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Loading and Unloading

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LOADING AND UNLOADING

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I. INTRODUCTION

Almost all of the cases involving the loading and unloading provisions of insurance policies arise in connection with the use of trucks, and most automobile liability policies covering trucks provide, substantially, that the insurance company will

> pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person . . . [and] . . . . injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile. . . . Use of the automobile . . . includes the loading and unloading thereof. . . . The . . . word "insured" includes the name insured and . . . also includes any person while using the automobile, and any person or organization legally responsible for the use thereof, . . . with . . . permission . . . .[1]

Since the automobile liability policies cover the use, loading and unloading of automobiles anywhere, the general liability policies (comprehensive or manufacturers and contractors or owners, landlords and tenants) correspondingly exclude, substantially, coverage for the automobile while away from premises owned, rented or controlled by the named insured, or the ways immediately adjoining, or the loading or unloading thereof. While the general liability policies do cover the use, loading and unloading of automobiles on premises owned, rented or controlled by the named insured and thus duplicate to a limited extent the coverage under the automobile liability policy where the accident occurs on such premises, the duplication is more apparent than real because (as contrasted with the automobile liability policy) the meaning of the word "insured," in general liability policies is confined to the named insured and any partner, executive officer or stockholder thereof while acting within the scope of his duties as such. It will be noted that even where the general liability policy covers the use or loading or unloading of an automobile on the premises in question, unlike the automobile policy it does not include as an "insured" any person while using or loading or unloading the

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1. See KEETON, BASIC INSURANCE LAW 629-37 (1959) for a reprint of a standard automobile liability insurance form using this language. The bodily injury and property damage provisions appear at 633, the definition of "use" at 632, the definition of "insured" at 634.

automobile. More particularly it does not cover as an "insured" the employee of the named insured who may be using, loading or unloading the automobile.

Almost from the start of the jurisprudence pertaining to loading and unloading there has been a division into two schools of thought, one known as the "coming to rest" doctrine and the other known as the "complete operation" doctrine.

A. Coming to Rest Doctrine

The "coming to rest" doctrine contemplates that loading does not commence until the items of cargo have left their place of rest (or in some cases the last place where they could be at rest) away from the automobile and are being physically carried or lifted onto the vehicle, and that unloading ceases when the items of cargo have reached a place of rest (or in some cases the first place where they could come to rest) away from the vehicle and are no longer being physically carried or lifted off of the vehicle. The "coming to rest" doctrine is losing its strength and is fast being replaced even in jurisdictions once considered its champion.

B. Complete Operation Doctrine

The "complete operation" doctrine contemplates that the loading commences when the items of cargo leave their original location on the way toward the vehicle (notwithstanding later temporary "comings to rest" on the way) and that unloading does not cease until the items of cargo have reached the final point of delivery toward which the transportation of the cargo by automobile was a part. The "complete operation" doctrine has almost pre-empted the field to the exclusion now of "coming to rest." The operation of the two doctrines will be illustrated in the manner in which they apply to a series of physical situations.

II. DEVELOPMENTS IN THE COURTS

Hatchway

In looking at the series of physical situations which have involved loading or unloading, let us consider first the hatchway cases.

In an Illinois case, the insured truck was being used to collect garbage. The named insured had picked up a basket of refuse in the basement of a customer's store and was standing on steps leading up from the basement, with the basket braced between his legs, and was pushing upward a sidewalk trap door, intending to place the basket on the truck parked at the curb, when a pedestrian tripped

over the trap door. The Illinois Appellate Court held that the named insured had coverage for his liability to the injured pedestrian since the accident was within the loading and unloading clause of the policy.[2]

In a Massachusetts case, the insured truck was used to deliver cartons of bottled beer to a restaurant. The truck was stopped in front of the restaurant. The driver and helper then removed fifty cartons of bottled beer from the truck and stacked them on the sidewalk. Thereafter, they placed the cartons—five at a time—upon a hand-operated, two-wheeled roller and pushed the roller 55 to 60 feet down the street along one side of the restaurant. They then removed the cartons from the roller and stacked them on the ground near a side door leading into the restaurant. Next, a board chute or skid was arranged to slide the cartons from the street through an open trap door inside the side door to the restaurant and onto the cellar floor of the restaurant. The cartons were then moved down this chute to the cellar floor and placed on the floor. The truck driver and his helper had gone to the cellar and were in the process of putting the cartons into an ice chest, when a prospective customer of the restaurant, undertaking to enter the restaurant through the side door, fell through the open trap door to the cellar and was injured. The Supreme Judicial Court of Massachusetts declared that the liability of the truck operator was covered because of the loading and unloading clause in the automobile policy covering the truck. The court indicated that, since the physical process of placing goods in or on a motor vehicle or in removing them from the vehicle plainly would be a "use" of the vehicle for those purposes, it was reasonable to conclude that the loading and unloading clause intended to cover something more and that, in reality, the loading and unloading clause involved the "complete operation," that is, not only the removal of goods from the motor vehicle but the entire process of making delivery to the purchaser or consignee; thus the court rejected the more restricted doctrine that the unloading has ended when the goods have come to rest.[3]

In an earlier case involving Massachusetts law, the insured express truck was stopped near the curb with the intention of making a delivery by means of an elevator below a trap door in the sidewalk. The truck driver got out of the truck, crossed the sidewalk to the building, and pressed a signal bell button. As a result of the signal, someone in the basement released a guard which permitted the truck

2. Coulter v. American Employers' Ins. Co., 333 Ill. App. 631, 78 N.E.2d 131 (1948).
3. August A. Busch & Co. v. Liberty Mut. Ins. Co., 158 N.E.2d 351 (Mass. 1959).

driver to open the trap doors on the sidewalk. The truck driver had returned to the truck to get the boxes of merchandise when a person fell into the elevator well. The Circuit Court of Appeals for the First Circuit held that the accident arose out of the unloading of the truck.[4]

An early Montana case is one of the leading cases cited in support of the "complete operation" doctrine. A brewery carried an automobile liability policy with one insurer and a general liability policy with another. The brewery truck stopped in front of a place to deliver beer. A beer barrel was taken from the truck and placed upon the sidewalk for delivery into the basement through doors in the sidewalk. One of the brewery employees raised the doors in the sidewalk from underneath just as a pedestrian stepped onto one of them. The pedestrian was injured. The state supreme court held that "unloading" embraced the continuous act of placing the commodities where they were intended to be delivered by the truck, so that the accident arose out of the unloading of the truck and was covered under the automobile liability policy and not under the general liability policy.[5] The opinion laid no stress on the fact that the definition of use, in the automobile liability policy, included "delivery." Perhaps for that reason, the case is frequently cited as establishing the "complete operation" doctrine for cases in which the automobile policy does not employ the word "delivery."

A Pennsylvania case illustrates the "coming to rest" doctrine. In order to remove ashes from the basement of certain premises, the insured truck was parked at the curb directly in front of the premises. A cellar door, through which ashes might be removed from the basement, was located in the sidewalk between the curb and the building. The truck driver entered the building by the front entrance and went to the basement where he picked up a can of ashes, placed the container on the steps in front of him, leaned against the ash can to hold it in place on the steps, drew the bolt from the door, and then raised the door, causing a woman pedestrian to trip on the door and fall. The truck driver who was moving the ash can intended to place the ashes in the truck which was parked at the curb about five feet away from the building and directly in front of the cellar door. The superior court held that to bring the accident within the "loading and unloading" clause of the policy there must be a connection between the accident and the use of the vehicle insured; that the vehicle must have been directly connected with the work of loading or it must have

4. Connecticut Indem. Co. v. Lee, 168 F.2d 420 (1st Cir. 1948), *affirming* 74 F. Supp. 353 (D. Mass. 1947).

5. State *ex. rel.* Butte Brewing Co. v. District Court of Second Judicial Dist., 110 Mont. 250, 100 P.2d 932 (1940).

been an active factor in the operation; that in the present case neither the ashes, nor the container in which they were carried, nor the insured truck, was the cause of, or involved in, the accident; that the instrumentality which caused the accident was the cellar door which was merely a convenience preparatory to loading, and was not, under the facts, included in the process of loading the truck; and, accordingly, that the accident did not arise out of the loading of the truck.[6]

A similar result was reached in a recent case arising under Pennsylvania law. The insured truck was parked near the curbing entrance to the basement of a grill. A barrel of beer was removed from the truck by the truck driver and his helper and placed upon the sidewalk near a cellar entrance consisting of doors level with the sidewalk. The driver's helper entered the basement of the grill by another entrance, unlocked the sidewalk cellar doors from the inside, and, in the act of opening the sidewalk doors, injured a pedestrian on the sidewalk. The driver's helper had intended to deliver the barrel of beer into the basement of the grill. The United States District Court for the Western District of Pennsylvania found that the opening of the sidewalk cellar doors was a part of the act of unloading the truck within the meaning of the automobile policy on the truck and held that, under Pennsylvania law, "the act of delivery of property is a part of the unloading process within the meaning of the unloading clause in an automobile policy."[7] The Court of Appeals for the Third Circuit reversed, holding that, under Pennsylvania law, the loading and unloading clause applies only when there is a "connection between the accident and the use of the vehicle insured" or the vehicle is "an active factor in the operation" and that, when the pedestrian was injured by the opening of the sidewalk cellar doors, the beer truck was not "in active operation and use" nor was it "directly connected with" the happening of the accident and "there was absent 'a connection between the accident and the use of the vehicle insured.' "[8]

In a Texas case, the owner of the insured truck operated a hog farm and had a contract with a restaurant whereby she picked up garbage in cans. The employees of the truck owner stopped the truck in front of the restaurant for the purpose of securing garbage and leaving empty cans being returned from a previous call. They opened the covering for a sidewalk elevator shaft and climbed down the shaft to obtain cross bars which could be fastened to the raised covers to act as guards. A person fell down the elevator shaft before

6. Ferry v. Protective Indem. Co., 155 Pa. Super. 266, 38 A.2d 493 (1944).
7. Kaufman v. Liberty Mut. Ins. Co., 160 F. Supp. 923, 928 (W. D. Pa. 1958), *rev'd*, 264 F.2d 863 (3d Cir. 1959).
8. Kaufman v. Liberty Mut. Ins. Co., 264 F.2d 863, 865 (3rd Cir. 1959), *reversing* 160 F. Supp. 923 (W.D. Pa. 1958).

anything had been loaded onto or unloaded from the truck. The Texas Court of Civil Appeals held that the injuries grew out of the loading and unloading of the truck.[9]

In a Utah case, a brewery carried an automobile liability policy with one insurance company and a general liability policy with another. Employees of the brewery, delivering beer to a restaurant, parked their truck at the curb. The beer kegs were removed from the truck and placed on the sidewalk. One of the brewery employees went through the building and from underneath raised a trap door in the sidewalk. While the kegs were being lowered into the basement by means of an elevator, a blind man fell through the opening. The supreme court held that the accident was covered by the automobile policy and not by the general liability policy.[10] The opinion seems to have been greatly influenced by the fact that the "purposes of use" were stated in the automobile policy to be "commercial delivery only." The later standard policies do not use the word "delivery."

Two Wisconsin cases reflect the trend from "coming to rest" to "complete operation." The first was a leading case supporting the doctrine of "coming to rest." The second came to the opposite conclusion on nearly identical facts. In each case, a brewery was covered by a general liability policy with one insurer and an automobile policy with another insurer. In the earlier Wisconsin case, the brewery's truck was used to deliver beer to a tavern. The truck driver parked the truck alongside the curb, got out, opened a hatchway in the sidewalk, removed a barrel of beer from the truck, placed it on the sidewalk or street, lifted the barrel, and put it through the hatchway into the basement of the tavern. While the driver was engaged in having the sales slip for the beer signed inside the tavern, a pedestrian fell into the open and ungnarded hatchway and was injured. The supreme court held that the accident was not covered under the automobile policy, stating that: "When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile may then be said to be no longer in use"; that where "the merchandise had been removed from the truck and considerable time had elapsed after anything was done

9. American Employers' Ins. Co. v. Brock, 215 S.W.2d 370 (Tex. Civ. App. 1948).
10. Pacific Auto. Ins. Co. v. Commercial Cas. Ins. Co., 108 Utah 500, 161 P.2d 423, 160 A.L.R. 1251 (1945).

which could reasonably be said to be connected with the actual unloading" the accident is not covered under the automobile policy but under the general liability policy; and that "while the open hatchway may have been a convenience in the process of further delivery of the goods, it was not . . . included in the process of unloading the truck."[11]

In the later Wisconsin case, the driver of the brewery's truck likewise stopped in front of a tavern to deliver kegs of beer into the basement through a trap door in the sidewalk. The truck double parked. The driver opened the trap door and, as he returned to the truck for the beer kegs, was asked to move the truck so that a car parked between the truck and the curb could get out. While the driver was so moving the truck, a pedestrian fell into the unattended trap door opening and was injured. The supreme court held that the opening of the trap door, in this case, was an essential part of the unloading operation.[12] It undertook to distinguish the earlier Wisconsin case on the ground, which seems tenuous, that here there was no unnecessary lapse of time between the "opening of the trap door and the intended continuing movement of beer into the basement for storage, which was an essential part of the unloading operation."[13] Although the earlier case did stress the lapse of time and there the beer was in the basement, whereas here it was on the truck at the time of the accident, it would seem that the earlier case was in effect overruled here. The only factual differences were a possible slight time differential and the fact that in the earlier case the accident occurred when the beer was in the basement (presumably *after actual* unloading) where here the accident occurred when the beer was still on the truck (presumably *before actual* unloading)!

The foregoing hatchway cases involved situations where the accident occurred while the truck was still present. There are two more hatchway cases which involve accidents which occurred after the truck had left the vicinity.

An early Georgia case involved the obligation of the automobile insurer to defend the named insured in a damage suit in which the plaintiff's pleading alleged that the named insured, after delivering coal to a realty company through a coal chute in the sidewalk, left the coal chute unattended and that while the plaintiff was walking along the sidewalk around 6:00 p.m., he fell into the coal chute and was injured. The insurer refused to defend the named insured who later brought action against the insurer to recover attorney's fees

11. Stammer v. Kitzmiller, 226 Wis. 348, 276 N.W. 629 (1937).
12. Hardware Mut. Cas. Co. v. St. Paul-Mercury Indem. Co., 264 Wis. 230, 58 N.W.2d 646 (1953).
13. 58 N.W.2d at 648.

incurred in the defense of the earlier damage suit. The court of appeals held that there was no obligation to defend the earlier damage suit since the allegations in that suit did not mention a truck and, so far as the allegations were concerned, the coal might have been hauled to the coal chute in a wagon or wheelbarrow, so that it "clearly appears from the allegations" in the earlier damage suit "that the proximate cause of his injuries was not from the use or operation of the truck in transporting materials or merchandise or loading or unloading, but . . . his falling into the open and unattended coal chute. . . ."[14] The opinion must probably be considered as confined to the technical point that the insurer is required to defend suits only when they allege facts within policy coverage. It is doubted that the court decided whether an accident occurring some time after the truck is driven away leaving the coal chute open is, or is not, within the unloading clause of the policy.

The last hatchway case to be discussed involves Missouri law. A truck was used to deliver coal to a customer's premises through a manhole in a public sidewalk. The truck driver failed to properly replace the manhole cover and left with the truck. About three and one-half hours later, a pedestrian stepped on the cover, it slipped or turned, and she fell into the coal chute and was injured. The Court of Appeals for the Eighth Circuit affirmed a judgment of the United States District Court for the Western District of Missouri, holding that, under Missouri law, the injury arose out of the unloading and use of the truck, since Missouri had adopted the "complete-operation" doctrine rather than the "coming-to-rest" doctrine.[15] Both federal opinions relied on an earlier Missouri case (which did not involve a hatchway) as putting Missouri behind the "complete-operation" doctrine.[16]

Injury in Building

There are a number of cases which have involved an injury in a building, either at the beginning of the loading process or at the end of the unloading process.

A case pertaining to Massachusetts law involved a furniture company which carried a general liability policy with one insurer and an automobile liability policy with another. The furniture company sold some new furniture to a customer, agreeing to take old furniture in exchange, and sent two of its employees in its truck to pick up the old furniture which was in the second-floor apartment of the cus-

14. Morgan v. New York Cas. Co., 54 Ga. App. 620, 188 S.E. 581 (1936).
15. Maryland Cas. Co. v. Dalton Coal & Material Co., 184 F.2d 181 (8th Cir. 1950), *affirming* 81 F. Supp. 895 (W. D. Mo. 1949).
16. The earlier Missouri case was Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W.2d 181, 154 A.L.R. 1088 (1944). See text accompanying note 49 *infra*.

tomer. The truck was parked on an adjacent highway. The furniture company's employees were engaged in moving a divan from the second-floor porch to the ground by means of a web strap. While the customer was assisting them, he fell from the porch to the ground, receiving injuries which he claimed resulted from the negligence of the employees of the furniture company. The United States Court of Appeals for the First Circuit affirmed a judgment of the United States District Court for the District of Massachusetts, holding that the coverage was under the automobile policy rather than the general liability policy since Massachusetts would follow the "complete operation" rule.[17]

An early New York case involved an automobile policy which probably did not contain a "loading and unloading" clause. The policy covered the "operation, maintenance or use" of a taxicab. In responding to a call from a tenant in an apartment house, and while the cab driver was carrying a trunk of the prospective passenger from the passenger's apartment, he damaged the marble hall and steps of the apartment house. The court held that the damage to the building was "wholly unconnected with the operation, maintenance, use . . . of the taxicab."[18]

A much later New York case is one of the few involving the question of loading or unloading a private passenger car. The named insured went to his storage garage to take out his automobile. He carried with him two pieces of baggage which he placed in the passageway portion of the garage waiting room while awaiting word that his automobile had been brought by elevator to the street floor of the garage. A person fell over the luggage and was injured. It was held that the injury did not arise out of the loading or unloading of the automobile, since "at least until the operation of taking the carton and handbag from the passageway to the car had started, the 'loading' of the car cannot properly be held to have commenced."[19]

In an Ohio case, employees of the named insured were carrying a stove from a furniture store preparatory to loading it on the named insured's truck. A davenport, property of the furniture store, was damaged as the result of the negligence of the employees of the named insured. A few days later, while employees of the named insured were carrying a stove into a residence after unloading it from the truck, the hallway of the residence premises was damaged.

17. Lumbermens Mut. Cas. Co. v. Employers' Liab. Assur. Corp., 252 F.2d 463 (1st Cir. 1958), *affirming* Employers' Liab. Assur. Corp. v. Robert Northridge Furniture Co., 148 F. Supp. 262 (D. Mass. 1957).

18. *In re* Consolidated Indem. & Ins. Co., 161 Misc. 701, 292 N.Y.Supp. 743 (Sup. Ct. Spec. T. 1936).

19. General Acc. Fire & Life Assur. Corp. v. Jarmuth, 150 N.Y.S.2d 836 (1956) (Sup. Ct. Spec. T. 1956).

The Ohio Supreme Court held that the coverage was under an automobile liability policy and not under a general liability policy issued to the same named insured, because the damage arose out of the loading and unloading of the named insured's truck away from the named insured's premises.[20] The remaining cases pertaining to injury in a building involve the unloading phase of the policy. The first two were elevator situations in the building.

An early Minnesota case arose out of a "teams" liability policy which covered the use, "loading and/or unloading" of vehicles drawn by horses. The driver of a milk wagon stopped his wagon in front of a building for the purpose of delivering bottles of milk to workmen on the third floor. The driver entered the building with a container filled with milk bottles. To avoid climbing the stairs, the driver went to an elevator, set down the container, and pulled on the elevator ropes preparatory to using the elevator. In so doing, he injured a person. It was held that the process of unloading was completed before the accident and that the operation of the elevator had nothing to do with the "use" of the vehicle.[21] While this was not an automobile policy, the policy wording was similar and this came to be a leading case on the "coming to rest" doctrine of loading and unloading.

A New York case involved the transportation of a 4,000-pound press from one building to another. To deliver the press to the second floor of the second building, the trucker's employees placed it within the elevator cage of the elevator in the building so that it was held by pulleys without resting on the floor of the elevator. The pulleys were drawn from pulley blocks installed by the trucker's employees at the top of the elevator shaft and were operated by a power winch affixed to and part of the truck. As the power winch lifted the press by winding the pulleys, the elevator was so managed by one of the men that it ascended at the same speed as the press. Before the press reached the second floor the rope parted, the press broke the floor of the elevator, and both elevator and press fell to the bottom of the shaft. The New York City Court held that liability for damage to the elevator and for damages for business suspension because of loss of use of the elevator was covered under the "unloading" clause of the truck policy.[22]

A Connecticut case involved a roll of linoleum ordered from a department store to cover a floor space of unknown area. The store agreed to send a roll of linoleum to the customer's house, where the amount required would be cut from the roll, after which the store

20. Bobier v. National Cas. Co., 143 Ohio St. 215, 54 N.E.2d 798 (1944).
21. Franklin Co-op. Creamry Ass'n v. Employers Liab. Assur. Corp., 200 Minn. 230, 273 N.W. 809 (1937).
22. Krasilovsky Bros. Trucking Corp. v. Maryland Cas. Co., 54 N.Y.S.2d (N.Y. City Ct. 1945).

would pick up the remainder and return it to the store. The store sent its truck for delivery of the linoleum. The driver backed the truck up to the steps leading to a porch at the customer's home and slid the roll from the truck onto a concrete landing at the top of the steps, where it rested in a horizontal position. With the help of a neighbor, the driver lifted the roll up to the porch level, slid it across the porch floor, and stood it upright against the wall near the front door of the house. Later on the same day, the roll of linoleum fell upon and injured the ten-year-old daughter of the customer. The Supreme Court of Errors of Connecticut held that, this being a question of first impression in that state, the court was free to choose between the "coming to rest" doctrine and the "complete operation" doctrine, and chose the latter. It decided that the operation of unloading did not end until the linoleum was placed where it could be used by the purchaser; and that, if the driver was negligent in his placement of the linoleum, his negligent act was part of the operation of unloading the truck.[23] It seems fair to suggest that the "end" of the operation here met the court's test, since the linoleum *was* placed where it could be used by the purchaser. Presumably it would not again have been moved by the store until after the purchaser had cut from the roll the amount of linoleum she required.

A Georgia case involved an insured Ford which was used to deliver a new adding machine to the office of the United States Department of Agriculture. The owner of the Ford took the new machine into the building and set it on the wing of a desk. He had previously installed a temporary machine which he was going to replace with the new machine and take away. When he lifted the temporary machine to make room for the new machine, the weight of the new machine upset the desk and the new machine struck and injured one who was standing nearby. The Georgia court held that there was no coverage under the automobile policy on the Ford, stating: "The acts of negligence . . . seem to us to be entirely disconnected from and disassociated with the maintenance, use, or operation of the automobile. . . . [T]he machine had been unloaded when it was taken from the automobile and carried by hand to an office of the building and placed on the desk. It had not only been removed from the automobile but had definitely come to rest."[24] This case is definite support for the "coming to rest" doctrine.

In a recent case involving Maryland law, a homeowner ordered nine pieces of sheet rock from a lumber company. An employee of

23. Raffel v. Travelers Indem. Co., 141 Conn. 389, 106 A.2d 716 (1954).
24. American Cas. Co. v. Fisher, 195 Ga. 136, 23 S.E.2d 395, 397, 144 A.L.R. 533 (1942), *reversing* 67 Ga. App. 784, 21 S.E.2d 306 (1942), *followed,* Fisher v. American Cas. Co., 68 Ga. App. 806, 24 S.E.2d 229 (1943).

the lumber company drove its truck carrying the sheet rock to the customer's home and was told by the homeowner to take the sheet rock into the cellar of the home. The truck driver carried the first piece of sheet rock into the cellar without setting it down or resting it until he placed it in the cellar with one edge on the cement floor and one edge leaning against the storage closet. He followed the same procedure with each piece of sheet rock. Four hours after the truck left the home, while the homeowner was standing near the sheet rock, it fell upon and injured her. The lumber company carried an automobile policy and a general liability policy with the same insurer. In a declaratory judgment action between the insurer and the lumber company, the United States District Court for the District of Maryland declared that Maryland would apply the "complete operation" rule of loading and unloading even where the accident occurred after the truck had left the premises, whereas the general liability policy excluded the unloading of vehicles away from the lumber company's premises, so that the lumber company had coverage under the automobile policy but not under the general liability policy.[25]

An early New Jersey case involved an ice pick. A dairy carried a general liability policy with one insurer and an automobile liability policy with another. The dairy's driver drove its truck to a store, removed a can of milk and a cake of ice from the truck, and carried them into the store. As the driver was lifting the ice, a person passed him and was injured by an ice pick protruding from the driver's pocket. It was held that the unloading of the merchandise had been completed when the accident occurred, and that the driver was engaged in the servicing of the delivered milk on the customer's premises, an act entirely disconnected from the unloading of the article from the vehicle; it followed that the liability of the dairy was within the scope of the general liability policy and not the automobile policy.[26]

In another interesting New Jersey case, the driver of the named insured's truck drove the truck to a certain place of business for the purpose of transporting and delivering two bottles of nitric acid. He parked at the curb on the street in front of the place of business. The truck driver entered the plant carrying a bottle of nitric acid in each hand and placed both bottles down on a rack about seven feet inside the door. Immediately after the bottles were set down on the rack, one bottle was found to be broken. Acid from the bottle

25. American Auto. Ins. Co. v. Master Bldg. Supply & Lumber Co., 179 F. Supp. 699 (D. Md. 1959).

26. Zurich Gen. Acc. & Liab. Ins. Co. v. American Mut. Liab. Ins. Co., 118 N.J.L. 317, 192 Atl. 387 (1937).

flowed over the rack and damaged some embossing plates stored beneath the rack. The state supreme court held that liability for the damage was covered under the unloading clause of the policy.[27]

A later New Jersey case involved the use of a hand truck in a building. The driver of a truck, insured under an automobile liability policy, parked it in front of the premises of a customer for the purpose of making a delivery of cases of soda. He unloaded the cases of soda to the sidewalk and from there delivered the cases into the building by means of a hand truck which was a part of the equipment of the truck. While the hand truck was in such use inside the building, it struck and injured a customer. A New Jersey District Court held that the accident was covered under the unloading clause of the automobile policy on the truck since the court (choosing between the two theories of interpreting the loading and unloading clause) chose the "complete operation," as distinguished from the "coming to rest," doctrine.[28] The opinion stated that this was a case of first impression in New Jersey and described the two theories in the following words:

> Under the 'coming to rest' doctrine, which gives a narrow and limited interpretation . . . the 'unloading' comprises only the actual removing or lifting of the article from the motor vehicle up to the moment where (a) the goods which were taken off the vehicle have actually come to rest and (b) every connection of the motor vehicle with the process of unloading has ceased . . . .
>
> Under the 'complete operation' theory, which gives a broader and more adequate interpretation, . . . the Courts take the view that such clauses cover the entire process involved in the movement of goods from the moment when they are given into the insured's possession until they are turned over at the place of destination to the party to whom delivery is to be made.[29]

In a New York case, the trucker was transporting three cartons to a certain building. The truck driver and his helper unloaded the cartons from the truck onto a jigger (hand conveyance). The truck driver or the helper wheeled or pushed the jigger thirty feet to the building entrance and eighteen feet further into the building where a person was injured by a collision with the jigger. The city court held that the unloading continued until the delivery was completed and therefore that the accident was covered under the automobile policy on the truck.[30] The opinion did not disclose whether the

27. American Oil & Supply Co. v. United States Cas. Co., 19 N.J. Misc. 7, 18 A.2d 257 (1940).

28. Turtletaub v. Hardware Mut. Cas. Co., 26 N.J. Misc. 316, 62 A.2d 830 (1948).

29. 62 A.2d at 832.

30. B. & D. Motor Lines v. Citizens Cas. Co., 181 Misc. 985, 43 N.Y.S.2d 486 (N. Y. City Ct. 1943), *aff'd mem.*, 267 App. Div. 955, 48 N.Y.S.2d 472 (1944), *appeal denied*, 268 App. Div. 755, 49 N.Y.S.2d 274 (1944).

jigger was part of the truck's equipment or was borrowed from the consignee.

Trash Dump

In a case involving Illinois law, the insured carried a general liability policy with one carrier and an automobile policy with another. An employee of the insured collected, on the insured's premises, trash and discarded material including a quantity of lint and several empty or nearly empty cans which had contained lacquer or paint. He loaded this rubbish into a truck insured under the automobile policy and drove the truck to the city dump. By means of a hydraulic lift apparatus which was a part of the truck, the driver unloaded the truck in the section of the dump reserved for rubbish to be burned, and then returned with the truck to the insured's premises. A number of hours later, a blaze in the dump reached the cans causing an explosion which resulted in injury to a minor who was walking through the dump. The United States Court of Appeals for the Seventh Circuit stated that the Illinois law followed the "complete operation" rule of unloading, which "covers the entire process from the time the goods are received until they have been finally delivered, regardless of whether the goods have come to rest at any time prior to final delivery," but held that here, since the cans had been finally and completely delivered, no further action as to the cans was contemplated and the truck had returned to the insured's premises, the unloading of the truck had been completed, so that the Seventh Circuit could not say that the Illinois courts would hold that the accident hours later was caused by the use, or the unloading, of the truck.[31]

Dump Truck

In a case involving California law, a contractor carried a general liability policy with one carrier and an automobile liability policy with another. He contracted with a mining company to construct a roofing plant on the mining company's property. The contractor was to be responsible for the management and supervision of the entire project and was required to prepare the site for an electric power substation which was to be built by an electric company under a separate contract with the mining company. The contractor constructed a retaining wall and was filling in behind the wall to bring the ground level up to the wall level. For this purpose he used two dump trucks belonging to the mining company. The contractor's flagman would signal the truck driver the point at which to dump

31. Liberty Mut. Ins. Co. v. Hartford Acc. & Indem. Co., 251 F.2d 761, 764 (7th Cir. 1958).

the load onto the fill. When the back filling operations had been nearly completed, the electric company entered the site below the wall to begin laying foundations for the substation. At a time when none of the supervisory employees of the contractor was present, a large rock dumped from one of the trucks rolled over the retaining wall and injured an employee of the electric company. The United States Court of Appeals for the Ninth Circuit held that the coverage was under the automobile policy, since the accident involved the unloading of the dump truck.[32]

In a New York case, the truck driver used the insured dump truck to haul some waste material known as "riprap" to a waste dump. In dumping this load, he did not raise the truck body to full height and some of the pieces of riprap, including large pieces of stone, remained on the bed of the truck. The next day the truck driver hauled a load of fine stone, backed up his truck to a hopper designed for receiving fine screenings, and by elevating the body of the truck, emptied the contents into the hopper. Some of the large pieces of riprap became dislodged by the screenings and damaged the conveyor system of the consignee. As one would expect from decisions already mentioned, it was held that the accident was covered by the automobile policy since "loading and unloading" includes the complete operations "in some cases quite removed from the vehicle itself."[33]

Injury on the Truck

A Minnesota case, not otherwise readily classifiable, involved injury on the truck. Gamble-Skogmo, Inc., was insured under an automobile policy with one insurer and under a general liability policy with another. Jensen was insured with a third company under an automobile liability policy covering Jensen's truck. Jensen was employed by Gamble-Skogmo to deliver a swather at the farm of the purchasers. When the swather was loaded onto Jensen's truck at Gamble-Skogmo's store, the hitch of the swather had to be disconnected from its operating position and elevated to a transport position. This procedure also involved disconnecting the tilting bar, which is part of the hitch. An employee of Gamble-Skogmo went with the truck to deliver the swather. Upon the truck's arrival at the farm, the purchasers of the swather and their employee assisted the Gamble-Skogmo employee in reassembling the disconnected swather hitch and tilting bar. This was done while the swather was still located on the truck which was parked in a private driveway and not in

32. Pacific Employers Ins. Co. v. Hartford Acc. and Indem. Co., 228 F.2d 365 (9th Cir. 1955), *cert. denied*, 352 U.S. 826 (1956).

33. Hudson River Concrete Prods. Corp. v. Callanan Road Improvement Co., 5 App. Div. 2d 49, 168 N.Y.S.2d 801 (1957).

motion. During that process the tilting bar lever struck and injured the employee of the purchasers. In an action by the injured against Gamble-Skogmo, its employee, and others, the jury found that Gamble-Skogmo was negligent in failing to properly instruct its employee but that the employee himself was not negligent. In a later action between the various insurers, the state supreme court held that the negligent act of Gamble-Skogmo in failing to instruct its employee was a general business risk of Gamble-Skogmo and was not related to the use or unloading of the automobile so that the liability of Gamble-Skogmo was covered under its general liability policy and not under either of the automobile policies.[34]

Overloading

In a case involving Ohio law, a road contractor carried an automobile liability policy with one insurer and a general liability policy with another. One person was killed and another injured in separate accidents as the result of a slippery condition of a highway because of dirt previously spilled on the highway by the contractor's truck. The United States District Court for the Southern District of Ohio held that the accident was covered by both policies, on the theory that the dropping of the dirt was within the automobile policy and the failure to remove it and failure to warn the public was within the general liability policy.[35]

Payloader

In a New York case, the insured truck was making a delivery of dirt to a construction job. The dirt could not be driven to the point where it was desired so it was dumped onto a sidewalk. Since it was necessary to carry the dirt from the pile on the sidewalk to the point of final delivery, the truck owner used a "payloader" for that purpose. As the "payloader" backed up to the pile of dirt it struck a beam on the sidewalk and the beam struck and injured a person. The court held that the injury arose out of the use of the truck.[36]

Petroleum

Eight oil or gasoline cases may be sub-classified according to whether the truck was present at the time of the accident or the accident occurred after the truck had left the premises.

In a case involving Alabama law, the insured truck with tank trailer

34. Gamble-Skogmo, Inc. v. Saint Paul-Mercury Indem. Co., 242 Minn. 91, 64 N.W.2d 380 (1954).

35. London Guar. & Acc. Co. v. Shafer, 35 F. Supp. 647 (S.D. Ohio 1940), *superseding* 32 F. Supp. 905 (S.D. Ohio 1940).

36. Kemnetz v. Galluzzo, 8 Misc. 2d 513, 163 N.Y.S.2d 998 (Sup. Ct. Tr. T. 1957).

attached was driven to a sawmill to deliver fuel oil. The truck equipment included a five-gallon can and a funnel which were used in pouring the fuel oil into the power unit of the sawmill. While the fuel oil was being removed from the trailer tank and into the power unit, the unit became filled to overflowing and the fuel oil ran out, as a result of which the oil was ignited, and the sawmill plant burned. The United States Circuit Court of Appeals for the Fifth Circuit held that the accident was covered under the unloading clause of the automobile policy on the truck and that the insurer's contention "that the unloading of the truck had been completed at the time of the fire was not borne out by the evidence."[37]

In a California case, an oil company carried a general liability policy with one carrier and an automobile liability policy with another. The oil company maintained an unloading rack on a marine terminal. The oil company's tank trucks drove up to the rack and oil was drawn out of each truck by a pump on the unloading rack through hoses connecting intakes *A* and *B* in the rack with the truck outlets. *A* and *B* were connected and each had valves. A truck unloaded using *A* and *B* valves and drove away. Apparently the employee in charge of the pump closed valve *A* but not valve *B*. Half an hour later, another truck arrived and was connected with intake *A* but not *B*. The driver and pumper left while the pump drew oil through *A* and it escaped through open valve *B* and caused damage. The district court of appeals held that the damage arose out of the unloading of the second truck and was covered by the automobile policy and excluded from the general liability policy.[38] The court considered both the "coming to rest" doctrine and the "complete operation" doctrine but did not choose between them, since it considered that this accident was the result of unloading on either theory.

In a New York case, the insured undertook to deliver fuel oil to a certain address but delivered it at the wrong address, through an intake valve onto the floor of a cellar containing no receptacle for its storage. A fire resulted. The court held that the damage from the fire arose out of the unloading of the truck, since the "complete operation" included the moving of the goods to the vehicle and until they are actually delivered to the consignee and arrive at the ultimate point of delivery designated by the consignee, and that, until the oil was deposited at its prescribed destination, the operation was not complete.[39]

In a case involving North Dakota law, the oil company carried an

37. St. Paul-Mercury Indem. Co. v. Crow, 164 F.2d 270 (5th Cir. 1947).
38. American Auto. Ins. Co. v. American Fid. & Cas. Co., 106 Cal. App. 2d 630, 235 P.2d 645 (Dist. Ct. App. 1951).
39. Mohawk Valley Fuel Co. v. Home Indem. Co., 8 Misc. 2d 445, 165 N.Y.S.2d 357 (Sup. Ct. 1957).

automobile liability policy and a general liability policy in the same insurer. The oil company transported gasoline in a truck for delivery at a farm. While the truck was standing adjacent to the farmer's gasoline tank and being unloaded, the truck rolled down an incline, struck a house, and gasoline poured into the house where it was ignited, causing injuries, a death, and property damage. The claims were settled for an amount in excess of the policy limit of the automobile policy. The insurer admitted its liability under the automobile policy and paid its policy limit but denied liability under the general liability policy. The oil company then paid the balance of the settlement and brought action against the insurer. The United States Court of Appeals for the Eighth Circuit held against the oil company, on the ground that the accident arose out of the unloading of the truck so that it was covered under the automobile policy and not under the general liability policy.[40]

The next four cases involved situations where the accident occurred after the truck had left the premises.

In a Georgia case, a hotel was covered under an automobile liability policy by one insurer and a general liability policy by another. While a tank truck insured under the automobile policy was driven across the sidewalk adjacent to the hotel into a parking space on hotel property, oil spilled out of the hydrant from the rear of the truck and collected in a pool on the sidewalk. A pedestrian was injured when he slipped in the pool of oil less than an hour later. The Georgia Court of Appeals held that the injury did not occur while the truck was being unloaded and that it did not arise out of the operation or use of the truck, so that there was no coverage under the automobile policy.[41]

A Massachusetts case involved a truck which stopped on the highway adjacent to a house in the cellar of which was a tank for the storage of oil with an outside fill pipe. The truck equipment included a hose and pump. An employee of the truck owner connected the fill pipe with the hose from the truck by means of which the oil was pumped from the truck through the hose into the tank in the cellar, but in greater quantity than the tank could hold, with the consequence that a large quantity of oil flowed upon the floor of the cellar. The truck was driven away. Several hours later, the oil on the cellar floor became ignited without the intervention of human agency and the house and its contents were damaged. The Supreme Judicial Court of Massachusetts held that the damage arose out of the "use"

40. Farmers Union Oil Co. v. Central Sur. & Ins. Corp., 256 F.2d 603 (8th Cir. 1958).

41. Ocean Acc. & Guar. Corp. v. J. B. Pound Hotel Co., 69 Ga. App. 447, 26 S.E.2d 116 (1943).

of the truck and that it was therefore unnecessary to decide whether the clause providing that use of the truck included "loading and unloading" added to the coverage.[42]

In an earlier case involving Massachusetts law, the insured was delivering fuel oil at an apartment house through a hose running from the truck to the apartment's filler pipe. An hour after the delivery was made and the truck had been driven away, an explosion occurred in the apartment house with a resulting fire. A little later, while the fuel oil was being pumped out of the tank in the apartment house, it was observed that oil was running out of the bottom of the tank in the apartment house and that buckets had been placed under the tank to receive the leaking oil. There was no evidence to indicate that these leaks had any connection with any faulty unloading by the truck. The District Court of the United States for the District of Massachusetts held that the claims for property damage resulting from the fire were not covered by the automobile policy since the unloading was completed before the accident so that there was no causal connection between the property damage and the unloading.[43]

In a case involving Texas law, the named insured's truck driver drove the insured truck to the named insured's premises for a load of merchandise. The truck needed gasoline for the trip. The driver drove up to a gasoline pump on the premises of the named insured. The pump was connected with two tanks, one underground and one overground. Having found the underground tank was empty, the driver opened a valve to permit gasoline to flow from the upper to the lower tank and thence through the pump and hose into the truck. After filling the fuel tank of the truck, the driver withdrew the hose and turned the valve. He thought that he had closed the valve and drove away in the truck. The valve was faulty and did not completely close. The gasoline continued flowing until the tank overflowed, coursing down the city gutters for several blocks. An hour after the truck had left and when the truck was forty or fifty miles away, the gasoline in the streets became ignited and caused an explosion. The United States Court of Appeals for the Fifth Circuit, reversing a judgment of the United States District Court for the Northern District of Texas, held that the property damage which resulted from the explosion was within the property damage liability coverage of the automobile policy on the truck, rejecting the "coming to rest" doctrine of loading and unloading and following the "complete operation" theory as adopted in Texas and holding that, if fueling the truck was

42. General Acc. Fire & Life Assur. Corp. v. Hanley Oil Co., 321 Mass. 72, 72 N.E.2d 1, 171 A.L.R. 497 (1947).

43. Maryland Cas. Co. v. United Corp., 35 F. Supp. 570 (D. Mass. 1940).

not "loading," it was still "use" of the automobile.[44]

Sidewalk

In a case involving California law, an automobile policy covered a truck owned by a fruit and vegetable peddler. The truck was parked along the curb across the street from the Piccadilly Inn in San Francisco. The truck driver had carried some vegetables into the inn from the truck and was returning hurriedly to the truck for more; as he ran across the sidewalk between the inn and the truck looking backwards he collided with a pedestrian. The United States Court of Appeals for the Ninth Circuit held that the accident arose out of the unloading and therefore out of the use of the truck.[45]

A Louisiana case involved a broken milk bottle, under a policy issued to a creamery and insuring its liability arising from the use of teams and vehicles drawn thereby and the loading or unloading of goods carried thereupon. The creamery's employees, while operating a team-drawn milk wagon, dropped an empty milk bottle in the street while tossing it from an employee on the sidewalk to another in the wagon. They left the broken pieces on the street and on the edge of the sidewalk. Seven days after the bottle was broken, a ten-year-old boy stepped on broken glass and was injured. When the boy brought action against the creamery and the insurer, the insurer refused to defend the creamery. The boy's suit was dismissed and there was a judgment against the insurer in favor of the creamery for the costs of defense. The Louisiana Court of Appeal affirmed the judgment in both respects, on the ground that even though there was lack of proof that the glass stepped on by the boy was the glass broken by the creamery the insurer was nonetheless bound to defend the claim, since if the identity of the glass had been established, the liability for injury to the boy would have been covered under the loading provision of the policy.[46]

In a Massachusetts case, the insured truck was parked adjacent to the curb in front of the named insured's place of business. The driver was engaged in unloading boxes, placing them in stacks on the sidewalk preliminary to bundling and carrying the stacks into the cellar. In so unloading, the driver permitted some short loops and lengths of rope to drop out or off of the boxes onto the sidewalk. None of the rope was physically attached to the truck. A pedestrian on the sidewalk tripped on rope which had so dropped and was injured. It

44. Red Ball Motor Freight v. Employer's Mut. Liab. Ins. Co., 189 F.2d 374 (5th Cir. 1951).
45. Maryland Cas. Co. v. Tighe, 115 F.2d 297 (9th Cir. 1940), *affirming* 29 F. Supp. 69 (N.D. Cal. 1939).
46. Lang v. Jersey Gold Creameries, 172 So. 389 (La. App. 1937).

was held that the presence of the rope on the sidewalk was too remote from the operation and use of the truck and that when the rope came to rest on the sidewalk it became disassociated from "the ownership, operation, maintenance, control or use" of the automobile.[47] The opinion did not refer to any loading and unloading clause. The case apparently involved only the Massachusetts statutory coverage which did not include a loading and unloading clause. The court adopted the "coming to rest" doctrine by relying on the "ownership, maintenance or use" language of the bodily injury liability coverage.

In a Minnesota case, the insured truck was owned by a terminal company which was engaged to move furniture from offices in a government building to offices in the telephone building. The terminal company used three separate crews. The first crew carried the furniture from offices in the government building to and placed it on the tailgate of the truck; the second crew received the furniture on the tailgate, arranged it on the truck, drove the truck to the telephone building, and moved the furniture to the tailgate; the third crew took the furniture from the tailgate, placed it on the sidewalk, put it onto hand trucks (which were the property of the terminal company but not part of the truck's equipment), pushed the hand trucks up a ramp laid over the stairs from the sidewalk to the first floor of the telephone building (the ramp was laid by the third crew, was not physically connected with the truck, and was borrowed by the terminal company from another transfer company which was moving other property into the telephone building), and then moved the hand trucks to the elevators for transportation to the upper floors of the telephone building. Toward the end of the day, an employee at the telephone building was injured when he fell on the ramp while using it to descend to the street. At that time, there was no activity on the ramp by the terminal company, none of its equipment was in motion, and there was no truck at the curb. A truck which had just been unloaded was in the act of pulling away. There may have been furniture on the sidewalk. The court held that the injury did not arise out of the unloading of the truck, since the goods here were unloaded when they were removed from the truck and placed upon the sidewalk and that "unloading" did not include the subsequent handling and transportation of the goods from the sidewalk into the building.[48]

In a Missouri case, the truck owner was delivering coal to a hospital in St. Louis through a chute in the sidewalk. The hospital furnished blocks to permit the coal trucks to ascend the curb so as

47. Perry v. Chipouras, 319 Mass. 473, 66 N.E.2d 361, 362 (1946).
48. St. Paul-Mercury Indem. Co. v. Standard Acc. Ins. Co., 216 Minn. 103, 11 N.W.2d 794 (1943).

to get close enough to the coal chute to deliver the coal. The hospital asked the truck drivers to leave the blocks on the sidewalk. A city ordinance made it unlawful to leave obstructions on the sidewalks. The coal company used the blocks to back the trucks over the curb and, after delivery was completed about noon, the blocks were left on the sidewalk and the last truck driven away. That evening after dark, a pedestrian tripped over the blocks and was injured. The supreme court held that the accident arose out of the use and unloading of the truck, whether or not such use was the direct and proximate cause of the accident.[49]

In a New York case, a man was fatally injured by a hose between the insured truck and a fill box on the sidewalk. The trial court held that the injury involved the unloading of the truck.[50]

A more recent case was submitted to the New York Appellate Division on stipulated facts. The court stated:

> In our opinion the stipulated facts fail to show that the injuries to a named pedestrian resulted from the negligence of defendant's insured in the loading or unloading process described therein. So far as the stipulated facts indicate, the employees on the truck of the defendant's insured had lined the 'skids' up against the building of the consignee, plaintiff's insured, or at the curb, had tucked ropes under the wheels of the skids to keep them from rolling, had then left the situs and had been gone for an hour and 40 minutes before the pedestrian tripped and fell over a rope lying on the sidewalk. Concededly, the skids were to be taken into the consignee's premises by its own employees. There is no suggestion in the stipulated facts as to how the rope in question had worked loose from under the wheels. Under these circumstances, no inference may be drawn by this court from the stipulated facts that the carelessness of the employees on the truck of the defendant's insured caused the pedestrian to trip over the rope . . . .[51]

As is too often the case with memoranda opinions by the New York Appellate Division, this decision is more intriguing than informative. The case obviously involved insurance, but the court did not reach insurance nor the question whether the employees of the consignee had coverage under the truck policy.

In an Ohio case, the insured truck was equipped with a permanently attached blower machine for the purpose of unloading wool insulation through a hose into place in a building. A pedestrian tripped over the hose which extended from the parked truck across the sidewalk into the building into which the insulation was being blown. The

49. Schmidt v. Utilities Ins. Co., *supra* note 16.

50. Gluck v. London & Lancashire Indem. Co. of America, 134 N.Y.S.2d 889 (Sup. Ct. Tr. T. 1954), *rev'd on other grounds*, 2 App. Div. 2d 751, 153 N.Y.S.2d 518 (1956), *aff'd* 2 N.Y.2d 953, 142 N.E.2d 423 (1957).

51. Employers Mut. Liab. Ins. Co. v. Aetna Cas. & Sur. Co., 7 App. Div. 2d 853, 181 N.Y.S.2d 813, 814 (1959), *appeal denied*, 6 N.Y.2d 705, 159 N.E.2d 355, 187 N.Y.S.2d 1025 (1959).

Ohio court held that the injury arose out of the use of the truck within the unloading clause of the automobile policy.[52]

In a case involving Tennessee law, the insured truck was delivering a load of coal to a building. The truck owner was required by his contract of sale to deliver the coal into the basement. The truck dumped the coal onto the sidewalk in which there was a manhole. A policeman required the truck driver to move the truck a block away. Thereafter, the driver and two others were shoveling the coal into the manhole when a pedestrian stumbled over a piece of coal in the pile on the sidewalk and was injured. The United States Court of Appeals for the Sixth Circuit, affirming a judgment of the United States District Court for the Middle District of Tennessee, held that the accident arose out of the transportation and delivery of materials and the unloading of the truck, since the delivery was not completed until the coal was in the basement.[53] The opinion may have been influenced by the fact that the word "delivery" was included in the definition of "commercial" use of the automobile. The word "delivery" is no longer included in the standard policy.

The delivery of coal was likewise involved in a Virginia case. The coal company was delivering coal in a dump truck to a store. The truck dumped its load of coal at the edge of the curb. Two employees of the coal company were shoveling coal from the place of deposit into a manhole in the sidewalk which was nearly five feet from the store and nearly fourteen feet from the curb. The dump truck was 100 feet away, returning to its loading place for another load of coal to be delivered, when a pedestrian fell over a piece of coal on the sidewalk between the store and the manhole. The Virginia Supreme Court adopted the "complete operation" doctrine, holding that, since the coal company's contract and practice was to "deliver" the coal, not onto the street but into the bin, and "the unloading was not completed until the coal was unloaded into the bin in the basement," the "shoveling was an integral part of the unloading process" and was covered by the policy.[54]

Stretcher

In an early Arkansas case, the insured automobile was an ambulance, which was sent to the home of a patient for the purpose of transporting her to the hospital and was parked in the street in front of the patient's home. A stretcher, carried as part of the ambulance equipment, was taken from the ambulance. While the

52. Thompson Heating Corp. v. Hardware Indem. Ins. Co., 72 Ohio App. 55, 50 N.E.2d 671 (1943); 74 Ohio App. 350, 58 N.E.2d 809 (1944).
53. Maryland Cas. Co. v. Cassetty, 119 F.2d 602 (6th Cir. 1941).
54. London Guar. & Acc. Co. v. C. B. White & Bros., 188 Va. 195, 49 S.E.2d 254 (1948).

stretcher was being used in carrying the patient from her home to the ambulance, the patient was allowed to fall from the stretcher to the pavement just as the attendants were passing from the yard to the sidewalk. Without specifically passing upon the question whether the accident was covered under the loading and unloading clause of the policy, the Arkansas court held that the accident arose out of the use of the ambulance since use of the stretcher to convey the patient from her home to the waiting automobile, although not a necessary incident to the use of the automobile as a motor vehicle, was an essential transaction in connection with the use of the automobile as an ambulance, particularly since the stretcher was part of the equipment of the automobile.[55]

Injury by Stranger to Truck Crew—
No General Liability Policy Known to be Involved

Each of the cases previously discussed involves a question of coverage for the named insured under the automobile policy or a member of the truck crew. This classification and the next one involve some of the physical classifications previously discussed but are treated separately because of the predominate factor that the injury was by a stranger to the automobile or the truck crew.

Perhaps the earliest case in this category was a Washington case which involved a baseball game. The labor council staged a Labor Day celebration at an athletic field. The chairman of the refreshment committee ordered from an ice company 15 gallons of ice cream to be given to the children. The ice company's truck was met at the field by the chairman who directed the driver to the spot where the truck should be parked. The parking spot was 25 feet outside the baseball diamond, halfway from home plate to third base. The truck driver left the truck there and returned to the ice company's plant. A railing was put in position beside the truck to keep the children in single file. The chairman and others were in the truck dispensing ice cream from it in cups and cones. An 11-year-old boy was standing near the truck awaiting his ice cream or reaching up to receive it when he was struck and injured by a foul ball. The boy recovered a judgment against the labor council's chairman, but the state supreme court held that there was no coverage under the automobile liability policy on the truck since the accident did not arise out of the ownership, maintenance or use of the truck, the truck was merely a storing place and had nothing to do with the accident, and the chairman was not "unloading" the truck when he was dispensing ice cream from it, cone by cone.[56]

55. Owens v. Ocean Acc. & Guar. Corp., 194 Ark. 817, 109 S.W.2d 928 (1937).
56. Handley v. Oakley, 10 Wash.2d 396, 116 P.2d 833 (1941).

In a case involving Alabama law, a tractor and trailer unit was used to deliver rolls of wire mesh to the premises of a glass company. The consignee was engaged in a construction contract upon the premises of the glass company and had the duty to unload the truck on arrival. While the consignee's employees were unloading the truck with the consent of the truck driver, the truck driver was struck and injured by a roll of wire mesh. The United States District Court for the Middle District of Alabama held that the consignee was an insured under the omnibus clause of the truck policy.[57]

In a California case, the insured truck was used to deliver beans to a warehouse. An employee of the warehouse placed blocks on a platform so that the truck could be backed onto the platform and rest against the blocks while the front of the truck was elevated to allow the beans to slide out. The warehouse employee directed the truck driver to back the truck onto the platform and against the blocks. The warehouse employee then raised the front end of the platform permitting the beans to slide into the pit. A few beans remained in the bottom of the bed of the truck. The truck driver obtained a broom from the warehouse, stationed himself at the rear of the truck, and reached into the truck to sweep out the remaining beans. While he was in this position, the rear wheels moved over the blocks, the truck moved backwards, and the truck driver was injured. The district court of appeal held that the warehouse employee was unloading the truck and was therefore using it and covered under the omnibus clause of the truck policy.[58]

In a case in the District of Columbia, the insured truck was used to deliver a load of steel beams to the construction site of a bridge. Several cranes hired by the construction company were used to move the steel beams from the truck to their eventual location. One of the cranes lifted the first beam from the truck by means of a cable fastened to the beam at one end and the boom of the crane at the other end. The beam was placed upon the new structure somewhat north of the position it was eventually to occupy and remained in that location for five minutes. During this interval the crane's cable was moved to the east end of the beam, while a similar cable was placed around the west end of the beam and fastened to another crane. This change was made because the supervisory personnel of the contractor believed that the first crane could not continue to move the beam alone without coming into contact with certain wires suspended over the construction site. The two cranes then picked up

57. St. Paul-Mercury Indem. Co. v. American Fid. & Cas. Co., 146 F. Supp. 39 (M.D. Ala. 1956), *rev'd on other grounds*, 248 F.2d 509 (5th Cir. 1957).

58. Pleasant Valley Lima Bean Growers & Warehouse Ass'n v. Cal-Farm Ins. Co., 142 Cal. App.2d 126, 298 P.2d 109 (Dist. Ct. App. 1956).

the beam and commenced to move it in a southerly direction. An employee of the contractor was guiding the beam by hand. While the cranes were moving the beam toward the position which it was eventually to occupy in the new structure, but before the beam came to rest upon this structure, the boom of the first crane came into contact with, or in close proximity to, a high tension wire, resulting in the electrocution of the contractor's employee. The United States Court of Appeals for the District of Columbia Circuit affirmed a judgment of the district court which had concluded that, under either the "complete operation" doctrine or the "coming to rest" doctrine of loading and unloading, the injury occurred *during* the unloading of the truck, so that the automobile insurer on the truck was obligated to defend the negligence action against the crane owners for the death of the contractor's employee.[59] Without necessarily disagreeing with the result, it may be pointed out that the question was not whether the injury arose *during* the unloading but rather was whether (in the words of the policy) the injury was one *arising out* of the use, that is, the unloading of the truck.

In a case involving Minnesota law, the insured truck was hired by a quarry to deliver lime. While the truck was at the quarry being loaded with lime, the truck owner stood on the box of the truck with a shovel checking the passage of the lime through a screen placed on top of the box. A power shovel operated by an employee of the quarry was used to load the truck from a stock pile. Something happened to the power shovel so that the quarry employee could not control the arm which held the shovel. The arm kept swinging and the shovel struck and injured the truck owner. The United States District Court for the District of Minnesota held that the accident was caused by the loading operation so that the quarry and its employee were using the truck and were omnibus insureds under the truck policy.[60]

In a New York case, the insured truck undertook to deliver cabinets at Macy's store. The truck backed up to the sidewalk and the truck driver moved the cabinets to the rear of the truck. An employee of Macy's removed the cabinets from the truck and placed them on a dolly. Another employee of Macy's then moved the cabinets on the dolly to an elevator of the building. During this process one of the cabinets fell off the dolly and struck a pedestrian on the sidewalk. The cabinet came to rest half in and half out of the building. The special term found that the injury was caused by the sole negli-

59. Indemnity Ins. Co. of North America v. Old Dominion Hoisting Serv., 251 F.2d 382 (D.C. Cir. 1958).

60. Bituminous Cas. Corp. v. Travelers Ins. Co., 122 F. Supp. 197 (D. Minn. 1954).

gence of the employee of Macy's and held that Macy's was entitled to be reimbursed by its employee and that the employee was covered under the omnibus clause of the truck policy as a person using the automobile, since he was "unloading" it.[61]

In another New York case involving Macy's, television sets were being unloaded at the store from a truck which was backed onto a platform. The sets were being unloaded upon skids supplied by Macy's. One of the skids was defective. An employee of the seller of the merchandise was working alongside the driver of the truck and was injured when he stepped off the defective skid. The special term indicated that the defective skid was utilized to facilitate the unloading operations so that Macy's was "using" the truck and was therefore an insured under the automobile policy issued to the trucking company.[62]

In a later New York case, the insured truck was in the process of delivering batch mix concrete to a construction site under a contract between the truck owner and a concrete company. The truck struck a person and he was fatally injured. It was held that the concrete company was "using the truck" and was "legally responsible" for its use since it was charged with a duty of supervision and direction, and was therefore covered under the truck policy.[63]

In another recent case from that jurisdiction a truck driver was injured by the negligence of an employee of the consignor who was loading carpets onto the truck. The New York Court of Appeals held that the negligent employee was covered under the truck policy.[64]

In a still more recent case involving New York law, a ship owner unloaded bags of napthalene from one of its ships at a pier in Brooklyn. An employee of a trucker was injured while loading the bags of napthalene into the truck. The injured brought action against the ship owner alleging that his injuries were caused by the negligence of the ship owner in permitting the bags of napthalene to remain on deck while being transported by sea, thereby subjecting them to exposure from salt water, sun, the other natural elements, and the napthalene itself; in permitting the bags to remain in an unsafe and dangerous condition; in failing to remove the bags to a dry, safe, and proper place; and in failing to have the bags properly packed. The ship owner settled the claim and then brought action

61. Lowry v. R. H. Macy & Co., 119 N.Y.S.2d 5 (Sup. Ct. 1952).
62. R. H. Macy & Co. v. General Acc., Fire & Life Assur. Corp., 4 Misc. 2d 89, 148 N.Y.S.2d 10 (Sup. Ct. 1955).
63. Tri-State Concrete, Inc. v. Nationwide Mut. Ins. Co., 5 App. Div. 2d 384, 172 N.Y.S.2d 123 (1958), *appeal denied,* 6 App. Div. 2d 731, 174 N.Y.S.2d 974, 153 N.E.2d 800 (1958).
64. Greaves v. Public Serv. Mut. Ins. Co., 5 N.Y.2d 120, 155 N.E.2d 390, 181 N.Y.S.2d 489 (1959), *affirming* 4 App. Div. 2d 609, 168 N.Y.S.2d 107 (1957), *reversing* 156 N.Y.S.2d 754 (1956).

against the automobile insurer of the truck. The United States District Court for the Southern District of New York dismissed the complaint, stating (1) that the issue was whether the automobile insurer could be charged with liability under its loading and unloading clause when there was no negligence of any kind claimed in connection with the loading or unloading operation, and (2) following the "only" New York case on the subject,[65] that no liability could attach under the loading and unloading clause in the absence of a showing that the accident resulted from negligence in the loading or unloading process, so that the ship owner was not an insured under the automobile policy.[66]

In a 1960 New York case, a trucker was engaged to haul a chemical product from one plant of a chemical company to another. When the truck arrived at the second plant, the truck driver engaged in unloading the truck. "At a time during the process, when there was no activity in the unloading process, one of the containers on the truck exploded" and the truck driver was injured. The injured truck driver brought action against the chemical company, alleging negligence in "allowing the shipment of an inherently dangerous product without adequate safeguards," and, by affidavit, disclaiming any negligence in "loading or unloading." In a declaratory judgment action between the chemical company and the automobile insurer of the truck, it was held that, while the chemical company would be an additional insured under the truck policy if the accident was caused by some negligent act in loading or unloading, there was no coverage for either the named insured or the chemical company under the truck policy since the injured truck driver made no claim of negligence in loading or unloading and since no act of loading or unloading was being performed at the time of the accident.[67] The court here followed *Employers Mutual*[68] and *Moore-McCormack*.[69] No other case comes to mind where the accident occurred during a suspension of the unloading process, which seems to have taken place here, but even if "unloading" was not involved, may not the presence and explosion of a dangerous product on the truck have been a "use" of the truck or have arisen out of the "loading" of the truck even though perhaps not physically loaded by the chemical company? Perhaps New York is receding from some of the extreme phases of *Wagman*[70] and its successors. It is noted with interest that the court thought that there

65. Employers Mut. Liab. Ins. Co. v. Aetna Cas. & Sur. Co., *supra* note 51.
66. Moore-McCormack Lines, Inc. v. Maryland Cas. Co., 181 F. Supp. 854 (S.D.N.Y. 1959).
67. Eastern Chemicals, Inc. v. Continental Cas. Co., 199 N.Y.S.2d 48 (1960).
68. Employers Mut. Liab. Ins. Co. v. Aetna Cas. & Sur. Co., *supra* note 51.
69. Moore-McCormack Lines, Inc. v. Maryland Cas. Co., *supra* note 66.
70. Wagman v. American Fid. & Cas. Co., *infra* note 74.

was no coverage for the trucker, named insured. As a matter of fact there wasn't since the truck driver was an employee of the named insured, but wouldn't the named insured have had coverage if the explosion had injured a stranger passing by?

An interesting recent Ohio decision denied coverage for the stranger to the truck crew but not for the reason that he was a stranger. The insured truck in that case was driven to the premises of the Gulf Refining Company which maintained a place of business for the distribution of petroleum products. The truck driver parked the truck near the loading platform, opened the valves and prepared to load diesel fuel. An employee of Gulf handed down to the truck driver a loading pipe from which the diesel fuel had not been drained after a previous loading. As the pipe was lowered to the truck driver, oil suddenly spewed forth from the pipe into the face of the truck driver, causing him to lose his balance, fall, and sustain injuries. The court held that, while Gulf was an insured under the omnibus clause of the truck policy if it was "loading" the truck, at the time of this accident the truck driver had performed no act which would tie in the movement of the pipe to the act of loading the truck, so that Gulf was not using or responsible for the use of the truck at the time of the accident since it had not yet made connection and started the movement of the product; that there is a distinction between cases involving loading of goods and those involving loading of oil; that, in the loading of goods, the loading commences when the goods are put on a pushcar to be conveyed to the truck or when they have started to move from the place of rest to the vehicle, and the unloading ceases when the goods have moved from the vehicle to the place of rest; that, here, the truck was not yet within the contemplated use of Gulf nor was Gulf responsible for its use since no goods had started moving toward the tank in the process of loading; and that the availability of the truck for loading in and of itself would not bring it within the loading and unloading provision, since there must be some action which would indicate that the process has started to completion.[71]

In a Texas case, the consignor of gravel which loaded the gravel into a truck owned by an independent contractor, was held to have coverage under the truck policy where, while the truck was proceeding with the gravel on a highway, a rock fell from the truck and went through the windshield of an automobile, injuring a person in that automobile, the court of civil appeals holding that the accident arose out of the loading of the truck.[72]

71. Travelers Ins. Co. v. Buckeye Union Cas. Co., 160 N.E.2d 874 (Ohio C.P. 1959).
72. Panhandle Gravel Co. v. Wilson, 248 S.W.2d 779 (Tex. Civ. App. 1952).

In a recent Texas case, the insured truck was being loaded with diesel fuel at the loading docks of the Standard Oil Company when an explosion occurred which injured the truck driver. The court held that the Standard Oil Company was covered as an insured under the truck company's policy, since it was engaged in loading the truck.[73]

Injury Caused by Stranger to Truck Crew—General Liability Policy Involved

The most interesting of the stranger cases involve the right of the stranger's employee over against the stranger where the employer is also insured under a general liability policy.

The earliest and leading case on that subject (startling at the time it was announced) involved an automobile liability policy and a general liability policy. The trucker was employed by Bond Stores to transport garments from one of its stores. The truck was parked at the curb in front of the store. Two of Bond's employees rolled onto the sidewalk and to the curb line a rack of garments to be loaded. The truck driver in the truck lifted the garments into the truck and handed them to his helper, who arranged them in the truck. The driver and helper were employees of the trucker. They did not leave the truck. None of Bond's employees entered the truck or brought the garments farther than the curb line. Bond's manager was on the sidewalk counting and checking the garments and supervising the pickup, but he did not participate in the actual movement of the garments. While the manager was on his way back to the store to check on further goods to be shipped, he bumped a pedestrian, causing her to fall to the sidewalk and sustain injuries. In a declaratory judgment action to determine whether the manager had coverage under the truck policy, the New York Court of Appeals held that the manager was an insured under the omnibus clause of the truck policy because the loading and unloading clause of the policy applied under the "complete operation" doctrine which embraces not only the immediate transference of the goods to or from the vehicle, but the complete operation of transporting the garments between the vehicle and the place to or from which they are to be moved, and that coverage was not precluded because of the fact that no employee of the trucker was involved, since the omnibus clause extends coverage to anyone using the truck and the manager was so using it.[74] In the meantime, the pedestrian brought action against the manager and

73. Standard Oil Co. v. Transport Ins. Co., 324 S.W.2d 331 (Tex. Civ. App. 1959).

74. Wagman v. American Fid. & Cas. Co., 304 N.Y. 490, 109 N.E.2d 592 (1952), *affirming* 279 App. Div. 993, 112 N.Y.S.2d 662 (1952), *affirming mem.*, 201 Misc. 325, 108 N.Y.S.2d 854 (Sup. Ct. 1951).

Bond Stores. Bond Stores cross-claimed against the manager as the person primarily liable. The pedestrian obtained a judgment against the manager and Bond Stores, and Bond Stores obtained a judgment over in its favor against the manager. The general liability insurer of Bond Stores furnished certain funds under a loan agreement which were paid in settlement and satisfaction of the pedestrian's judgment. Bond Stores then brought action against the automobile insurer for reimbursement of the amount paid. The special term granted a summary judgment for Bond Stores, holding that Bond Stores had the right to recover to the same extent as if the action were by its manager and that the manager was covered under the automobile policy but was not covered under the omnibus clause of the general liability policy carried by Bond Stores.[75] Without necessarily conceding that the New York Court of Appeals was correct in holding that the manager was loading the truck, the other results of the litigation follow that holding. The general liability policy does not cover, as an insured, an employee of the named insured. Accordingly, the general liability policy did not cover the manager and since the automobile policy did, and since the employer had a right over against the negligent employee causing loss to the employer, the burden necessarily fell upon the automobile insurer as the only insurer of the negligent actor. This leading case on that subject has been followed by many others.

In a case involving California law, while a truck was delivering a girder to certain premises, an employee of the contractor supervised the unloading of the girder. Slings were placed around the girder. The truck driver's helper was directed to remove the front chain binder. While he was so doing, the employee of the contractor, who was supervising the unloading, allowed the beam to shift precipitating the truck driver's helper to the ground and he was injured. A judgment against the contractor and its supervising employee was paid by the contractor's general liability insurer which then obtained a judgment against the automobile insurer on the truck. The United States District Court for the Northern District of California held that the supervisor was "unloading" the truck and therefore was "using" it within the meaning of, and was an "insured" under, the omnibus clause of the truck policy; that the contractor was also an insured under the omnibus clause of the truck policy as "legally responsible"; that the supervisor was not an insured under the general liability policy which had no general omnibus clause; that the contractor was insured under each policy, but that the supervisor who was the ultimately liable tort-feasor was insured only under the

75. Bond Stores, Inc. v. American Fid. & Cas. Co., 133 N.Y.S.2d 297 (Sup. Ct. 1954).

truck policy; and that the automobile insurer was therefore liable for any judgment against the supervisor, since the general liability insurer was subrogated to the contractor's right over against his negligent employee.[76] The United States Court of Appeals for the Ninth Circuit affirmed, holding that (1) where only the agent has been at fault, the agent has a duty to reimburse the principal found liable and (2) while the contractor was insured under its own policy and under the omnibus clause of the automobile policy, the negligent employee was insured only under the omnibus clause of the automobile policy, so that the general liability insurer was entitled to recover against the automobile insurer as the only insurer of the negligent employee who was the person ultimately liable.[77]

In a rather recent California case, the truck driver was instructed to drive the truck to a railroad spur track where he was to report to and take orders from employees of one who hired the truck. The truck was being loaded with steel pilings which were hoisted from a gondola car on the railroad track to the truck by a crane. Employees of the person who hired the truck were in the gondola car and attached a single piling to the boom hooks of the crane. They then signaled the crane operator, who transported the piling over to the truck, where it was placed at the direction of the truck driver and and others who were on the truck. After twelve pilings had been loaded, the men in the gondola car attached a piling to the crane hooks in such a manner that an additional piling became wedged into the secured piling. The truck driver called the attention of the crane operator to this fact and the latter attempted to dislodge the extra piling by banging it within the gondola car. The men in the gondola signaled the operator to lift the load from the car. The operator lifted it, moved it over to the bed of the truck and lowered it into the truck, under the direction of the truck driver and others. When about six inches from the bed of the truck, the wedged piling broke loose from the secured piling and injured the truck driver. The claim was settled by several insurers representing various interests, but not including the automobile insurer on the policy issued to the person who hired the truck. The general liability insurer of that person then brought action against the automobile insurer of that person to recover the amount paid by it. The district court of appeal affirmed a judgment against the automobile insurer, holding that the accident occurred while the truck was being loaded, that the general liability insurer was not liable under its policy, but that the

76. United States Fid. & Guar. Co. v. Church, 107 F. Supp. 683 (N.D. Cal. 1952), *aff'd*, 213 F.2d 658 (9th Cir. 1954).

77. Canadian Indem. Co. v. United States Fid. & Guar. Co., 213 F.2d 658 (9th Cir. 1954), *affirming* 107 F. Supp. 683 (N.D. Cal. 1952).

automobile insurer was liable under its policy, and that the general liability insurer was therefore entitled to recover all of its payment from the automobile liability insurer.[78] This rather loosely written and confusing opinion may stand for the proposition that the insurer covering the negligent employees must bear the loss.

In an Illinois case, a truck was employed to transport a diesel engine from the seller of the diesel engine to the premises of a consignee. The truck was driven onto the premises of the consignee. The diesel engine was being moved from the truck by means of a hoist owned and operated by the consignee. Four employees of the consignee were participating in the unloading of the diesel engine. A hitch was used to unload the engine. When the hoist was tightened the engine slid toward the back of the truck. It was then hanging from the hoist, clear of the truck, when it dropped and fell on an employee of the seller. The appellate court held that the consignee and its employees were unloading the truck and were covered under the omnibus clause of the truck policy; that the primary coverage for the consignee was in the truck policy; that the coverage under a general liability policy issued to the consignee "at most was excess coverage"; and that the only insurance coverage for the employees of the consignee was under the truck policy.[79]

A Louisiana case came to another conclusion on the "right over" under a somewhat different set of facts which involved a "non-ownership" automobile liability policy instead of a general liability policy. A consignor proposed to ship a number of grader blades in a certain truck. The blades were stacked in bundles on the loading platform of the consignor. The truck driver backed the truck to the edge of the loading platform. An employee of the consignor cut the wire binding one bundle of blades by striking the wire with a hammer, and then placed address tags on each blade. The truck driver stood in the back of the truck and pulled each blade into the truck after it had been tagged. When the employee of the consignor cut the wire on the second bundle, three of the blades fell off the stack and struck the foot of the truck driver. The court held that there was coverage under the automobile policy for the consignor and its employee, since the tagging of the blades was an integral part of the loading process and in view of the fact that the latter included the entire process during which the goods were being transferred from the consignor to and into the truck for shipment. The automobile insurer under its policy on the truck and the non-ownership automobile insurer

78. Employers Mut. Liab. Ins. Co. v. Pacific Indem. Co., 167 Cal. App. 2d 369, 334 P.2d 658 (1959).

79. Bituminous Cas. Corp. v. American Fid. & Cas. Co., 22 Ill. App. 2d 26, 159 N.E.2d 7 (1959).

under its policy issued to the consignor were held proportionately liable to the injured truck driver, on the ground that, while the consignor's employee was not an insured under the consignor's "non-ownership" policy, the consignor was a joint tort-feasor with its employee, so that neither the consignor nor its insurer could recoup from the automobile insurer as the sole insurer of the consignor's employee.[80]

This question arose in two cases involving Minnesota law. In one, the truck driver was directed to make delivery of certain freight. Upon arrival at the yard of the consignee, the truck driver was directed by an employee of the consignee to back the truck onto a driveway for unloading. In the process of unloading, the truck driver was injured through the negligence of the employee of the consignee. After the truck insurer declined to defend an action brought by the injured, a judgment against the consignee and its employee was paid by the general liability insurer of the consignee, which then brought action against the truck insurer to recover the amount paid by it. The United States District Court for the District of Minnesota entered judgment for the general liability insurer, holding that the injury arose by reason of the use of the insured truck; that the general liability policy covered the consignee but not its employee; that the consignee had a right over against its employee; and that the automobile insurer, as the sole insurer of the consignee's employee, bore the ultimate liability.[81]

The other Minnesota case involved an interesting variation of facts. A general contractor held an automobile liability insurance policy in one insurer and a general liability policy in another. One of his subcontractors carried an automobile policy in a third and hired a truck from a truck owner insured by a fourth insurer. The trucks were unloaded in a congested area. Each truck mounted a turntable to be turned around for final backing to discharge the load into a paver. When the truck driver entered the area he became subject to the exclusive control of the general contractor who also arranged the objects in the area. The owner of the truck hired by the subcontractor drove his truck into the area, backed it on signal from the turntable operator, and struck and injured a state inspector. The inspector brought action against the general contractor, the subcontractor, and the truck owner, and recovered a judgment against the general contractor only. The subcontractor and the truck owner were exonerated. In an action between the various insurers, the supreme court held that the four insurers were proportionately liable, since the two items

80. Spurlock v. Boyce-Harvey Mach., Inc., 90 So. 2d 417 (La. App. 1956).
81. Travelers Ins. Co. v. American Fid. & Cas. Co., 164 F. Supp. 393 (D. Minn. 1958).

of negligence of the general contractor—mislocation of the turntable and giving the truck owner a back-up signal when the inspector was in a position of obvious peril—were concurrent proximate causes of the accident, and in assuming exclusive supervisory control over the movements of the truck, the general contractor was using the truck and was then an insured under each of the three automobile policies, whereas the active negligence involving general business operations was covered under the general liability policy.[82]

A recent Missouri case on this subject is quite confusing. One insurer issued an automobile liability policy to a trucking company and a warehouse. Another insurer issued a general liability policy to the warehouse. An employee of the trucking company drove one of its trucks to the warehouse for the purpose of obtaining a load of merchandise to be delivered elsewhere. All of the merchandise was loaded except one carton. The truck was completely filled except for a small space at the rear of the truck. The truck driver, in an attempt to load the last carton, fell from the truck and was injured. An employee of the warehouse had brought the merchandise from the warehouse to the truck. The truck driver brought suit against the warehouse alleging negligence by its unnamed servants and employees in pushing the box of merchandise into the body of the truck, thus causing the truck driver to fall to the ground. The truck insurer refused to defend the warehouse. The general liability insurer of the warehouse settled the claim and then caused the warehouse to bring suit against the employee who had brought the merchandise from the warehouse to the truck. The St. Louis Court of Appeals, in a declaratory judgment action brought by the employee alleged to be negligent, held that the truck insurer was not obligated to defend the employee alleged to be negligent nor to pay any part of a judgment which might be rendered against him since, while the warehouse and its employee were using the truck and the employee was therefore an additional insured under the truck policy, the injured was an employee of the named insured under the truck policy, so that the employee exclusion of that policy precluded coverage for anyone.[83] The employee exclusion of the truck policy should not have been applied here, since it refers only to injury to employees of "the insured," meaning the person claiming coverage. Since the injured was not an employee of either the warehouse or its negligent employee, each had coverage. The general liability policy did not cover the employee alleged to be negligent. If he was the negligent actor and

82. Woodrich Constr. Co. v. Indemnity Ins. Co., 252 Minn. 86, 89 N.W.2d 412 (1958).

83. Simpson v. American Auto. Ins. Co., 327 S.W.2d 519 (Mo. App. 1959). See Plummer, *Automobile Policy Exclusions,* 13 VAND. L. REV. 945, 955-57 (1960).

if the liability of the warehouse was vicarious, the warehouse should have had a right over against its negligent employee, in which case the loss should have been settled upon the truck insurer, as the only insurer of the negligent actor.

In a New Jersey case, the truck driver drove the truck to the Camden marine terminal to be loaded with rolls of paper. The loading operation was performed by the truck driver and an employee of the terminal. The employee of the terminal was lifting rolls of paper by means of a lift truck and releasing the rolls onto the main truck. The truck driver was on the main truck and adjusting the rolls after they were placed thereon when the employee of the terminal released one of the rolls onto the main truck in such a manner as to cause the roll to strike and injure the truck driver. The New Jersey Supreme Court affirmed a judgment of the appellate division, which had held: that the activities of the employee of the terminal were part of the complete operation of loading; that the terminal was "using" the truck through its employee; that the employee and the terminal were additional insureds under the omnibus clause of the truck policy; that the terminal had a right over against its employee; that the general liability insurer on the terminal was subrogated to that right; and that the negligent employee of the terminal was insured only under the truck policy.[84]

In a recent New York case, an employee of a subcontractor, engaged in excavation work, was using a crane to load a truck. A large rock fell from the truck and injured a workman, who recovered judgment against the general contractor, the subcontractor, and the owner of the truck. The general contractor and the truck owner paid the judgment. The truck owner secured a judgment in contribution against the subcontractor and then brought action against the general liability insurer of the subcontractor. The general liability insurer brought action for a declaratory judgment against the automobile insurer of the truck. The special term held that the obligation to pay the contribution judgment rested with the automobile insurer rather than with the general liability insurer for the reason that, while the general liability policy covered the subcontractor because the accident occurred on "ways immediately adjoining" premises under the control of the subcontractor (so that the automobile exclusion of the general liability policy was inapplicable), it did not cover the subcontractor's negligent employee who was, however, covered under the omnibus clause of the automobile policy as loading,

84. Maryland Cas. Co. v. New Jersey Mfrs. Cas. Ins. Co., 28 N.J. 17, 145 A.2d 15 (1958), *affirming* 48 N.J. Super. 314, 137 A.2d 577 (1958), *reversing* 43 N. J. Super. 323, 128 A.2d 514 (1957).

therefore "using," the truck.[85]

An Ohio case involved the rare question of coverage under the loading and unloading clause of an automobile policy covering a private passenger automobile. The private passenger automobile was driven to the premises of a food market where its owner made a number of purchases. An employee of the market delivered the purchases to the automobile, which was parked on the market's premises, and while so doing closed the automobile door on the hand of the owner of the automobile. The food market brought an action for a declaratory judgment against the insurer of the automobile, the injured car owner, and the liability insurer of the food market. The Ohio Court of Common Pleas dismissed, holding that the question of coverage for the food market under the automobile policy "had not been settled in the decided cases"; stating that "to say the least for a named assured to make claim under a policy issued to protect him, on the ground that it covers the liability of another using the car by loading it with his permission is inconsistent with the position of the named assured for whose protection the policy was primarily issued"; and further stating that it was unnecessary to decide the issue of coverage since the accident was also covered by the liability policy issued to the food market so that that insurer still had the obligation to defend, and that the court therefore declined "to make a determination which in effect would throw the entire burden of the defense upon" the automobile insurer.[86] The court of appeals affirmed.[87] It is not clear from the opinions whether the liability policy on the food market afforded automobile coverage. Despite the statement of the court of common pleas, the food market and its employee obviously had coverage under the automobile policy issued to the owner of the automobile, since the employee was loading the automobile. If the liability policy on the food market covered the non-owned automobile hazard, its coverage was probably excess and the employee probably had no coverage under that policy. If the policy on the food market covered general liability only, the employee had no coverage under that policy. In either case, the only coverage for the negligent employee was under the customer's automobile policy and the entire exposure probably should have been unloaded onto that policy.

In a later Ohio case, the insured truck was driven onto the premises of a steel company. After the truck owner alighted from the truck,

85. D'Aquilla Bros. Contracting Co. v. Hartford Acc. and Indem. Co., 193 N.Y.S.2d 502 (Sup. Ct. 1959).

86. Century Food Mkts. Co. v. Nationwide Mut. Ins. Co., 161 N.E.2d 650, 651 (Ohio C. P. 1958), *aff'd*, 161 N.E.2d 652 (Ohio App. 1958).

87. Century Food Mkts. Co. v. Nationwide Mut. Ins. Co., 161 N.E.2d 652 (Ohio App. 1958), *affirming* 161 N.E.2d 650 (Ohio C. P. 1958).

he stood nearby while the steel company operated an overhead crane with an electric magnet attachment for the purpose of unloading the truck. The truck owner was struck when the crane swung at him a piece of scrap taken off the truck. There was litigation between the automobile liability insurer on the truck and the comprehensive automobile-general liability insurer of the steel company. The court of appeals held that the steel company was covered under the truck policy as well as under its own comprehensive policy, but that the comprehensive policy was "general" whereas the automobile policy was "specific," so that the primary liability lay with the automobile insurer.[88] The result was correct. It is unfortunate that the court based its decision on the unsound "general" and "specific" theory. A better reason for the result would have been that the coverage under the comprehensive policy for non-owned automobiles was excess over the coverage under the automobile policy. A possibly still better reason appears not to have been before the court. Since the steel company was a corporation, the negligence of the crane operator must have been that of an individual, presumably an employee of the steel company. If the steel company were held liable on the basis of respondeat superior, as seems to have been contemplated here, it would have had a right over against the negligent crane operator. While both policies covered the steel company, the crane operator was covered as an omnibus insured under the automobile policy but he was not covered under the omnibus clause of the comprehensive policy.

In a rather recent Ohio case, a truck driver employed by a trucking company drove the company's truck to a coal tipple to obtain a load of slack coal, and backed the truck beneath the tipple. The owner of the tipple opened the chute and four or five tons of slack coal entered the truck. This quantity was considerably less than the capacity of the truck. The owner of the tipple then went to the upper level of the tipple in order to dislodge some more coal which apparently was not flowing freely from the bin and while the owner of the tipple was on the top level, the chute of another bin, holding egg coal, opened and the egg coal poured down upon the truck driver, injuring him. In declaratory judgment proceedings between the automobile insurer of the truck and the general liability insurer of the tipple operator, the Court of Common Pleas held that the tipple operator was covered as an insured under the truck policy since he was engaged in loading the truck, notwithstanding the fact that the truck driver was injured by the egg coal, rather than the slack coal he came to obtain, and that the general liability policy was

88. United States Fid. & Guar. Co. v. Nationwide Mut. Ins. Co., 163 N.E.2d 46 (Ohio App. 1959).

excess because of a "null and void" provision in case there was other insurance.[89]

In a case that is difficult to understand (to say nothing of explain), arising in Oregon but applying Minnesota law to a policy issued there, a trucker was transporting potato combines from Minneapolis to a consignee in Idaho. The equipment was carried on a tractor and semi-trailer which also carried unloading equipment consisting of a winch and boom poles with which the trailer could be unloaded. Upon the arrival of the tractor-trailer in Idaho, the consignee directed its employee to assist the truck driver with the unloading of the trailer. The consignee's employee drove the consignee's truck with an A-frame containing a winch close to the transporting trailer. The driver of the transporting tractor and semi-trailer, standing on the ground between the trailer and the consignee's truck, attached a line from the A-frame of the consignee's truck to a box of combine parts resting on the trailer bed of the transporting trailer. The driver of the transporting vehicle then signaled the employee of the consignee, who was in the consignee's truck, to move that truck forward to tighten the line before lifting the box. The consignee's employee shifted into what he thought was low gear but when he applied the power the consignee's truck, instead of proceeding ahead, backed up and pinioned the transporting truck driver between the rear end of the consignee's truck and the side of the bed of the trailer. At the time of the accident, the transporting trailer was motionless and its tractor motor was not running. The consignee's truck had a defective transmission and the defect was known both to the consignee and to his employee. In an action between the automobile insurer on the transporting tractor and trailer and the comprehensive liability insurer on a policy issued to the consignee, the latter conceded that the employee of the consignee was an additional insured under the omnibus clause of its policy. The United States District Court for the District of Oregon held that the insurers were equally responsible, since the employee of the consignee was engaged in unloading the transporting equipment, even though he was operating the other truck, and the consignee was legally responsible for the negligence of his employee; that the consignee and his employee were therefore covered by the truck policy on the transporting equipment; that they were both negligent in using the defective truck of the consignee; that the consignee was independently negligent as well as liable under the theory of respondeat superior; that the negligence of the consignee in failing to keep his truck in proper repair was not covered under the truck policy of the transporting tractor-trailer, since the failure

89. Employers' Liab. Assur. Corp. v. Liberty Mut. Ins. Co., 167 N.E.2d 142 (Ohio C. P. 1959).

to repair was removed from the unloading operations, both in the sense that it occurred prior to the accident and also in the sense that it occurred some distance away from the scene of the accident; that accordingly the consignee's liability insurer was the sole insurer of the prior independent negligence of the consignee in failing to repair his truck; and that both insurers were responsible for the concurring negligence of their "respective insureds."[90] The court's decision that the consignee's employee was an insured under the policy on the transporting tractor-trailer was correct. So was the consignee. The court said that the consignee's liability insurer had conceded coverage for both under its policy. It is accordingly hard to understand why the court ended up with the statement that the policy on the transporting equipment covered the consignee's employee and that the consignee's policy covered the consignee, implying that the truck policy on the transporting equipment did not cover the consignee and that the liability policy issued to the consignee did not cover his employee.

In a case involving Pennsylvania law, a trailer had been used to transport the main portion of a dragline shovel and it became necessary to remove the rear wheels of the trailer so that the shovel could be driven off the trailer under its own power. Upon completion of that operation, the shovel was standing idle 150 feet away from the trailer. It was necessary to replace the rear wheels. This was normally done by hand or by means of a winch attached to the trailer, but in this instance, a crane was used. The crane came into contact or close proximity with overhead power lines while the rear wheels were being replaced, causing injuries to the operator of the trailer. The United States Court of Appeals for the Third Circuit held that the person in possession of the crane was using the trailer and was therefore an omnibus insured under the automobile liability policy issued to the owner of the trailer; that, as to the contention that the accident was not caused by, nor did it arise out of the ownership, maintenance or use of the trailer, there was no necessity for causal connection where the question is coverage under the policy, but that the coverage exists when the use of the automobile is not the cause of the injury but where there is a connection between the accident and the use of the insured vehicle; and that, while the operator of the crane was not an omnibus insured under the liability policy issued to the person in possession of the crane, he was an omnibus insured under the automobile policy covering the trailer.[91]

90. Canadian Indem. Co. v. State Auto. Ins. Ass'n, 174 F. Supp. 71 (D. Ore. 1959).

91. Federal Ins. Co. v. Michigan Mut. Liab. Co., 277 F.2d 442 (3rd Cir. 1960), *affirming* 172 F. Supp. 858 (E. D. Pa. 1959).

In a 1960 Texas case, a cement company had a subcontract to furnish ready-mix concrete for the construction of a high school. One of its trucks brought a load of cement to the construction project, carrying the cement in a rotating drum on the truck. The truck equipment included a chute attached to the back of the truck that was used to convey the concrete from the rotating drum to the bucket of a crane belonging to a steel subcontractor. The crane was being used to transport the concrete in the bucket to a portion of the construction work. During this process, the crane buckled and killed some men on the high school job. In an action by the general liability insurer of the steel subcontractor against the truck insurer, after the former had settled the death claims, there was evidence that, after the concrete was emptied from the truck into the bucket of the crane, the cement company had no further control over the concrete, the bucket, or the crane. The court of civil appeals affirmed a judgment for the truck insurer, holding that the action of the trial court, in finding that the truck was completely unloaded at the time the accident occurred and that the steel subcontractor was not insured by the truck policy, was justified by the evidence.[92] It is interesting that the court stated that there was "at most a remote connection with . . . [the] truck and the fatal accident. If the crane and its boom had been structurally strong enough to do the work it was to perform, the accident in all probability would not have occurred." That statement has implications severely limiting coverage for strangers to the truck crew.

In a fairly recent Wisconsin case, the truck was driven to a factory for the purpose of picking up a load of scrap metal. The truck driver was injured there when a portion of an overhead crane dropped upon his hand. The state supreme court held that, if the truck driver was injured during a loading operation, the truck insurer would be liable and that if, as contended, both the truck policy and the general liability policy issued to the factory were excess insurance, the damages would be pro-rated according to policy limits.[93] If the party ultimately at fault was an employee of the factory who had no coverage under the general liability policy issued to his employer and that employee was "loading" the truck and therefore had coverage under the omnibus clause of the truck policy, the entire liability should fall upon the truck policy.

92. Travelers Ins. Co. v. Employers Cas. Co., 335 S.W.2d 235, 238 (Tex. Civ. App. 1960).

93. Ermis v. Federal Windows Mfg. Co., 7 Wis. 2d 549, 97 N.W.2d 485 (1959).

III. SUMMATION

This discussion may be summarized then with three general conclusions: (1) The "coming to rest" doctrine has been largely superseded by the "complete operation" doctrine so that "loading and unloading" seems tantamount to delivery with the "loading" commencing at the point from which the material to be loaded starts toward the truck and with the "unloading" ending after the goods transported have reached their final destination. (2) Any person participating in any way in the loading or unloading of the automobile is covered under the automobile policy, however much of a stranger he may be, and while, if the negligent actor causes his employer to become vicariously liable, the employer is covered both under his general liability policy, if any, and under the truck policy, the negligent actor is usually covered only under the truck policy and not under the general liability policy, so that the ultimate responsibility for his negligence will rest upon the automobile insurer rather than upon the general liability insurer. (3) Both conclusions, and especially the second, have been importantly limited in some of the most recent "loading and unloading" cases.