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**THE PITFALLS AND DANGERS OF
THE ADDITIONAL INSURED
VENDOR ENDORSEMENT FORM**

I. INTRODUCTION

Why should a company be concerned about obtaining the correct additional insured vendor endorsement form (hereinafter “the Form”) from the named insured? By analyzing the Form, this Article will illustrate that, depending on the facts of a given dispute, an additional insured endorsement form may exclude insurance coverage to a particular company from a named insured insurance policy. This exclusion from the named insured insurance policy may create a real financial impact on a company, because an insurance policy may cover the risks assumed by the named insured and may include the duty to defend in the case of liability of the named insured to the additional insured.¹ In addition, without insurance coverage from the named insured, a company will have to look to the named insured’s assets to pay any liability amount that may arise from a breach of contract. If the named insured lacks any assets and is in essence judgment proof, the fact that a company is not provided insurance coverage under the named insured insurance policy could cause that company to be in a position to not be able to recover for a loss from a third party.

¹ DONALD S. MALECKI, ET AL., THE ADDITIONAL INSURED BOOK 56-57 (5th ed. 2004).

The Insurance Services Office, Inc. (“ISO”)² has created a Form.³ The Form, created by the ISO, is generally adopted and used by the insurance industry in the United States.⁴ Typically an insurance policy provider will use the present version of the Form, but on occasion they will use an older version. The insurance policy provider may also modify the language found on the Form, but this is not common. It has been the author’s experience that insurance policy providers usually use the Form as drafted by the ISO.

This article will limit its discussion to the legal issues created by the Form. Part II of this Article introduces the Form. Part III will discuss the commercial purpose behind the Form. Part IV highlights rational behind why various parties in the chain of commerce utilize the Form. Part V establishes the split in judicial authority as to whether a named additional insured would be excluded from coverage. Part VI analyzes the majority view to this judicial split, while part VII analyzes the minority view. While the scope of this article is limited to the Form, this article highlights the importance of knowledge regarding the facts of your particular situation and the current state of the law to determine if an additional insured will be afforded insurance coverage from the insurance policy of the named insured. Only after a vendor knows the facts of their particular situation coupled with the applicable law can the vendor assess whether or not the Form will provide the vendor with insurance coverage from the named insured insurance policy.

II. THE VENDOR ENDORSEMENT FORM

One of the ways a manufacturer can induce retailers, distributors, wholesalers and other (vendors) to sell its products is to provide the vendor with the Form, providing them with “additional insured status under

² *Pardee Constr. Co. v. Ins. Co. of the West*, 92 Cal.Rptr.2d 443, 456 n. 15 (Cal. Ct. App. 2000)

ISO is a nonprofit trade association that provides rating, statistical, and actuarial policy forms and related drafting services to approximately 3,000 nationwide property or casualty insurers. Policy forms developed by ISO are approved by its constituent insurance carriers and then submitted to state agencies for review. Most carriers use the basic ISO forms, at least as the starting point for their general liability policies. *Id.* (citing *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 891 n. 13 (Cal. 1995))

³ *See generally* The Vendor Endorsement Form is one of the standard additional insured endorsement forms created by the ISO, ISO Properties Inc., *Additional Insured – Vendors*, Commercial Gen. Liab. 20 15 07 04 (2004) (provided as an example of a Vendor Endorsement Form).

⁴ *Pardee*, 92 Cal.Rptr.2d. at 455.

the product liability coverage of the manufacturer's commercial general liability insurance" policy.⁵ "A similar situation arises when distributors or wholesalers seek to establish a system of independent retailers dedicated to handling their products."⁶ Like the situation with the "manufacturer, the distributor [or wholesaler] may find the Form helpful in inducing retailers to carry its product line."⁷ "This additional insured status is usually provided by attaching the Form to the manufacturer's, distributor's or wholesaler's" commercial general liability insurance policy.⁸ The Form "provides the vendor with product liability coverage with respect to claims that arise from the named insured manufacturer's, distributor's or [wholesaler's] products."⁹ The Form is widely used in agricultural and non-agricultural transactions when an insurance agent and/or broker determine that there is a vendor/vendee relationship. Vendor has been defined as "...one that vends: SELLER,"¹⁰ "someone who promotes or exchanges good or services for money"¹¹ and any person or company that sells goods or services to someone else in the economic production chain. Parts manufacturers are vendors of parts to other manufacturers that assemble the parts into something sold to wholesalers or retailers. Retailers are vendors of products to consumers.¹² These definitions indicate that the definition of who is a vendor is quite broad and would indicate broad use of the Form in the agricultural and non-agricultural space. This is the only ISO form that specifically covers the situation that involves a vendor, so most, if not all, insurance companies use this form in situations that involve a vendor.¹³ There are situations in which an insurance company will provide a variation of the Form, but this would be the exception and not the rule.

The current ISO Form for a General Liability Policy states that:

A. Section II – Who is an Insured is amended to include as an additional insured any person(s) or organization(s) (referred to below as vendor) shown in the Schedule, but only with respect

⁵ MALECKI, ET AL., *supra* note 1, at 223.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Vendor*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/vendor.html> (last visited Feb. 11, 2012).

¹¹ *Seller*, THEFREEDICTIONARY.COM, <http://www.thefreedictionary.com/seller.html> (last visited Feb. 11, 2012).

¹² *See Retailer*, THEFREEDICTIONARY.COM, <http://www.thefreedictionary.com/retailer.html> (last visited Feb. 11, 2012).

¹³ *See generally* MALECKI, ET AL., *supra* note 1, at 395-430.

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, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the 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; or
 - h. 'Bodily injury' or 'property damage' arising out of the sole negligence of the vendor for its own acts or 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 Sub-paragraphs **d.** or **f.**; or
 - (2) Such inspections, adjustments, tests or service-ing as the vendor has agreed to make or nor-mally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.
2. This insurance does not apply to any insured person or or-ganization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompany-ing or containing such products.”¹⁴

The Form “requires that the vendor be specifically named, and that the named insured’s products handled by the vendor also be listed” on the Form.¹⁵ The additional insured status is provided to the vendor by the named insured attaching the Form to the named insured insurance pol-icy.¹⁶

In general, the Form will provide the vendor with insurance coverage when:

- “(1) bodily injury or property damage arises out of the named insured’s products that are listed on the Form;
- (2) the products being distributed or sold in the vendor’s regu-lar course of business; and
- (3) none of the Form exclusions applies.”¹⁷

For the Form to provide the vendor with insurance coverage, the bod-ily injury or property damages must “arise from” the named insured’s products.¹⁸ The phrase “arising out of,” has been “consistently held by the courts to include a broad range of degrees of causality.”¹⁹ “California courts have consistently given a broad interpretation to the terms ‘arising out of’ or ‘arising from’ in various kinds of insurance provisions.”²⁰ The language “arising out of” or “arising from” does not import any particu-lar standard of causation or theory of liability into an insurance policy,”

¹⁴ ISO Properties Inc., *Additional Insured – Vendors*, Commercial Gen. Liab. 20 15 07 04 (2004).

¹⁵ *Id.* at 227.

¹⁶ *Id.*

¹⁷ *Id.* at 227 – 37.

¹⁸ *Id.*

¹⁹ *Id.* at 224.

²⁰ *Acceptance Ins. Co. v. Syufy Enter.*, 81 Cal.Rptr.2d 557, 561 (Cal. Ct. App. 1999).

but rather “broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.”²¹ The *Acceptance* court further states that their holding is consistent with the reasoning adopted in cases from other jurisdictions²² concerning the effect of the additional insured provisions governing liability “arising out of ‘your work’” or “arising out of operations performed” by the named insured.²³

III. PURPOSE OF THE VENDOR ENDORSEMENT FORM

One of the purposes of the Form is to protect the vendor against the expense of being dragged into a lawsuit as an additional defendant for a defect in a product that it distributes.²⁴ The Form is intended to protect

²¹ *Id.*

²² *Id.*:

Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity and Guaranty Co., *supra*, 143 F.3d at pp. 9-10, applying Massachusetts law [“arising out of” denotes “intermediate causation standard” between “but for” and proximate cause; endorsement covered additional insured for its own negligence]; Township of Springfield v. Ersek (Pa. Cmwlth. 1995) 660 A.2d 672, 676-677 [“arising out of” means causally connected with, not proximately caused by; additional insured covered for its own negligence]; Consolidated Edison Co. of New York, Inc. v. Hartford Ins. Co. (App.Div. 1994) 203 A.D.2d 83, 610 N.Y.S.2d 219, 221 [“policy language focuses not upon the precise cause of the accident ... but upon the general nature of the operation in the course of which the injury was sustained;” negligence of additional insured “is immaterial”]; McIntosh v. Scottsdale Ins. Co., *supra*, 992 F.2d at pp. 254-255, applying Kansas law [coverage is not limited to cases where additional insured is vicariously liable for named insured’s negligence; remote “but for causation” is insufficient, but standard is more liberal than proximate cause]; Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Cos. (Ill.App.1986) 150 Ill.App.3d 472, 103 Ill. Dec. 495, 501 N.E.2d 812, 814-815 [“but for causation” is sufficient; coverage does not depend on fault of named insured]. See also Florida Power Co. & Light v. Penn America Ins. Co., *supra*, 654 So.2d at p. 279, approved in Container Corp. of America v. Maryland Cas. Co. (Fla. 1998) 707 So.2d 733, 737 [coverage “only with respect to operations by or on behalf of the Named Insured” did not require fault on part of named insured before additional insured would be included]; Lim v. Atlas-Gem Erectors Co., Inc. (App.Div.1996) 225 A.D.2d 304, 638 N.Y.S.2d 946, 947 [negligence of additional insured was immaterial under provision covering it “only with respect to operations performed by or on behalf of the Named Insured”].

²³ *Id.*

²⁴ Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co., 280 F.3d 744, 746 (7th Cir. 2002).

the vendor against liability which the vendor may incur due to a defect in the product sold to the vendor by the named insured.²⁵

“[T]he commercial purpose behind the vendor’s endorsement is the knowledge that the manufacturer’s insurer will defend and indemnify the vendor for losses *caused by the manufacturer’s product*, not for the contents put in it or additions to it by the vendors.”²⁶ It makes sense for the manufacturer to buy the insurance, since the manufacturer has a better sense of the risk caused by their products.²⁷ This assumes that the vendor’s role in the distribution of the product is passive.²⁸ The manufacturer would be unlikely to insure the vendor against defects caused by the vendor, since the risk of those defects would be better known to the vendor than to the manufacturer.²⁹

There is certainly a marked difference between insuring a mere distributor, a nonculpable conduit, and an entity that changes a product or incorporates into another thing before passing it on in the chain of commerce.³⁰ The Form is not intended to cover the vendor for changes in the product made by the vendor over which the manufacturer has no control,³¹ or to cover a vendor for its own negligence.³² Given the fact that the Form is not intended to cover any changes to the product that the vendor makes, the Form exclusions include, but are not limited to: “(1) liability resulting from physical or chemical changes made in the product by the vendor, (2) repacking of the product by the vendor except under specified conditions associated with inspection or testing of the product, and (3) labeling or relabeling of the product by or for the vendor.”³³ These three exclusions and their interrelationship have generated most of the case law in this area of the law³⁴ and are applicable to an agricultural business.

²⁵ *SDR Co., Inc. v. Fed. Ins. Co.*, 242 Cal.Rptr., 534, 537 (Cal. Ct. App. 1987).

²⁶ *Id.* at 538.

²⁷ *Hartford*, 280 F.3d at 746.

²⁸ *Id.*

²⁹ *Id.* at 746-47.

³⁰ *Alpha Holdings, LTD. v. Travelers Indemnity Co.*, 2006 WL 1916982, 1, *13 (Cal. Ct. App. 2006).

³¹ *SDR Co., Inc.* 242 Cal.Rptr. at 537.

³² *Trek Bicycle Corp. v. Mitsui Sumitomo Ins. Co., LTD*, 2006 WL 1642298, 1,* 3 (W.D. Ky 2006.).

³³ MALECKI, ET AL., *supra* note 1, at 233.

³⁴ *Id.*

IV. THE RATIONALE FOR THE VENDOR ENDORSEMENT FORM

One of the ways a manufacturer can induce retailers, distributors, wholesalers, and other vendors who sell its products is to provide these vendors with additional insured status under the products liability coverage of the manufacturer's commercial general liability insurance by giving them the Form.³⁵

A manufacturer will often add to its product liability insurance an endorsement extending coverage to distributors of its product who may be sued for breach of warranty or for strict products liability should the product turn out to be defective or unreasonably dangerous and cause an injury. 'When a manufacturer produces a product which contains a defect in design or one caused by faulty workmanship and it is sold to a distributor who in turn sells it to a retailer, the latter two links in the chain to the ultimate consumer ordinarily are merely conduits in the stream of commerce which ends at the ultimate consumer. The manufacturing or design defect, as to which they had no creative role, was in existence when each of them received the product and each is merely a nonculpable accessory in the eventual sale. Nevertheless, each, in that role, is strictly liable to the injured ultimate user.... The nonculpable distributor or retailer is not, however, without remedy and has 'an action over against the manufacturer who should bear the primary responsibility for putting the defective products in the stream of trade.' ...³⁶

Given the nature of this factual situation for the ordinary case between a manufacturer and a distributor:

...the liability trail eventually leads back to the manufacturer, and consequently to his insurer, it is a matter of common sense and fair dealing that the coverage of the manufacturer should be extended to the distributor and the insurance of the distributor in turn cover the retailer.' [citations omitted] ... [O]ne can perceive the economic logic of this form of insurance easily enough; it allows the insurer to coordinate the defense of multiple suits arising out of the same injury and spares the distributor the expense of hiring a lawyer to defend against a suit

³⁵ See *id.* at 223.

³⁶ *Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 280 F.3d 744, 745 (7th Cir. 2002).

arising out of a design or manufacturing defect with which the distributor had nothing to do.³⁷

In line with the rationale for the Form, it is designed and drafted to protect a passive vendor from a product liability claim that is brought against a vendor “simply because they are part of the distribution chain.”³⁸ This point cannot be overemphasized and many of the cases in this area of the law consider the rationale for the Form when determining how the court will rule in a particular case.

V. TWO LINES OF CASES THAT ADDRESS THE VENDOR ENDORSEMENT FORM

In the United States there are two lines of cases that determine if the additional insured’s injuries or losses are covered by the named insured’s insurance policy and are not excluded from coverage due to the Form.³⁹ These two lines of cases view and consider this legal issue in a very different manner. The majority view’s main consideration is whether or not a vendor is passive or active,⁴⁰ while the minority view looks carefully at whether the Form exclusions apply, and if they apply, whether the actions of the vendor create the injury or liability.⁴¹

The majority view holds that the Form applies only when a vendor is being sued in strict liability.⁴² The main rationale for this line of cases stems from the belief that the purpose of the Form is to protect a passive vendor against the expense of being dragged into a lawsuit as an additional defendant due to a defect that the vendor merely distributes.⁴³ This assumes that the vendor’s role in the process is passive, because the “manufacturer would be unlikely to insure the vendor against defects introduced by the vendor himself.”⁴⁴ Under this line of cases, the Form will not provide insurance coverage if a vendor’s actions fall under an exclusion and the vendor may be responsible for the alleged defect out of which the lawsuit arises.⁴⁵ Whether the vendor is an active or passive vendor is the critical issue for the court to determine whether or not the

³⁷ *Id.* at 745-46.

³⁸ MALECKI, ET AL., *supra* note 1, at 233.

³⁹ Gen. Sec. Indem. Co. of Ariz. v. Great N. Ins. Co., 2007 WL 845857, at *10 (D.Idaho Mar. 19,2007).

⁴⁰ *Hartford*, 280 F.3d at 747.

⁴¹ See *Buss v. Superior Court*, 939 P.2d 766, 772 (Cal. 1997).

⁴² See *Hartford*, 280 F.3d at 747.

⁴³ *Id.*, at 746.

⁴⁴ *Id.*, at 746-47

⁴⁵ Gen. Sec. Indemnity Co. of Ariz, 2007 WL 845857, at *10

Form will provide insurance coverage to the additional insured vendor from the named insured's insurance policy.

The minority view takes a close look at the facts of a situation and the language set forth on the Form and the Form exclusions to determine if the vendor should be an additional insured on the named insured insurance policy.⁴⁶ Under the minority view, if the Form exclusion applies the court will look to determine if the injury or loss was caused by the negligence of the vendor.⁴⁷

Given the fact that the outcome of such a case may hinge on whether or not the majority or the minority view applies, it is important to determine which view applies. In some jurisdictions this is clear, while in other jurisdictions the courts are silent and one has to speculate on the view the courts may apply in that jurisdiction. Once one has determined which view will apply, one must carefully determine the actions of the vendor to determine the potential legal result under the majority or the minority view. To make the correct determination is easier in theory than in practice, based in part on the fact that the case law is not very well developed in this area and there is no uniform national rule of law.

VI. MAJORITY VIEW

A. *Who is an Active or Passive Vendor?*

The critical question for the majority view courts is whether or not one of the Form exclusions apply and if the vendor is passive or active.

In the *Hartford* case, Judge Posner used California law to decide a case involving a Form.⁴⁸ On August 31, 1995, Wendy Como suffered a stroke and claimed that it was caused by a diet pill she was taking called "Trim Easy."⁴⁹ The diet pill was manufactured by Nion Laboratories ("Nion") and distributed by Team Up International ("Team Up").⁵⁰ Team Up was not just the distributor, it also supplied Nion with the formula for Trim Easy and designed the contents of the label, including the warnings, and provided labels to Nion, which placed them on the bottles.⁵¹ This lawsuit included a claim that the labels failed to warn the

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 280 F.3d 744, 744-45 (7th Cir. 2002).

⁴⁹ *Id.*, at 746.

⁵⁰ *Id.*

⁵¹ *Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 280 F.3d 744, 746 (7th Cir. 2002).

injured party of the risks created by Trim Easy.⁵² This suit was settled (liability was never determined by a court of law) in a sum in excess of \$1 million, paid by the Hartford Fire Insurance Company (“Hartford”), to Team Up.⁵³ Hartford held the excess liability insurance policy, so Hartford would only be responsible for losses that exceeded the cap on Team Up’s other insurance policies.⁵⁴ St. Paul Surplus Lines Insurance Company (“St. Paul”) was the defendant in this case and was the primary liability policy issuer for Nion.⁵⁵ The Hartford and St. Paul insurance policies were in force when Wendy Como was injured.⁵⁶ Hartford brought this suit, because it contended that Team Up was covered by the Form that was provided by Nion’s primary insurance policy with St. Paul, so the St. Paul insurance policy should pay for this loss up to the St. Paul insurance policy limits of \$1 million before the Hartford excess liability insurance policy would be responsible to pay on this loss.⁵⁷ The Seventh Circuit, affirming the district court’s holding, ruled in favor of St. Paul.⁵⁸

These actions by Team Up led the court to determine that this distributor was an active vendor, therefore nullifying the insurance coverage provided to them by the Form from Nion.⁵⁹ According to the Seventh Circuit, California follows the majority view that a Vendor’s Endorsement Form is inapplicable if the vendor participates in the production of the product, or alters or repairs it, and may be responsible for the alleged defect out of which the product liability suit arises.⁶⁰ Stated another way, the Form will not provide coverage to the additional insured if one of the Form exclusions apply and the additional insured is an active vendor.⁶¹ “The majority view is not based on the language of the Form, which does not define ‘vendor,’ or on the ordinary meaning of the word, which does not distinguish between active and passive vendors, but on the improbability of supposing that the manufacturer’s insurer intends to protect others against the risks that others create.”⁶² A further consideration is the fact that the Forms are cheap add-ons to a product liability policy and

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 748.

⁶⁰ *Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 280 F.3d 744, 747 (7th Cir. 2002).

⁶¹ *Id.* at 748.

⁶² *Id.* at 747.

their cheapness makes the most sense if they are limited to situations in which the vendor is completely passive in relation to the harm that gives rise to the liability rather than an active creator of the harm.⁶³

B. Under the Majority View would a Produce Shipper be an Active or a Passive Vendor?

To apply this rule of law to the produce industry,⁶⁴ one needs to determine whether the Shipper⁶⁵ participates in the production of the Produce,⁶⁶ or by altering it, their actions make the Shipper responsible for the alleged defect in a product liability suit.⁶⁷ This rule of law as it relates to the Produce industry involves a three-prong test to determine if a Shipper is an active or passive vendor:

1. Did the Shipper participate in the production of the Produce; or,
2. Did the Shipper alter the Produce; and,
3. The Shippers actions in prong one or two may be responsible for the alleged defects out of which the product liability suit arose.

The first question is whether the Shipper is involved in the production of the Produce at a level that would make them an active vendor under the *Hartford* case.⁶⁸ In an effort to explore the answer to this question, I will look at some of the actions a Shipper may take in the production of Produce.

The actions of one Shipper as compared to another Shipper will vary and, even within the operation of an individual Shipper, their relationship with each Grower⁶⁹ may vary depending on the Produce commodity and whether the Shipper has an equity interest in the crop.⁷⁰ The process generally begins with the Grower and Shipper working together to determine the wet dates,⁷¹ types of crop, acres for each crop, and harvest dates. While the Grower usually completes the day-to-day farming of

⁶³ *Id.*

⁶⁴ For the purpose of this Article the “Produce Industry” shall be defined as an industry that grows, harvests and sells vegetables.

⁶⁵ For the purpose of this Article a “Shipper” shall be defined as a business within the Produce Industry that purchases vegetables from growers to market and sell the vegetables to retailers, distributors, wholesalers, and others vendors.

⁶⁶ For the purpose of this Article “Produce” shall be defined as a vegetable.

⁶⁷ *Hartford*, 280 F.3d at 744.

⁶⁸ *See generally id.*

⁶⁹ For the purpose of this Article a “Grower” will be defined as an individual and/or business that grows vegetables and sells to a Shipper.

⁷⁰ Interview with Bob Thorp, Senior Manager of Agric. Operations, Growers Express, LLC. (Oct. 24, 2011).

⁷¹ In the Produce Industry a wet date is generally thought of as the date in which Produce is planted and first watered.

the crop, the Shipper will generally monitor the crop's progress. If a problem is detected, the Grower and Shipper will determine the best course of action to alleviate the problem. A Shipper will usually monitor the completion of the wet dates to confirm the correct amount of acres were planted. Following the crop being thinned, some Shippers will walk the field to assess the plant population and potential yield from the field. Approximately a month prior to the harvest date, a Shipper may increase the amount of times they walk the fields. The Shipper will generally set the harvest date, the amount to harvest, the type of product to harvest, packaging, pack size, and harvest crew. The Shipper's harvest crew or an independent harvester hired by the Shipper will generally harvest, pack, and haul the Produce to the Shipper's cooler. In some cases, the Produce will be further altered in a shrink wrap operation or in a value-added product line. In addition, Shippers generally have a food safety department that further inspects the Grower's operations to ensure that the Produce is safe for human consumption.

In the *Hartford* case, the diet pill Trim Easy was manufactured by Nion and distributed by Team Up.⁷² Team Up was not just the distributor given the fact that it supplied Nion with the formula for Trim Easy and also designed the contents of the label, including the warnings, and provided labels to Nion, which placed them on the bottles of Trim Easy.⁷³ In this situation the Shipper will work with a Grower to determine the wet dates, types of crop, acres for each crop and harvest dates. While the Grower will complete the day-to-day farming of a crop, a Shipper will monitor the progress of the crop and tell the Grower if they see a problem with the crop. The Shipper will then determine when and how the crop will be harvested and may be the party that owns and/or hires the harvest crew. Following harvest, the Shipper will usually control the Produce. While opinions may differ on this point, there appears to be a valid argument to be made that a Shipper's activities are more extensive than the actions taken by Team Up in the *Hartford* case, making a Shipper an active vendor.

2. *Did the Shipper alter the Produce?*

This second prong relates back to the Form, Section A.1.c., which excludes coverage if a Shipper intentionally makes any physical or chemical change to the Produce.

⁷² *Hartford*, 280 F.3d at 746.

⁷³ *Id.* at 746.

A California case on point involved the incorporation of diced almonds into nut clusters and cereal products.⁷⁴ The nut clusters were composed mainly of diced almonds and congealed syrup with small portions of walnuts and pecans.⁷⁵ These nut clusters were then used in a General Mills breakfast cereal called “Clusters.”⁷⁶ This case determined that this action caused a physical or chemical change to the almonds.⁷⁷ The facts in this case are somewhat analogous to a Company that produces processed salads, and it directly addresses the issue of whether or not there would be a physical or chemical change to the Produce when a Shipper’s actions are limited to the harvesting, packing and shipping of Produce. That being said, if the mixing of almonds with congealed syrup and small portions of walnuts and pecans to create a nut cluster rises to the level to create a physical or chemical change to the diced almonds, one could make the logical analogy that the harvest of Produce would also create a physical or chemical change to the Produce. This argument is further supported by the fact that once the Produce is harvested the Produce ceases to be a living plant and begins to deteriorate making it necessary to cool immediately and keep the Produce cool until consumed.⁷⁸

In the view of certain insurance industry professionals, the harvesting of Produce would most likely amount to a physical or chemical change to the Produce. This makes sense from a real life and practical perspective, because there is a physical change to the Produce following harvest.

3. *The Shippers actions in prong 1 or 2 may be responsible for the alleged defects of which the product liability suit arose.*

According to Brian Stepien, Vice President of Technical Services at Growers Express, LLC, “Most food-borne illness outbreaks in the Produce Industry are not traced back to one identifiable source, so it is very difficult to prove who is or who isn’t responsible. Your product may become ‘guilty by association’ because it was purchased by a company that had an outbreak, even if your product wasn’t the cause of the outbreak, and sometimes that company isn’t even your direct customer.”⁷⁹ Under the *Hartford* case, if the Shipper is unable to prove that it did not

⁷⁴ *Shade Foods, Inc. v. Innovative Prod. Sales & Mkg, Inc.*, 93 Cal.Rptr.2d 364, 373 (Cal. Ct. App. 2000).

⁷⁵ *Id.* at 861.

⁷⁶ *Id.*

⁷⁷ *Id.* at 867-68.

⁷⁸ Interview with Bob Thorp, *supra* note 70.

⁷⁹ Interview with Brian Stepien, Vice President of Technical Services, Growers Express, LLC (Jan. 25, 2012).

contribute to the injury of the injured party, the logical implication is that the Shipper may be responsible for the alleged defect out of which the products liability suit arises.⁸⁰ Depending on the Shipper's involvement in the production of the Produce, the Shipper may be deemed to be an active vendor causing the Form to be inapplicable to the Shipper. If the Grower's Form is inapplicable to the Shipper, the Shipper will not be afforded any insurance coverage from the Grower's insurance policy.

It is important to remember that when completing the analysis based on the three-prong test, the actions of the Shipper only need to meet prong one or prong two and need not meet both prongs. If the actions of the Shipper meet prong one or prong two, then the Shipper's actions only need to rise to the level where their actions may be responsible for the alleged defects out of which the product liability suit arose. Given the difficulty in determining who is at fault in the situation of a food-borne illness outbreak it will be very likely that a Shipper may be responsible for the alleged defects out of which the product liability suit arose.

VII. MINORITY VIEW

The minority view hinges on whether or not the Form exclusions apply in a particular situation.⁸¹ Determining if the Form exclusions apply also depends in part on understanding the legal meaning of the Form exclusion language. To understand the meaning of the Form exclusion language one must look to the rules of contractual interpretation and the notion that insurance policy exclusionary language should be narrowly construed and ambiguities should be construed against the drafter of the insurance policy exclusionary language.

While insurance policies have special features, they are still contracts in which the ordinary rules of contractual interpretation apply.⁸² The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.⁸³ "If the language of the insurance contract is clear and explicit, it governs."⁸⁴ If the meaning a layperson would ascribe to the insurance policy language is not ambiguous, then the court will apply it even if legally trained observers would perceive the lan-

⁸⁰ *Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 280 F.3d 744, 747 (7th Cir. 2002).

⁸¹ *Gen. Sec. Indem. Co. of Ariz. v. Great N. Ins. Co.*, No. CV 06-0032-S-MHW, 2007 WL 845857, at *1, *10 (D. Idaho Mar. 19, 2007).

⁸² *Pardee Constr. Co. v. Ins. Co. of the West*, 92 Cal.Rptr.2d 443, 450-51 (Cal. Ct. App. 2000).

⁸³ *Id.*

⁸⁴ *Id.* at 451.

guage as raising doubts as to coverage due to sophisticated legal distinctions.⁸⁵ “In other words, whatever ambiguity may attach to contract language due to a party’s legal knowledge is resolved in favor of coverage.”⁸⁶

An insurance policy provision is considered ambiguous when it is capable of two or more constructions, both of which are reasonable.⁸⁷ The determination of whether a contract is clear or ambiguous is a question of law.⁸⁸ If an asserted ambiguity is not eliminated by the language and the context of the policy, courts will then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (generally the insurer) in order to protect the insured’s reasonable expectation of coverage.⁸⁹ Policy ambiguities are to be resolved in favor of coverage, and exclusions from coverage are to be construed narrowly.⁹⁰

The California Supreme Court has held that in the insurance context the court should “begin with the fundamental principle that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear.”⁹¹ The California Supreme Court has declared on many occasions that “any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.”⁹² To be enforceable, any insurance policy provision that takes away or limits coverage reasonably expected by an insured must be “conspicuous, plain and clear,”⁹³ and is “subjected to the closest possible scrutiny.”⁹⁴ In addition, exclusionary clauses or exceptions to insurance policies are to be interpreted by their plain meaning and will not be stretched to cover areas not intended by the clause.⁹⁵

If one of the exclusions on the Form applies to the vendor’s situation, it will nullify their insurance coverage, unless the vendor can prove to the court that their actions did not cause the injury to the injured party.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 450.

⁸⁹ *Id.*

⁹⁰ *Id.* at 451.

⁹¹ *State Farm Mut. Auto. Ins. Co. v. Jacober*, 514 P.2d 953, 958 (Cal. 1973).

⁹² *Id.*

⁹³ *Oliver Mach. Co. v. U.S. Fid. & Guar. Co.*, 187 Cal.App.3d 1510, 1514 (Cal. Ct. App. 1986).

⁹⁴ *Id.*

⁹⁵ *Id.*

An important case to consider in an effort to better understand this point of law is the *Sears* case,⁹⁶ which both national and California case law frequently rely upon.⁹⁷ This case arose out of a product liability suit brought against Sears, Roebuck and Company (“Sears”) by Rollie and Francine Cumberland following the death of their daughter from injuries sustained when a pair of girls slacks purchased from Sears caught on fire.⁹⁸ The underlying product liability suit alleged that fabric used in the slacks was defective due to the design and manufacture of the slacks.⁹⁹ In this case, the fabric manufacturer made the fabric for the slacks and then sent it to the manufacturer who measured, cut, sewed, labeled, and packaged the slacks for Sears.¹⁰⁰ Both the fabric manufacturer and slack manufacturer named Sears as an additional insured on the Form.¹⁰¹ The fabric manufacturer claimed that the Form excluded insurance coverage to Sears, because the slack manufacturer’s actions of cutting, sewing and labeling the slacks for Sears met the relevant exclusions of the Form.¹⁰² The fabric manufacturer’s relevant Form exclusions state that:

1. The insurance with respect to the vendor does not apply to
 - (b) bodily injury or property damage arising out of
 - (i) any physical or chemical change in the form of the product made intentionally by the vendor,
 - (ii) repacking, unless unpacked solely for the purpose of inspection, demonstration, testing or the substitution of parts under instructions from the manufacturer and then repacked in the original container,
 - (iv) products which after distribution or sale by the named insured have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.¹⁰³

The insurance company for the fabric manufacturer argued that it should escape its policy obligations, because the fabric was sent to the

⁹⁶ *Id.*

⁹⁷ *See generally* *Oliver Mach. Co. v. U.S. Fid. & Guar. Co.*, 187 Cal.App.3d 1510, 1514 (Cal. Ct. App. 1986).

⁹⁸ *Sears, Roebuck and Co. v. Reliance Ins. Co.*, 654 F.2d 494, 495 (7th Cir. 1981).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 496.

¹⁰¹ *Id.* at 495-96.

¹⁰² *Id.* at 497.

¹⁰³ *Id.* at 496.

slack manufacturer who “physically changed” the fabric by cutting and sewing the raw fabric into slacks, adding an elastic waistband and then “labeling” the slacks for Sears.¹⁰⁴ The fabric manufacturer’s argument proved too much for the court, because “if the mere labeling or use as a part of the finished slacks could defeat coverage of any defect in the fabric itself, the vendor’s insurance covering Sears would not be worth the piece of paper on which it was printed.”¹⁰⁵ The court also focused on the fact that under the Form at issue, the bodily injury must have arose from the exclusions set forth on the Form, and required a nexus between the changes to the fabric and the injuries.¹⁰⁶ In this case, the injuries “arose out of”¹⁰⁷ the fabric itself, and not any change made to the fabric or any repacking.¹⁰⁸ Where the change to the form of the fabric does not cause the injury and the injury is caused by the fabric itself, the fabric manufacturer is responsible for any harm arising therefrom.¹⁰⁹ This court indicated that it must assume that the insurance company for the fabric manufacturer intended to insure Sears under the Form, unless there was nexus between the changes made by Sears and the underlying injuries.¹¹⁰ “Any other assumption would allow the carrier to simply accept the premium and avoid any corresponding obligation,” and the law cannot encourage such illusory coverage.¹¹¹ The court concluded that to rule in favor of the fabric manufacturer and nullify the Form would contravene public policy and cause a forfeiture of coverage when the parties intended coverage.¹¹²

¹⁰⁴ *Id.* at 497.

¹⁰⁵ *Id.* at 498.

¹⁰⁶ *Id.* at 498.

¹⁰⁷ It is important to note that previous version of the Form had the “arising out of” language in the exclusion section of the Form, while the present version of the Form places this “arising out of” language in the first part of the Form, prior to the Form exclusions. With the present version of the Form one has to go through a three step process to determine if the Form provides the vendor with product liability coverage. The first step is for the vendor to determine if the bodily or property damage arises from the named insured products, if the products were distributed or sold in the vendor’s regular course of business and then determine if one of the Form exclusions applies to a particular situation. If one of the Form exclusions apply the only way the applicable exclusion will not nullify insurance coverage for the vendor is if the vendor can prove to the court that their action did not cause the injury to the injured party. ISO Properties Inc., *Additional Insured – Vendors*, Commercial Gen. Liab. 20 15 07 04 (2004).

¹⁰⁸ *Sears, Roebuck and Co. v. Reliance Ins. Co.*, 654 F.2d 494, 497-98 (7th Cir. 1981).

¹⁰⁹ *Id.* at 498.

¹¹⁰ *Id.* at 499.

¹¹¹ *Id.*

¹¹² *See id.* at 499-500.

When one considers the impact of the minority view on a Shipper in the Produce industry one must first determine if one of the Form's exclusions would apply to the actions of the Shipper. An applicable exclusion is the Form Section A.1.c., which excludes coverage if a Shipper intentionally makes any physical or chemical change to the Produce.¹¹³ Many of the Shippers have their own harvest crews, or harvest crews working on their behalf, to harvest the Produce.¹¹⁴ For the exclusion to apply one must determine if the harvesting of Produce creates a physical or chemical change to the Produce. The first argument that the harvest of Produce creates a physical or chemical change to the Produce is that by the harvest of the Produce, the Produce ceases to be a living plant and begins to deteriorate, making it necessary to cool the Produce immediately and keep it cool until consumed.¹¹⁵ In addition, in the view of certain insurance industry professionals, the harvesting of Produce would most likely amount to a physical or chemical change to the Produce.

Once the exclusion applies, it would then become the Shipper's burden of proof to show that the harvest of the Produce did not cause the contamination of the product.¹¹⁶ As indicated above, food-borne illness outbreaks in the Produce industry are usually not traced back to one identifiable source, making it very difficult to prove who is or who is not responsible for the contamination.¹¹⁷ This fact may make it difficult for the Shipper to prove that the harvest of the Produce did not cause the contamination of the Produce. Under the minority view, a Shipper may in fact have an exclusion apply due to their harvest of the Produce and, from a practical perspective, the Shipper may not be able to prove to the court that its actions did not cause the contamination of the Produce. In this situation, the Shipper may not be able to prove to the court that the contamination was not caused by the harvest of the Produce thereby causing the exclusion to apply. This illustrates the importance of really understanding the exclusions found in the Form and determining if the facts in your situation would fall under one of these exclusions.

VIII. CONCLUSION

To determine whether the Form would provide insurance coverage to a vendor from the named insured's insurance policy depends on the facts

¹¹³ ISO Properties Inc., *Additional Insured – Vendors*, Commercial Gen. Liab. 20 15 07 04 (2004).

¹¹⁴ Interview with Bob Thorp, *supra* note 70.

¹¹⁵ *Sears, Roebuck and Co. v. Reliance Ins. Co.*, 654 F.2d 494, 498-499 (7th Cir. 1981).

¹¹⁶ *Id.* at 497-98.

¹¹⁷ Interview with Brian Stepien, *supra* note 79.

of each specific situation and whether the majority or the minority view would be applied.

The Form provides the vendor with insurance coverage if:

- “(1) bodily injury or property damage arising out of the named insured’s products that are listed on the Form;
- (2) the products being distributed or sold in the regular course of the vendor’s business; and
- (3) whether one of the Form exclusion applies.”¹¹⁸

After one has determined that the bodily injury or property damage arises from the named insured’s products, and it is distributed or sold in the vendor’s regular course of business, one must determine if one of the Form exclusion applies. If an exclusion applies, the next question to ask is if the majority or the minority view should be applied. Due to the fact that case law in this area of law is ambiguous and not very well developed, it is a challenge to determine the probable outcome for a vendor receiving the Form.

As this Article illustrates, it is critical that a vendor carefully consider and review all the facts of a situation and the applicable law to determine if the Form will provide the vendor with insurance coverage from the named insured insurance policy.

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¹¹⁸ MALECKI, ET AL., *supra* note 1, at 227 – 28.