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DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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ALLSTATE INSURANCE COMPANY,  
Plaintiff-Respondent

v.

LIBERTY SURPLUS INSURANCE CORPORATION,  
Defendant-Appellant

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Cheryl Carey)

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

To protect itself against product defect claims, Wing Enterprises purchased “products-completed operations” coverage from Liberty Surplus Insurance. The parties also agreed that this coverage should be extended to some of Wing’s vendors. Liberty did not charge Wing extra premium for a “vendors’ endorsement” because it did not increase Liberty’s exposure; that is, if one of Wing’s vendors was sued because of an alleged product defect, the vendor would have an indemnity action against Wing, which Liberty would cover in any event.

The parties did not agree, however, that all of Wing’s vendors were automatically covered by the endorsement. Rather, they left it to Wing and its broker to specifically identify the “Name” of the particular vendors they wanted covered during the policy period. Advanced Ladders was not one of those named vendors and, thus, not an additional insured under Wing’s policy with Liberty. When Mr. Colton made a claim against Advanced Ladders for injuries he suffered in its store, Liberty had no duty to defend or indemnify Advanced Ladders.

More fundamentally, and even if the vendors’ endorsement somehow encompassed Advanced Ladders, the Liberty policy itself did not cover Mr. Colton’s claim because he alleged that Advanced Ladders’ negligence caused his injuries, not a defect in Wing’s product. While

Liberty had no duty to defend or indemnify Advanced Ladders under these circumstances, Advanced Ladders' own insurer, Allstate, did. And that is precisely why Allstate settled Mr. Colton's claim.

Allstate now wants Liberty to pay for that settlement even though Wing's ladder had nothing—and Advanced Ladders' negligence had everything—to do with Mr. Colton's injuries. Allstate asks this Court to ignore language in the vendors' endorsement on the one hand (*i.e.*, "Name ... On File"), while construing it expansively on the other hand (*i.e.*, "arising out of your product"). In the end, however, the plain language of the policy, its obvious and intended purpose and the weight of authority all undermine Allstate's (and the trial court's) interpretation. For the reasons explained in Liberty's opening brief and below, (1) Advanced Ladders is not an additional insured under the terms of the vendors' endorsement, and (2) regardless, the policy does not provide coverage for injuries caused exclusively by Advanced Ladders' own negligence.

## II. ARGUMENT

### A. **Advanced Ladders Was Not An Additional Insured Under Wing's Policy With Liberty.**

Allstate largely ignores the unambiguous language of the vendors' endorsement to the Liberty policy—for obvious reasons. *See Australia Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 765-66, 198

P.3d 514 (2008) (“if the policy language is clear and unambiguous, the court must enforce it as written”). The endorsement provides:

WHO IS AN INSURED (SECTION II) is amended to include as an insured any person or organization (referred to above as vendor) shown in the Schedule ...

CP 40. The Schedule referred to in the endorsement states as follows:

**“Name of Person or Organization (Vendor): On File With Company.”**

CP 40 (emphasis added). Allstate concedes that the name “Advanced Ladders” does not appear anywhere in the terms of the Liberty policy, any endorsement to the policy, Wing’s application for insurance, or any certificate of insurance. Indeed, with the exception of obviously irrelevant post-accident references to the Colton claim itself (discussed below), Allstate cannot identify a single document in any Liberty file identifying Advanced Ladders as an additional insured. There is none.

**1. Wing’s Insurance Application Did Not Put Advanced Ladders’ “Name ... On File” With Liberty As An Additional Insured Under The Vendors’ Endorsement.**

Rather, Allstate relies primarily on a generic reference to retail locations on Wing’s insurance application. The application asked Wing to identify the “[l]ocation of factories or stores at which products are manufactured.” CP 561. Wing apparently interpreted the question to ask for the location at which its products were sold, and it gave the following answer: “Over thousands of locations though out the United States.” *Id.*

Based solely on that question and answer, Allstate argues, “Wing’s reference in its insurance application to the fact that it has thousands of vendors was sufficient to notify Liberty of all of Wing’s vendors which Wing wanted covered.” Allstate’s Br. at 20. Not so.

Even putting aside the fact that Allstate’s argument ignores the plain language of the endorsement—which requires an actual “Name” of a vendor to be in Liberty’s file—the application itself has nothing to do with vendor coverage. The application contains some 25 questions relating to, among other things, Wing’s operations, products and claims history. CP 561-564. None of these questions asked Wing to identify what vendors, merchants or distributors it wanted covered as additional insureds. *Id.* More than that, the question Allstate relies on did not even ask Wing to identify its vendors generally, but merely asked for a list of geographic “locations” where its products were sold. CP 561. Allstate’s conflation of the terms “vendor” and “locations” also fails to account for the broad nature of the question, in which the term “location” could just as easily refer to a retail outlet owned by Wing, rather than a third party.

Further, nothing suggests that Wing, its broker, or Liberty intended this question to serve as a means of identifying the particular vendors “which Wing wanted covered,” as Allstate speculates. Allstate’s Br. at 20. Indeed, Liberty’s vice president testified that nothing in the application

indicated that Wing wanted a vendors' endorsement; she knew that only because of a conversation she had with Wing's broker. CP 692 (Corwin Dep. at 13:15-20). And, as discussed further below, Allstate did not and could not proffer any extrinsic evidence from Wing or its broker showing that Wing believed its answer to this unrelated and generic question would automatically confer coverage upon Advanced Ladders and "thousands" of other vendors in the United States. In short, Wing's application did not put Advanced Ladders' "Name ... On File" with Liberty.

**2. Documents Arising From Advanced Ladders' Tender To Liberty Do Not Satisfy The Vendors' Endorsement.**

Allstate next argues that there were "references to Advanced Ladders ... within Liberty's files." Allstate's Br. at 21. But what Allstate doesn't say is that these references occur solely in connection with the very coverage dispute that led to this lawsuit. Specifically, the references relate to Liberty's investigation into the Colton claim, and Advanced Ladders' request for coverage under the Liberty policy. *See* CP 728 (Moray Dep. at 31:15-19) ("An investigation was conducted as a result of a tender made ... by the attorneys that represented Advanced Ladders."); CP 266-267 (letter from counsel for Advanced Ladders to Liberty); CP 749-751 (letter from Liberty to counsel for Advanced Ladders). Certainly, Advanced Ladders cannot put itself "On File" with Liberty after Mr. Colton made his claim by demanding coverage that does not exist.

Contrary to Allstate's suggestion, this case is not analogous to the Sunset Ladder matter. Allstate's Br. at 22, 26. Liberty did not provide coverage to Sunset Ladder because its written tender letter somehow put its "Name ... On File" with Liberty. Rather, Liberty *agreed* to defend and indemnify Sunset Ladder in a product defect action because it recognized that, if the plaintiff prevailed, Wing would ultimately be liable in any event; that is, Sunset Ladder, as a mere seller, would have the right to indemnification from Wing, the manufacturer of the allegedly defective product. *See* CP 726 (Moray Dep. at 24:16-22) ("Q. And Sunset would have a clear case of indemnity against Wing, so you might as well be involved with Sunset as well, correct? A. Yes, because they simply are just a seller of a product that was defective."). Liberty therefore chose to overlook the deficiency in Sunset Ladder's tender – *i.e.*, that its "Name" was not on file – in light of the economic realities of the underlying claim.

Unlike the Sunset Ladder claim, the Colton claim was premised solely on the negligence of Advanced Ladders' employee, not an alleged product defect. CP 86-87 (Alcaraz Decl., ¶ 4). Since Wing faced no potential exposure to either Mr. Colton or Advanced Ladders, Liberty simply had no reason to voluntarily extend coverage as it had done in the Sunset Ladder case. *See* RCW 7.72.030 (manufacturer liable only where harm is caused by "the negligence of the manufacturer" or "by the fact

that the product was not reasonably safe in construction”). Indeed, as discussed below, doing so would be contrary to the very purpose of the “products-completed operations” coverage provided under the policy and the vendors’ endorsement. In the end, Liberty’s handling of the Sunset Ladder matter simply reinforces its interpretation of the vendors’ endorsement, discussed below. It has nothing to do with whether Advanced Ladders’ “Name” was “On File With” Liberty.

**3. The Vendors’ Endorsement Is Not Ambiguous, But Extrinsic Evidence Does Not Support Allstate’s Interpretation In Any Event.**

Perhaps recognizing that Advanced Ladders is not an additional insured under the plain language of the Liberty policy, Allstate claims that the endorsement is ambiguous because “[i]t does not say what specifically is required for the description of the vendors,” and “does not say when the vendor information has to be on file with [the] company.” Allstate’s Br. at 23. The endorsement, however, unambiguously answers both questions. Terms in an insurance contract must be given their ordinary and common meaning. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). The endorsement confers coverage where the “Name of Person or Organization (Vendor)” is placed in Liberty’s file. CP 40. Given its ordinary and common meaning, the endorsement required Wing to identify, by “Name,” the particular vendors it wanted covered during the

policy period. As noted, it is undisputed that neither Wing nor its broker ever identified Advanced Ladders as an additional insured and, thus, the name Advanced Ladders appears nowhere in any relevant Liberty file.

There is no merit to Allstate's suggestion that this straightforward interpretation of the vendors' endorsement renders it illusory. Allstate's Br. at 23, 28. By its plain terms, the endorsement merely allowed Wing to identify particular vendors as qualifying for products liability coverage as the need arose. Indeed, as explained in Liberty's opening brief, over fifty vendors and partners of Wing obtained certificates of insurance during the policy period from Wing's broker which identified them, by "Name," as additional insureds under the policy. *See* CP 566-684. Wing's broker was to provide a copy of the certificates to Liberty so that they could be placed "On File" with the company. CP 705 (Corwin Dep. at 65:13-15).<sup>1</sup>

Because the policy language is not ambiguous, there is no need to resort to extrinsic evidence. *See Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-66, 15 P.3d 115 (2000) (extrinsic evidence may be considered only if the policy language is ambiguous). Even if that

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<sup>1</sup> Allstate complains that Wing's broker failed to actually deliver the certificates of insurance to Liberty during the policy period. Allstate's Br. at 22. Even if this were relevant, it does not show that the endorsement is ambiguous or illusory; it simply shows that Wing's broker didn't do its job. CP 705 (Corwin Dep. at 65:13-15) (Q. Is Liberty supposed to get a copy of these when they are issued? A. Yes, they are.").

evidence were considered, the result is the same.<sup>2</sup> Allstate relies heavily on the testimony of Liberty’s representative, Laura Corwin, but critically Ms. Corwin did not testify that the vendors’ endorsement automatically conferred coverage on Advanced Ladders. To begin with, Ms. Corwin testified that while she “assumed” that Wing’s broker wanted a policy that would include coverage for some of Wing’s vendors, there was no discussion with either Wing or its broker as to which particular vendors would qualify for coverage and how. CP 696 (Corwin Dep. at 26:17-23).

As a result, Liberty employed a “blanket vendor’s endorsement” that effectively left that decision to Wing and its broker—which Liberty could do since it charged the same premium for the policy with or without a vendors’ endorsement. CP 699 (Corwin Dep. at 41:4-8). Specifically, Ms. Corwin testified:

Q. What do you mean by “a blanket vendor’s endorsement”?

A. Well, we would then put in there information on file which would be based on what was in the application or what [Wing] had contractual agreements with, and we had certificates of insurance that would let us know who would be additional insureds under the vendors coverage.

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<sup>2</sup> This Court should reject Allstate’s request that any ambiguity in the policy be construed in its favor. The rule is that a court will construe ambiguity in favor of *an insured*. See *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005). That rule has no application in a contribution action between insurers, especially since Advanced Ladders has already received full coverage for the Colton claim by way of its separate policy with Allstate.

CP 698 (Corwin Dep. at 36:10-18). Consistent with the plain language of the endorsement, Ms. Corwin further testified that Wing could identify particular vendors “either by application, certificate of insurance, or ... email request.” CP 701 (Corwin Dep. at 48:2-4). As noted, Wing’s broker identified dozens of Wing’s vendors by “certificate of insurance” during the policy period, but never Advanced Ladders. *See* CP 566-684.

Had the parties intended the vendors’ endorsement to apply to all of Wing’s vendors without more, as Allstate surmises, they would have—and easily could have—chosen different language. *See Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994) (“courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question”). Specifically, rather than require Wing to identify the “Name of Person or Organization (Vendor),” the endorsement could have applied to “All Vendors”—which was the language used in Wing’s prior insurance policy with a different insurer. CP 694 (Corwin Dep. at 19:4-7). Allstate failed to provide any extrinsic evidence—and no testimony from Wing or its broker—explaining why the parties chose to use markedly different language here if they wanted the endorsement to have the same meaning

as Wing's prior policy. In sum, even if extrinsic evidence is considered, there is no coverage for Advanced Ladders in this case.<sup>3</sup>

**4. Liberty Did Not Admit That Advanced Ladders Was An Additional Insured Under The Policy.**

In a last ditch effort to find coverage, Allstate argues that Liberty admitted that it had a duty to defend and indemnify Advanced Ladders. Allstate's Br. at 29. Liberty did no such thing. In its answer, Liberty admitted coverage only to the extent coverage was required under the terms of the policy. CP 7-8 ("pursuant to the terms and conditions of its policy"). When Allstate raised the question of Liberty's answer early on in discovery, Liberty's counsel wrote to clarify that, "[i]n no way was Liberty's answer ... intended to admit that coverage existed under the Liberty policy for the Colton claim." CP 419. The trial court agreed, and rejected Allstate's argument on this issue. CP 756 ("the Court did agree that Liberty had not admitted coverage for Advanced Ladders in its answer"). This Court should do the same. *See Adams v. King County*, 164 Wn.2d 640, 657, 192 P.3d 891 (2008) (courts "liberally construe pleading

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<sup>3</sup> Allstate refers to the fact that Liberty did not explicitly cite non-coverage under the vendors' endorsement as a basis for its initial denial of Advanced Ladders' tender. Allstate's Br. at 27-28. Even putting aside the fact that Liberty's denial letter was written without a complete understanding of the facts or involvement of counsel, the letter is irrelevant because it says nothing about the parties' intent at the time of contract formation. *See Lynott*, 123 Wn.2d at 689 (statements made months after policy was negotiated have no bearing on parties' intent).

requirements in order to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process”).<sup>4</sup>

**B. The Liberty Policy Did Not Cover Mr. Colton’s Claim For Injuries Arising Solely From Advanced Ladders’ Negligence.**

Even if Advanced Ladders were an additional insured under the vendors’ endorsement, Allstate still has no claim for contribution because the policy does not cover injuries arising from Advanced Ladders’ negligence. Although Allstate complains that Liberty “spends little time ... discussing the actual language and wording in its policy” (Allstate’s Br. at 29), it ultimately agrees with Liberty that the following language of the vendors’ endorsement—which Liberty quoted repeatedly—controls:

WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (referred to above as vendor) ..., 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 business ...

CP 40 (emphasis added). “[Y]our products” refers to Wing’s ladders.

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<sup>4</sup> Because the trial court rejected Allstate’s argument in this regard, it did not consider Liberty’s alternative request to amend its answer—a request which Allstate also opposed. Had the trial court found it necessary to reach the issue, it certainly would have granted Liberty leave to amend. CR 15(a) (“leave shall be freely given when justice so requires”). Allstate had known of Liberty’s position since early on in the case (CP 419), had taken and responded to discovery on the coverage issue (CP 471-483), and had substantively briefed the merits during the summary judgment proceedings. Allowing Liberty to amend the answer to reflect what the parties already knew would not have prejudiced Allstate and, indeed, in opposing Liberty’s request, Allstate did not even argue prejudice. CP 530.

Thus, the issue is whether Mr. Colton’s injuries—which Allstate concedes were caused exclusively by the negligence of Advanced Ladders’ employee (CP 86-87 (Alcaraz Decl., ¶ 4))—arose out of Wing’s ladder.

Relying on the broadest possible construction of the term “arising out of,” and reading it isolation, Allstate argues that the test is met simply because “Mr. Colton was standing on a Wing ladder ... at the time of the accident.” Allstate’s Br. at 31. Allstate’s strained interpretation ignores both the plain language and the underlying purpose of the Liberty policy, and would lead to absurd results. As discussed in Liberty’s opening brief and below, when the vendors’ endorsement is read in harmony with the entire Liberty policy, it is clear that the term “arising out of ‘your products’” covers only those injuries caused, at least in part, by defects in Wing’s products. Both Washington and foreign case law is in accord. Finally, to the extent there are two reasonable interpretations of the vendors’ endorsement, extrinsic evidence shows conclusively that both Wing and Liberty intended the endorsement to provide coverage only in instances of alleged product defect.

**1. Wing’s Products-Completed Operations Policy Covers Product Defect Claims, And Does Not Cover Injuries Caused Solely By Vendor Negligence.**

The phrase “arising out of ‘your products’” which appears in the vendors’ endorsement cannot be read in a vacuum, as Allstate urges.

Rather, it must be read together with the main policy in order to properly ascertain the intent of the parties. *Transcontinental Ins. Co. v. Washington Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 462, 760 P.2d 337 (1988). Allstate does not dispute that Wing's policy with Liberty provided only "products-completed operations" coverage. Allstate's Br. at 15; see CP 67-79. The unambiguous text of the Liberty policy, not just its title, reflected this fact. The policy required Liberty to pay for:

... "bodily injury" and "property damage" occurring away from premises you own or rent arising out of "your product" or "your work" ...

CP 78. The policy thus provided Wing with coverage for all kinds of product defect claims arising from Wing's products after they entered the stream of commerce. The intent to cover products defect claims only is further reflected by the fact that policy did not cover any injury arising from Wing's negligent use of a ladder, regardless of where the injury occurred; the policy specifically excludes claims against Wing for injuries arising from products "still in [Wing's] physical possession." *Id.*

Washington courts have likewise recognized that the basic purpose of a products-completed operations policy is to provide coverage to the manufacturer for products defect claims, not any claim that merely involves the use of its product. This Court has specifically noted:

The purpose of the products-completed operations hazard coverage is to insure against the risk that the product or

work, *if defective*, may cause bodily injury or damage to property of others after it leaves the insured's hands.

*Goodwin v. Wright*, 100 Wn. App. 631, 635-36, 6 P.3d 1 (2000) (emphasis added); *see also Transport Indem. Co. v. Sky-Kraft, Inc.*, 48 Wn. App. 471, 489, 740 P.2d 319 (1987) (products-completed operations policy “was designed to provide coverage for injuries or damages caused by *defects* in goods or products”) (emphasis added). In *Sky-Kraft*, this Court not only recognized the purpose of products-completed operations policies, but also refused to construe a nearly analogous “arising out of” language in such a policy to require the insurer to cover claims that did not stem from an alleged product defect. *Id.* As discussed below, the *Sky-Kraft* decision dictates the outcome here.

Thus, the clear language, the purpose of the policy as a whole, as well as settled Washington case law, demonstrate that the Liberty policy covers only claims arising from alleged product defects, not negligent use. Nothing in the language of the vendors' endorsement—which limits coverage to injuries “arising out of ‘[Wing’s] product’”—compels a contrary result, nor should the endorsement be construed to otherwise expand the scope of the policy's products-completed operations coverage. If anything, the very fact that Wing obtained added coverage for vendors—at no additional price (CP 699 (Corwin Dep. at 41:4-8))—confirms the parties' intent to limit coverage to product defect claims only.

After all, as Liberty explained in its opening brief, only in the context of a product defect claim does the manufacturer have an incentive to extend its coverage to its vendors. That practical and economic incentive is absent where—as in the case of vendor negligence—the manufacturer would not otherwise be liable. Liberty’s Op. Br. at 26-29.

Allstate ignores all of this, and myopically argues that the vendors’ endorsement applies anytime a Wing ladder is involved, even in the absence of a product defect. That interpretation must be rejected as contrary to *Sky-Kraft* and, more generally, because it improperly “contradicts the general purpose of the [insurance] contract,” and “results in hardship or absurdity ... unintended by the parties.” *Campbell v. Ticor Title Ins. Co.*, 209 P.3d 859, 862 (Wash. 2009). Not only is Allstate’s construction totally divorced from the basic purpose and economic reality of a vendors’ endorsement (*i.e.*, extending product defect coverage to vendors at no cost), it would give Advanced Ladders more coverage than Wing itself (*i.e.*, coverage for claims arising from workplace negligence). Indeed, it would require Liberty to indemnify vendors for conduct that had nothing to do with Wing or its products, and for which it received no additional premium. Allstate cannot discount these absurdities with its flip suggestion that the parties could have “specifically excluded any and

all vendor negligence” (Allstate’s Br. at 37)—for workplace negligence and/or negligent use of the product were not covered in the first place.

Washington case law defining the term “arising out of” in cases unrelated to products-completed operations policies do not support Allstate’s interpretation. Allstate’s Br. at 32. As discussed above, only the *Sky-Kraft* court interpreted that term in the context of a products-completed operation policy, and it held—after “giving the policy a plain reading”—that it afforded product defect coverage only:

Transport ... argues that Section II affords typical products liability coverage and was not intended to provide coverage for Sky-Kraft’s negligence in operation of its flight school. Transport’s contention is the better view.

Products liability insurance is designed to protect the producer or manufacturer of goods against loss by reason of injury to the person or property of others caused by the use of a product after the product is no longer in the possession of the insured. 1 G. Couch, Insurance § 190 (2d rev. ed. 1984); Note, 91 A.L.R.3d 921 (1979); *see also* 43 Am.Jur.2d Insurance § 728 (1982); Note, 45 A.L.R.2d 994 (1956). Such policies represent the application of products liability coverage to persons who in the course of their business are exposed to claims by third persons on the ground that their products caused injuries or damages after they were no longer in the possession of the insured. 1 G. Couch, Insurance § 1:90 (2d rev. ed. 1984).

... Although the use of the aircraft was indivisibly related to the accident, the aircraft itself was not the cause in fact of the injury. Therefore, as Transport correctly noted, section II was not intended to provide coverage for Sky-Kraft’s negligent operation of its flight school, but rather was designed to provide coverage for injuries or damages

caused by defects in goods or products. Accordingly, we find no coverage under section II.

*Sky-Kraft*, 48 Wn. App. at 489.<sup>5</sup> This reasoning applies here, and even more so where coverage is extended to the manufacturer's vendors for no additional premium. In any event, even using the definition of "arising out of" from *Australia Unlimited*, it cannot be said that Mr. Colton's injuries "originated from," "had its origin in," "grew out of" or "flowed from" Wing's ladder when Advanced Ladders' negligence was the sole and exclusive cause of his fall. The ladder simply had nothing to do with it.

Finally, there is no merit to Allstate's suggestion that *Equilon Ent. LLC v. Great Am. Alliance Ins. Co.*, 132 Wn. App. 430, 132 P.3d 758 (2006), compels a contrary result. The policy at issue provided coverage to the additional insured, Shell, "only with respect to liability arising out of [the named insured's] operations or premises." *Id.* at 434. The court concluded that Shell was covered under the named insured's policy, not because its sign was merely located at its service station, as Allstate

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<sup>5</sup> Allstate attempts to distinguish *Sky-Kraft* on the grounds that the policy there "was worded more narrowly than the Liberty policy language." Allstate's Br. at 37. To the contrary, it was worded more broadly in that it covered injuries "arising out of the possession, [or] use ... of any goods ... after such goods or products have ceased to be in the possession or under the control of the Insured." *Sky-Kraft*, 48 Wn. App. 489 n. 5. As the Court noted itself, even though the policy expressly purported to cover injuries arising from mere "use" of the product, the court found no coverage absent an allegation of product defect.

suggests, but because the presence of the sign was “an aspect of [the named insured’s] ongoing operations” and, indeed, formed the underlying basis of the plaintiff’s apparent agency theory against Shell. *Id.* at 436-39. In other words, the plaintiff’s claim against the additional insured turned entirely on—and thus, “arose out of”—the conduct of the named insured. Unlike *Equilon*, here, the Colton claim against the purported additional insured (Advanced Ladders) had nothing to do with either the conduct *or the product* of the named insured (Wing). *Equilon* is far off point.

**2. Cases From Other Jurisdictions Confirm That There Is No Coverage Under A Vendors’ Endorsement For Injuries Caused Exclusively By Vendor Negligence.**

As explained in Liberty’s opening brief, a majority of courts and commentators agree that vendors’ endorsements preclude coverage where the vendor’s negligence, not the manufacturer’s product, causes injury. *See Raymond Corp. v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 833 N.E.2d 232, 236 (N.Y. 2005) (“[o]ur interpretation of the endorsement follows its language and comports with the traditional majority view, the origins of the vendor’s endorsement as an outgrowth of products liability law, and common and economic sense”); *Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 280 F.3d 744, 746 (7th Cir. 2002) (“the purpose of a vendor’s endorsement is to protect the vendor ... against the expense of being dragged as an additional defendant into a lawsuit arising from a

defect in a product”); *McGill v. Cochran-Sysco Foods*, 818 So.2d 301, 308 (La.App. 2002) (“Vendor’s endorsements have been interpreted as providing coverage where the vendor is found strictly liable for selling a defective product and excluding coverage where the vendor is found to be independently negligent”); 15 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 130.3, at 130-10 (3d ed. 2000) (“Coverage under the vendor’s endorsement is limited to injuries arising out of a defect in the manufacturer’s product.”).

Notably, in *Raymond*, the Court of Appeals of New York came to that conclusion interpreting the exact same policy language at issue in this case. It expressly held that the term injuries “arising out of Your Products” must be construed to “mean[] injuries arising out of defects in the products, rather than arising out of the vendor’s negligence.” *Raymond*, 833 N.E.2d at 234. The *Raymond* court also rejected another argument Allstate makes here: that negative inferences taken from language in the endorsement’s exclusions imply the existence of coverage. Allstate’s Br. at 43. Interpreting exclusions nearly identical to those in Liberty’s endorsement (CP 41), the court concluded that they were intended to simply limit coverage “where the *defective* product causing injury was being demonstrated, installed, serviced, repaired or rented by

someone other than” the vendor. *Id.* at 235-36 (emphasis added). Allstate’s argument can and should be rejected on the same basis.

The cases relied upon by Allstate represent the minority view, employ reasoning contrary to *Sky-Kraft* and Washington law, and are inconsistent with the fundamental purpose of a vendors’ endorsement. *See Campbell*, 209 P.3d at 862 (interpretation that “contradicts the general purpose of the [policy] ... is presumed to be unintended by the parties”).

Indeed, these cases ignore economic reality. As Judge Posner noted:

[V]endor’s endorsement policies are cheap add-ons to product 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 rather than the active author of the harm, would be entitled to indemnity from the manufacturer in the event that he (the vendor) was sued and held liable and made to pay damages. For in such a case the vendor’s endorsement would be unlikely to impose a big loss on the insurance company even if the vendor was hit with a damages judgment.

*Hartford*, 280 F.3d at 747. This reasoning is sound and even more applicable in a situation like this one—where the *only* coverage Wing purchased from Liberty was products-completed operations coverage intended to insure against the risk of injury caused by product defects. *See Goodwin*, 100 Wn. App. at 635-36 (purpose of products completed operations coverage “is to insure against the risk that the product or work,

if defective, may cause bodily injury”).<sup>6</sup> As noted throughout, that Wing paid nothing for the vendors’ endorsement confirms its limited reach.

**3. Both Liberty And Wing Intended The Vendors’ Endorsement To Provide Additional Coverage For Product Defect Claims Only.**

Liberty believes that the policy and the vendors’ endorsement are unambiguous, and can only be interpreted to preclude coverage for Advanced Ladders’ negligence in this case. If, however, this Court concludes that Allstate’s contrary interpretation is also reasonable, then it may resort to extrinsic evidence to resolve the ambiguity. *Weyerhaeuser*, 142 Wn.2d at 666 (“A clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.”). The extrinsic evidence is undisputed and one-sided. Both Liberty and Wing—the only two parties to the Liberty policy—understood the vendors’ endorsement to provide Wing’s vendors with coverage for injuries arising out of product defect claims only.

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<sup>6</sup> In the cases cited by Allstate, the insured purchased a commercial general liability policy rather than one limited, like the Liberty policy, to “products-completed operations” coverage. See *Kmart Corp. v. Fireman’s Fund Ins. Co.*, 88 F.Supp.2d 767, 772 (E.D. Mich. 2000) (CGL policy); *Sportmart v. Daisy Manufacturing Co.*, 645 N.E.2d 360, 361 (Ill. App. 1994) (same); *Pep Boys v. Cigna Indem. Ins. Co. of North America*, 692 A.2d 546, 547 (N.J. Super. A.D. 1997) (“policy of liability insurance”); *Makrigiannis v. Nintendo of America, Inc.*, 815 N.E.2d 1066, 1071 (Mass. 2004) (same); *Twin City Fire Ins. Co. v. Fireman’s Fund Ins. Co.*, 386 F.Supp.2d 1272, 1279 (S.D. Fla. 2005) (“CGL Coverage Form”).

Ms. Corwin, a Liberty vice president, testified repeatedly that she believed the purpose of a vendor's endorsement "is to extend coverage *for product liability* to vendors of a manufacturer ..." CP 694 (Corwin Dep. at 21:13-17) (emphasis added); *also* CP 695 (Corwin Dep. at 22:18-19) ("the vendor could be covered for a *product liability* loss") (emphasis added). As noted above, because the endorsement covered only product liability claims, for which Wing would be liable in any event, Liberty charged no additional premium for it. CP 699 (Corwin Dep. at 41:4-8).

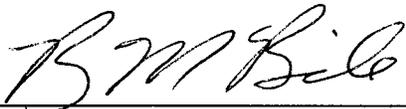
Wing and its broker, Marsh, understood this as well. On each and every one of the more than 50 certificate of insurance forms generated by Marsh on Wing's behalf for vendors during the policy period, it expressly added under the heading "Type of Insurance" the following language: "PRODUCTS LIABILITY ONLY." CP 566-684. There is no evidence in the record to suggest that Wing and Liberty intended the policy, and the vendors' endorsement thereto, to provide coverage for anything other than just that. Certainly, Allstate produced no such evidence. Thus, the extrinsic evidence confirms a plain and common sense reading of the policy and vendors' endorsement: injuries caused solely by Advanced Ladders' workplace negligence are not covered.

**III. CONCLUSION**

For the reasons set forth above and in Liberty's opening brief, this Court should reverse the trial court's grant of summary judgment in favor of Allstate, and remand for entry of judgment in favor of Liberty.

RESPECTFULLY SUBMITTED this 14th day of August, 2009.

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