore determined that it would not be reasonable expectation for an insurer to insure claims based on negligent installation, adjustment and testing performed by the vendor.

In Senior Home Health Care, Inc. v. Sunrise Medical HHG, Inc., the seller of home oxygen systems (Senior Home) and the manufacturer of an oxygen tank (Sunrise Medical) were sued after the explosion of an oxygen tank, resulting in a fire. The underlying plaintiff alleged bodily injury caused by Senior Home's failure to provide adequate warning and/or instructions in connection with Sunrise Home’s oxygen equipment. Senior Home sought vendor’s coverage under a policy issued to Sunrise Medical. The Michigan federal court concluded that the language of the vendor's endorsement affords coverage for bodily injury arising out of Sunrise Medical's products distributed in the course of Senior Home’s business, expressly including the providing or failure to provide warnings or instructions.

In a case involving non-standard vendor’s wording, an Illinois court concluded that the vendor’s coverage applied if the named insured’s product caused the injury, regardless of whether the product was defective. In St. Paul Fire and Marine Ins. Co. v. Antel Corp., Unocal modified a control system from manual to computer operation. A container referred to as “vessel V-211” was used to combine chemicals used in the manufacture of paint. Unocal bought a temperature control device from Kaye Industries through a distributor, Antel. The Kaye product was attached to vessel V-211 to control the temperature inside. Temperature settings were made automatically and electronically according to the applicable batch recipe. A substance was pumped into vessel V-211 and the applicable batch recipe did not call for the heating of the substance. The vessel was nonetheless heated because the system had been programmed to do so. The substance vaporized, ignited and exploded, injuring two Unocal employees. The evidence revealed that the Kaye controller performed as it was designed to perform.

The injured employees sued Antel and Kaye. Kaye was granted summary judgment based upon the absence of any evidence of a product defect. St. Paul insured Kaye under a policy containing a vendor’s endorsement. It defended both Kaye and Antel in the suit until Kaye was granted summary judgment. In a coverage action between St. Paul and Antel regarding vendor’s coverage under the St. Paul policy issued to Kaye, St. Paul contended that Antel was not a vendor; that the injuries did not result from the sale of the Kaye controller; and that Antel was not afforded coverage pursuant to an exclusion for injury “resulting from a change made in conditions of any of your [Kaye’s] products,” and an exclusion for relabeling. It was alleged that Antel recommended the Kaye controller to Unocal and that Antel received a commission from the sale. Citing Sportmart, the trial court determined that the vendor’s endorsement was limited to injuries caused by the product itself, and that there was no causal link between the sale or distribution of the Kaye controls by Antel and the injuries sustained by the two Unocal employees. The trial court also found applicable an exclusion for any product of Kaye used as part of anything else.

68 See further discussion of a later, related case at fn. 76.
69 899 N.E.wd 1167 (Ill. App. 2008).
The Illinois appellate court noted that the vendor’s endorsement applied to claims “resulting from the sale or distribution” of a Kaye product, and that coverage was not dependent upon a product defect. Citing Sportmart, the court stated that “resulting from” is synonymous with “arising out of,” “connected with,” “originating from,” “growing out of,” and “flowing from,” all of which are broad and vague. Because the injuries would not have occurred but for the Kaye controller, the court found the underlying action to be potentially within the coverage afforded by St. Paul under the vendor’s endorsement. Rejecting St. Paul’s invocation of an exclusion for relabeling on the basis of the court’s earlier decision in Travelers v. Freightliner, the court stated that the exclusion applied there because Freightliner used the seats in trucks it manufactured and sold as finished products. Antel in contrast is not a manufacturer, but only a seller of goods, who did not incorporate the Kaye controller into another device and sell it to Unocal. Antel sold the product to Unocal which then utilized the product as it was intended. The court cited with approval Murray v. Continental, to hold that there was no purpose in providing full coverage for a product whose only use is as a part of another product, and then removing all coverage when the product is used in that manner. The court rejected the claim by St. Paul that Antel was a “manufacturer’s representative” rather than a distributor and therefore did not “sell” the controller placing it outside the reach of the vendor's endorsement. The court found the argument “incredible at best and disingenuous at worst.” At the least, according to the court, the definition of “seller” was ambiguous, and properly construed against the carrier.

Coverage was similarly found in Dometic Corporation v. Liberty Mutual Ins. Co. There, the manufacturer of recreational vehicles sought vendor’s coverage from a policy issued to the supplier of refrigerators (Dometic) installed by the manufacturer in its RV products, after being sued for property damage by RV owners due to a defect in the refrigerators. Liberty insured Dometic under a policy containing a vendor's endorsement, and the manufacturer sought coverage for the claims against it. Liberty disputed that the manufacturer was not a vendor because it was an original equipment manufacturer incorporating parts or components of others into a unique product of its own.

The court rejected the contention, citing evidence that Liberty was aware of the product lines manufactured by Dometic and that RV vendors were part of the vendor force for which the endorsement was sought. Liberty claimed coverage was excluded inasmuch as the refrigerators became “part of another thing.” Noting Sears v. Reliance, the court repeated the determination of other courts that the “arising out of” language requires that the changes in the product cause the claimed injury. The court cited Murray v. Continental and Mattocks v. Daylin to the same effect, but acknowledged that policies issued subsequent to these decisions (like the policy at issue in case before the court) were modified, and the “arising out of” language previously applicable to the exclusions, removed. The court noted a holding to this effect in Travelers v. Freightliner, but also referenced the decision in Shade Foods, where, without discussing the changes in the form wording, the court applied Sears v. Reliance to a policy omitting the “arising out of” language. The court noted that “there is no unanimity with regard to the interpretation of the newer endorsement language,” and also cited the decision of the Seventh Circuit in Hartford v. St. Paul.

On the basis of this discussion, the court stated that it knew too little to grant summary judgment to either party. Among the future considerations relevant to the court were the premium cost for the vendor’s coverage, how much of Dometic’s business was done through RV manufacturers and how much involves products sold “off the rack” since the vendor’s coverage could prove illusory “if 98 percent of Dometic’s

70 Id. at 1177.
sales are through RV vendors . . . that merely install the unchanged products on a boat or vehicle ...”

The court continued:

While the RV vendors roles are not totally passive, they apparently rarely do more than what might be done to install a traditional refrigerator in a home, and that analogy has a certain appeal under the circumstances. Is this a circumstances more comparable to a seat in a tractor trailer cab, as in the Freightliner case, or does it jibe more with a traditional refrigerator, which no one has suggested would be considered a component part of a house?73

The Fifth Circuit found vendor’s coverage in Weaver v. CCA Industries, Inc.74 despite the evidence of negligence by the vendor. In that case, the plaintiff took a diet aid/appetite suppressant containing a certain drug, and allegedly suffered a stroke as a result. The pill was manufactured by Phoenix Laboratories utilizing a formula provided by CCA. Phoenix combined the diet pill ingredients and shipped the product in bulk to CCA to be packaged and labeled. CCA marketed the drug for sale to the public. The plaintiff sought damages from CCA only and not Phoenix. CCA sought vendor’s coverage under a policy issued by NY Marine to Phoenix, and the carrier denied coverage. The trial court concluded that coverage was absent because of CCA’s own independent negligence, stating that under Louisiana law, vendor’s coverage extends only to claims involving strict product liability. Alternatively, the trial court applied several exclusions in the endorsement.

On appeal, the Fifth Circuit determined that the vendor’s endorsement applied because a claim for strict liability under state law was in fact asserted based upon the allegation that the product was unreasonably dangerous in construction or composition. Specifically, the court found that CCA could be liable for labeling the product and selling it on its own, or could be strictly liable for the actions of Phoenix. The court rejected the carrier’s reliance upon the labeling exclusion because there was no nexus shown between CCA’s labeling or other alteration of the product and the plaintiff’s injury. The court cited Maddocks v. Daylin, and noted that the “arising out of” language at issue limited the exclusion, and cited Sears v. Reliance in support of the conclusion that the vendor changes must cause the plaintiff’s injuries to invoke the exclusion. The court acknowledged that the plaintiff’s claim was arguably predicated on a failure to warn theory that had a nexus to CCA’s relabeling of the product. However, as in Maddocks v. Daylin, the plaintiff asserted a number of other theories of recovery that have no nexus to the relabeling, and the court consequently determined that the trial court was wrong to conclude that the exclusion defeats the claim of CCA. Finally, the court rejected the claimed application of the exclusion for product used as an ingredient in another thing, concluding that it was inconsistent with common sense.

There is a logical, common sense distinction between the formula, a list of ingredients, and the ingredients themselves... [T]he formula or recipe for a product is different from the ingredients used to create the product. No one would say that a recipe for lemon pie is one of the ingredients the baker uses to make the pie.75

A Michigan federal court found vendors coverage in Senior Home Health Care, Inc. v. Sunrise Medical HHG, Inc.,76 where the claimants were injured by a fire which occurred at an apartment building. The vendor (Senior Home) had an oxygen service contract with an apartment resident, pursuant to which the vendor supplied oxygen equipment manufactured by Sunrise Medical. The resident accidently started a

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72 Id. at *9.
73 Id.
74 529 F.3d 335 (5th Cir. 2008).
75 Id. at 335.
fire in his apartment, which was found to have either originated with the oxygen equipment or to have been accelerated by the presence of the equipment. The vendor was sued for failure to warn, and sought coverage under the manufacturer’s policy, which included a vendor’s endorsement with respect to damages “arising out of ‘your products’ shown in the Schedule which are distributed or sold in the regular course of the vendor’s business.”

On the claimed duty to indemnify, the insurer argued that the “your products” referred only to the manufacturer’s products, and that the endorsement could not be read to include allegations that the vendor failed to adequately warn or provide instructions regarding one of the manufacturer’s products. The court summarily rejected the argument, since the term “your” included the named insured and any other person qualifying as “an insured.” The court found that the language of the endorsement did not preclude coverage for lawsuits alleging the vendor’s failure to warn or instruct in the use of the manufacturer’s product. The insurer also argued a lack of evidence to tie the fire/injuries to the manufacturer’s product. Applying Michigan law, the court disagreed. “Arising out of” means “originating from,” “having its origin in,” “growing out of,” “flowing from” or “incident to or having a connection with.” While the “mere presence” of the oxygen equipment, without more, may not have been an adequate nexus, the court found evidence showing more than mere presence, and that issues of fact precluded summary judgment on the issue.

In a decision extensively discussing the differing New Jersey appellate court decision in American White Cross and Pep Boys, a Minnesota federal court stated that the language of the vendor’s endorsement controlled, rather than the perceived basis for such coverage abstractly. In Durabla v. Continental, Durabla purchased asbestos sheet packing from Goodyear for processing into gaskets, and was ultimately subject to asbestos litigation claims. Coverage for Durabla under numerous primary policies issued to Goodyear by Continental, Aetna and Travelers with varying vendor’s endorsements were at issue, as were policies sitting excess of the primary coverage. Among the older policies were vendor’s endorsements which like in American White Cross extended vendor’s coverage “with respect to” the distribution or sale of the named insured’s goods or products, while other policies applied to injury “arising out of” the insured’s products distributed or sold in the course of the vendor’s business. The exclusions in certain policies were also applicable to injury “arising out of” the identified conduct enumerated in the vendor’s endorsement, while the exclusions in other policies did not contain the “arising out of” language and stated that the coverage for the vendor “does not apply to” the enumerated conduct. Like the policies in American Indemnity and Sears v. Travelers, certain of the older policies contained exclusions for liability arising from the negligence of the vendor.

In analyzing the potential coverage afforded to Durabla, the Minnesota court first addressed the insurer’s contention – citing American White Cross – that the court “should view the policy language through the narrow aperture of a social policy that they favor”:

However appealing such a view of the social order might be, particularly to insurers who have issued vendor endorsements, we have no occasion here to legislate broad social policy, as our function is to ascertain the meaning of the operative policy provisions based upon the language that the contracting parties employed. . . Indeed, the American White Court subsequently expressed misgivings about the breadth of its earlier dictum . . .

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78 Id. at *7.
79 Id.
Citing *Pep Boys*, the court stated that its role was instead to apply the language of the vendor’s endorsement at issue to the specific facts of the case “and not to superimpose some generic meaning to these provisions, based solely on their characterization as vendor endorsements.”

Addressing first the insuring agreement of various of the older primary policies, the court said that the policies do not define “goods” or “products,” and that unqualified, the terms are “expansively encompassing.” The court concluded, however, that Continental and Aetna wrote the policies, and that it had no hesitation in concluding that Durabla was within the insuring agreement of the older policies. Turning to exclusions, the court determined that an exclusion similar to that contained in the ISO form for products used as an ingredient by the vendor of any other thing or substance potentially applied based upon evidence that Durabla had provided Goodyear with a “secret formula” for the asbestos sold to Durabla. On this the court found a fact question.

Turning to exclusions in the Aetna and Travelers’ policies which precluded coverage for injury “arising out of” the enumerated conduct, the court conclude that the exclusions were intended by the contracting parties, to protect vendors of Goodyear’s products, who merely passed those goods on, in the stream of commerce, without change, express warranty (other than Goodyear’s), or relabeling or re-trademarking, and without any involvement in the original constituency of the product, by way of providing any component of the product, including the formula for its fabrication. Although we reach this conclusion based upon the policy language in question, our interpretation of those provisions is consistent with common sense.

The court concluded that it would not read the policy as creating an obligation to pay for the alleged “bad acts” of Durabla which are wholly independent of any asserted “bad acts” of Goodyear, and Goodyear would have to share its policy limits with Durabla. Consequently, while agreeing that the policy wording controlled the availability of coverage under the vendor’s endorsements, the court implicitly determined that coverage would not be afforded to Durabla if as a matter of fact it was established that Durabla supplied the formula for the product purchased from Goodyear.

In *United Rentals, Inc. v. Genie Indus., Inc.*, a Colorado federal court concluded that the rental of a product was not the sale of a product, and therefore not within the coverage of a vendor’s endorsement. There, an employee of Hayden Construction was injured while operating a boom lift rented by Hayden from United Rentals. The boom lift was manufactured by Genie, and sold to United’s predecessor. Arrowood insured Genie under a policy containing a vendor’s endorsement. United sought vendor’s coverage under the Arrowood policy, claiming that it was a distributor of Genie equipment. The court found coverage absent, noting that United was the owner of the boom lift and not the seller of it. The rental of the lift to Hayden was not sale or distribution of the Genie product. The court furthermore found that an exclusion for any act or omission of the vendor applied because the injured Hayden employee alleged that United had caused the lift be defective by changes, improper maintenance and other negligent acts.

*Shearer v. Gemini Ins. Co.*, involved application of the vendor’s endorsement to claims for allegedly negligent construction, with the court finding coverage to exist. There, the installer of a stucco product

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80 Id.
81 Id. at *8.
82 Id. at 12.
84 240 P.3d 67 (2010).
(Fred Shearer & Sons) on a construction project sought vendor’s coverage under a policy issued by Gemini to the distributor of the product, TransMineral USA, after Fred Shearer and TransMineral were brought into a construction defect suit by a general contractor (Walsh). Gemini denied coverage to Fred Shearer, relying upon a physical change exclusion and an exclusion for use of product as part or ingredient of any other thing. Specifically, Gemini contended that by mixing TransMineral’s products with water and then installing them on homes, Shearer changed the physical composition of the stucco products and fabricated on-site a product that was separate and distinct from its constituent parts. Citing Weaver v. CCA, Hartford v. St. Paul, Dometic v. Liberty, Shade Foods, and Travelers v. Freightliner, the court stated that there must be some nexus between the vendor’s conduct and the damages alleged. The court found ambiguity, however, in terms of whether it was significant under the exclusion how the damage arose. The court said there was more than one plausible reading of each exclusion – specifically what the “change” or relabeling applies to. The exclusions were ambiguous as to whether coverage was preserved for defects independent of any change, or injury arising out of something other than the labeling, relabeling, or use of a product as part of something else.

Addressing the absence of any “arising out of” language in the exclusions – as distinguished from the insuring agreement, which contained this language – the court said a reasonable purchaser of insurance might well expect the exclusion in the policy to similarly relate to how bodily injury or property damage has arisen. The absence of “arising out of” language in the exclusions supported Gemini’s interpretation of the policy exclusions, but also made the language ambiguous. The court concluded that the exclusions should be read as requiring a nexus between the vendor’s conduct and the alleged injury or damage and found that a duty to defend existed.

Vendors coverage was found absent in Allstate Ins. Co. v Liberty Surplus Ins. Co., where a ladder manufactured by Wing Enterprises and being sold by Advanced Ladders collapsed while being tested by a potential purchaser, causing injury. Advanced sought vendor’s coverage under a policy issued to Wing by Liberty. The evidence was that the collapse was the result of negligence on the part of Advanced or its employee. The court acknowledged that the customer would not have been injured but for the ladder, but concluded that this was not the test for coverage under the vendor’s endorsement. According to the court, the ladder was merely the conveyance through which the vendor’s negligence caused injury. As a result, no vendor’s coverage was afforded.