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Automobile Policy Exclusions

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AUTOMOBILE POLICY EXCLUSIONS

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The exclusions in the automobile liability insurance policies have required much litigation to clarify and interpret the intent of the draftsmen and underwriter who wrote them. An exclusion takes away or modifies certain coverages given in the insuring agreements. The giving and taking-away provisions of insurance policies are necessary in the making of a limited contract. They tend to avoid duplication of coverage, limit the assumed risk or hazard, avoid underwriting the primary liabilities of others that should be covered by other policy forms, and otherwise limit the scope of coverage. Since 1936 there has been a constant effort by automobile insurers and their affiliated insurance bureaus and associations to draft and underwrite standard insuring agreements including the exclusions. The April 1955 *Standard Form Automobile Policy* will be used as a guide for coverage or exclusion provisions for this article. The theme song of the exclusions begins with the favorite expression: *"This policy does not apply . . . ."*

I. Public or Livery Conveyances

This policy does not apply: "(a) Except under division 2 of coverage C [medical payments], while the automobile is used as a *public or livery conveyance,* unless such use is specifically declared and described in the policy . . . ."

This policy was drafted to cover the ordinary risks and hazards of operating private passenger automobiles and regular commercial vehicles. But taxicabs, buses, tractor-trailer units and similar passenger and freight transportation units are more accident prone and hazardous. So, to cover them the particular use of the vehicle must be declared and an adequate premium stated. To illustrate the problems involved in this area a number of interesting cases will be discussed briefly.

Exclusion held not to apply.—Three men made a trip across the country in a station wagon under a verbal agreement to bear equally the oil and gasoline expenses. One of the passengers was injured due to the operator's negligence. *Ganzborn v. Manufacturers' Casualty Ins. Co.,* 179 Misc. 548, 39 N.Y.S.2d 522 (Sup. Ct. 1942).

A man and wife were injured while being transported in a Mercury sedan that was used by its owner as an emergency substitute for one

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of his taxicabs which had been disabled by a flat tire. The court applied the following test: "(1) that the primary factor in determining whether a vehicle is used as a public or livery conveyance depends upon whether the transportation is generally available to the public rather than whether any money has or will be paid, (2) that by transporting in one isolated instance a couple who were in a special predicament, the owner of the Mercury did not thereby convert his car into a public or livery conveyance." *St. Paul Mercury Indemnity Co. v. Knoph,* 251 Minn. 366, 87 N.W.2d 636 (1958).

An injured passenger paid the owner-operator of a private passenger car two and one-half dollars per week under a share-the-ride arrangement. The following test was applied: "The automobile was not being used as a public or livery conveyance since those words imply the holding out of the vehicle to the general public for carrying passengers for hire, rather than a limited use to certain persons and particular occasions." *Allor v. Dubay,* 317 Mich. 281, 26 N.W.2d 772 (1947). In one similar case the injured agreed to pay fifty cents for each day;[1] and in another the injured agreed to pay eighteen dollars for the trip.[2]

Insured's claim for the theft of his automobile was denied because he used it to transport four of his players for radio and television appearances. A Tennessee court held that the exclusion applied only if the conveyance was used by the public in general, not simply by employees of the insured. *Commercial Credit Corp. v. Monroe,* 38 Tenn. App. 596, 277 S.W.2d 423 (1954).

In declaring a pedestrian-injury taxicab-collision case to be covered by the policy, an eastern court held the term "private livery" in the declaration to indicate some character of public use. *Biehler v. Great American Indemnity Co.,* 127 N.J.L., 114, 21 A.2d 225 (Sup. Ct. 1941).

An injured guest in the insured's automobile recovered after proof that at the time the accident occurred the vehicle was not being used as a taxi, and that the insured had abandoned the taxi business and obtained a non-taxi license for the car. *Wall v. Great American Indemnity Co.,* 46 So. 2d 655 (La. Ct. App. 1950).

Insured let Mitchell use his truck provided he would put fifty cents worth of gasoline in the tank. Mitchell did so and while operating the vehicle struck another car. It was held that the truck was not hired out, and that for the exclusion to apply the vehicle must be used indiscriminately or generally in conveying the public, or held out to the public as a vehicle for carrying persons for hire, and so used

1. Union Auto. Indemn. Ass'n v. Reimann, 171 S.W.2d 721 (Mo. Ct. App. 1943).
2. Stanley v. American Motorists Ins. Co., 195 Md. 180, 72 A.2d 1, 30 A.L.R.2d 268 (1950).

on one or more occasions. *Georgia Casualty & Surety Co. v. Turner,* 87 Ga. App. 618, 74 S.E.2d 665 (1953).

In a case where recovery was denied for other reasons, the New Jersey court indicated in passing that the term "livery" may also mean the hiring out of an automobile with or without an operator. *Marx v. United States Fidelity & Guaranty Co.,* 118 N.J.L. 262, 191 Atl. 789 (Ct. Err. & App. 1937).

An insured county in Kansas used its truck to transport its employees to and from work, but did not require them to ride in it. One of the employees was killed in a collision with another vehicle while being so transported. The Kansas court held that the truck was not being used as a public or livery conveyance, and was not carrying passengers for a consideration. *Elliott v. Behner,* 150 Kan. 876, 96 P.2d 852 (1939). Similarly a federal court held the exclusion inapplicable where an employee allowed several co-workers to ride in his truck for thirty cents per round trip. *Allstate Ins. Co. v. Roberson,* 217 F.2d 10 (8th Cir. 1954).

Exclusion held to apply.—A private passenger car was converted to taxi service after the policy was issued. *Warren v. Royal Exchange Assur. Co.,* 205 S.W.2d 744 (Mo. Ct. App. 1947). A panel-body delivery sedan was made over into a bus to carry passengers for hire after delivery of the policy; the exclusion was not waived by an agent's knowledge of the conversion. *Lumber Mutual Casualty Ins. Co. v. Wells,* 226 N.C. 574, 39 S.E.2d 741 (1946). Insured owned a Dodge truck for farm use and an International truck for commercial hauling of freight under a trucker's permit. On the day of the accident the Dodge truck was used to haul cattle to market under this permit. After three submissions to the Supreme Court of South Dakota the truck was finally held not to be covered. *Sunshine Mutual Ins. Co. v. Addy,* 74 S.D. 387, 53 N.W.2d 539 (1952).

Summary: It may be succinctly stated that this exclusion applies whenever the insured vehicle is used for transporting persons or freight for a consideration generally or indiscriminately in public service and not so declared to the insurer.

II. Contract or Agreement

This policy does not apply: "(b) Under coverages A and B [bodily injury and property damage liability], to liability assumed by the insured under any *contract or agreement* . . . ."

This exclusion did not appear in the subsequent family automobile liability forms of 1956 and 1958. Since those forms were not intended to be used for most commercial vehicles and some private passenger

cars, this exclusion still affects the coverage of many risks. The agreement to indemnify or hold harmless, or in some other contractual way give protection in the policy to the insured and others, very substantially increases the hazards of a risk for which an additional premium is required. In some instances an endorsement is added for separate policy provisions. Because of this increase in the hazard this exclusion is inserted to afford some protection to the insurer who could not otherwise control the liability created by contract. This exclusion has been an issue in a relatively small number of reported cases.

Recent illustrative decisions.—Bacus bought a 1951 DeSoto automobile and persuaded his employer Gardner to be a co-signer of a promissory note given as security for payment; then he purchased an automobile liability policy. He lost his job with Gardner, failed to make payments on the note, and at last gave full possession and use of the car to Gardner. Later Gardner sold the car without transfer of title to another employee, Mosley, who also defaulted in payments. Gardner then sold it, again without transfer of title, to Linder, who had the accident resulting in an unsatisfied judgment against him. No transfer of insurance was ever attempted by any of the users or purchasers. In the garnishment action brought against the insurer to collect the unsatisfied judgment against Linder, one of the defenses raised was that Bacus had attempted to assign the policy in violation of this exclusion. The court tersely held this defense to be without merit and found that Linder was covered because he had general permission to use. *Haynes v. Linder,* 323 S.W.2d 505 (Mo. Ct. App. 1959).

The insured agreed with the transportation company in a trip lease to be liable for all personal injury and property damage which occurred while hauling freight under their S.C.C. permit. The Sixth Circuit Court of Appeals held the contract void and found the exclusion defense to be without merit. *Virginia Surety Co. v. E.T. & W.N.C. Transportation Co.,* 219 F.2d 919 (6th Cir. 1955).

A dump truck belonging to the insured damaged a conveyor system owned by the Hudson Company, for whom the insured was working under a contract. In a suit against the insurer to obtain payment of a judgment against the insured, the New York Appellate Division held that the exclusion defense was "wholly without merit since the clause was intended only to prevent the insured from agreeing to liability." *Hudson River Concrete Products Corp. v. Callanan Road Improvement Co.,* 5 App. Div. 2d 49, 168 N.Y.S.2d 801, 803 (1957).

Robert Bell signed his son's application for a motor vehicle operator's license, which included a written undertaking to be jointly and

severally responsible for any injury or damage which his son might cause by the operation of a motor vehicle. While operating another's automobile on a personal trip the son had an accident in which he and others were killed and injured. In an action against the father under his policy due to the above agreement, the insurer filed a declaratory judgment action pleading this exclusion. *Held:* The exclusion applied and the accident was not covered. *Buckeye Union Casualty Co. v. Bell,* 249 F.2d 211 (7th Cir. 1957). Under the *Family Automobile Liability Policy Forms* of 1956 and 1958 which lacked this exclusion, the accident would have been covered. In a Wisconsin case, similar to the *Bell* case on the contract obligation, the court held the insurer was estopped from asserting the exclusion defense due to a filing of form SR 21 declaring coverage for both father and son. *Behringer v. State Farm Mutual Automobile Ins. Co.,* 275 Wis. 586, 82 N.W.2d 915 (1957).

Summary: It is evident from this study of the courts' comments on this contractual liability exclusion that the draftmen's intent to restrict coverage will be given effect if tort liability is increased by a legitimate contract or agreement.

III. Trailers

This policy does not apply: "(c) Under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company. . . ."

To avoid the effect of this double-barrel exclusion there must be bodily injury and property damage liability coverage with the same insurer on all automobiles or trailers owned by the insured, *whenever the vehicles are used together.* The hazards of use are increased whenever a trailer is attached to a motor vehicle. As one court put it, a trailer adds "to the length, the weight, the momentum of the truck, and to the dynamics of operating it." *Manufacturers Casualty Ins. Co. v. Goodville Mutual Casualty Co.,* 394 Pa. 364, 147 A.2d 161, 163 (1959). It should be noted that this exclusion was not retained in the 1956 and 1958 family automobile policy forms.

The definition of an automobile in the insuring agreement of the 1955 automobile policy form includes all trailers described in the policy; and it includes all trailers not described in the policy, if they are designed for use with a private passenger automobile and are not being used with another type automobile for business purposes. But this "trailer exclusion" is confined to automobiles or trailers that

are "owned or hired" by the insured, within the policy definition of an automobile. The causal connection of the trailer with the accident is not pertinent in all jurisdictions in determining the coverage issue.[3]

Illustrative cases.—Where the insured violated this policy exclusion by using a tank trailer not covered by like insurance it was held that the state's financial responsibility law would not enforce coverage, since this was not a certified or required policy of motor vehicle liability insurance. *United States Fidelity & Guaranty Co. v. Maxwell,* 329 P.2d 857 (Okla. 1958); *United States Fidelity & Guaranty Co. v. Walker,* 329 P.2d 852 (Okla. 1958). In New York the courts have held that the trailer exclusion is violative of section 59-a of the Vehicle and Traffic Law which "requires that the policies of insurance issued to the owner of an auto-truck or auto-trailer, or issued to the owner of a trailer or semi-trailer, shall contain a provision for indemnity for security against the liability and responsibility in this section." *Mondelli v. Harrison Hub, Bed & Spring Co.,* 10 Misc. 2d 883, 172 N.Y.S.2d 931 (N.Y. City Ct. 1958); see also *Wheeler v. Piscina,* 302 N.Y. 689, 98 N.E.2d 484 (1951). There is also a condition in the policy by which the insured agrees to reimburse the insurer for any payment made by the insurer which it would not have been obligated to make under the terms of the policy except for the agreement relating to the financial responsibility laws.

A concrete mixer, mounted on wheels, and with a tongue used for towing was held not to be a trailer under the Vehicle Code of California. *Maryland Casualty Co. v. Aguayo,* 29 F. Supp. 561 (S.D. Cal. 1939). In another state it has similarly been held that a tractor-trailer unit being pulled by another tractor belonging to another owner was not a trailer and that the exclusion did not apply. *Eastern Transportation Co. v. Liberty Mutual Casualty Co.,* 101 N.H. 407, 144 A.2d 911 (1958).

A semi-trailer did not lose its identity and become merely a part of the truck because the two were united by an iron bar. *Welborn v. Wyatt,* 175 Va. 163, 7 S.E.2d 99 (1940). A four wheeled, one and one-half ton haygrinder of standard truck width which lacked a braking device and an independent motive power unit was held by the Nebraska court to be a trailer or vehicle. *Moffitt v. State Auto Ins. Ass'n,* 140 Neb. 578, 300 N.W. 837 (1941). However, a "hotrod" with it own motor power and used as a "souped up racing car" was held not to be a trailer in Tennessee. *Blue Ridge Ins. Co. v. Haun,* 197 Tenn. 527, 276 S.W.2d 711 (1954). Two boys in their home-made

3. Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co., 394 Pa. 364, 147 A.2d 161 (1959); State Farm Mut. Auto. Ins. v. Bass, 192 Tenn. 558, 241 S.W.2d 568 (1951).

wagon were given a lift over a hill by the operator-owner of the insured automobile that resulted in an accident which injured the boy guiding the wagon by means of his feet and a rope. The Tennessee court held the wagon to be a trailer and found the exclusion applicable. *Waddey v. Maryland Casualty Co.*, 171 Tenn. 112, 100 S.W.2d 984, 109 A.L.R. 654 (1937).

The exclusion applies whether the motor vehicle and trailer are moving, stopped, or parked, provided they are used together within the term "the towing of."[4]

It has been held unnecessary for the named insured to hold title to a truck for the exclusion to apply, if he controlled and managed the business of the title owner. *American Indemnity Co. v. Carney*, 54 F. Supp. 273 (E.D. Mo. 1944). In a jurisdiction where the financial responsibility law prevented the enforcement of the exclusion, the omnibus insured was held responsible to reimburse the insurer because he alone invoked the policy coverage. *Employers Mutual Liability Ins. Co. v. Byers*, 99 N.H. 455, 114 A.2d 888 (1955). The named insured, manager of a Rent A Trailer Company in Detroit, drove to Chicago on a day off from work in the insured Ford coupe, where he picked up two of his employer's trailers that belonged in Detroit. He was enroute home, towing the trailers, when he collided with another vehicle. Since he did this without his employer's knowledge or request but solely as an accommodation the loss was covered. This was not a standard form exclusion but one which omitted coverage if the trailer was used to haul passengers or material for any business enterprise. *Lintern v. Zentz*, 327 Mich. 595, 42 N.W.2d 753, 18 A.L.R.2d 713 (1950).

When coverage is in question, it is sometimes necessary to determine who the "insured" is in the particular case—the named insured or an omnibus insured. That issue was not clarified in a case where the named insured owned the automobile and also the uninsured trailer which were being operated by an omnibus insured at the time of the accident. The exclusion should have applied solely to the named insured since only he owned the trailer. *Pothier v. New Amsterdam Casualty Co.*, 192 F.2d 425 (4th Cir. 1951).

The coverage issue raised by this exclusion can be avoided by waiver in some instances. An example of this is a recent Wisconsin case in which the coverage issue was waived by filing an SR-21 form in accordance with that state's Safety Responsibility Law.

4. Maryland Cas. Co. v. Cross, 112 F.2d 58 (5th Cir. 1940), *cert. denied*, 311 U.S. 701 (1940); Maryland Cas. Co. v. Aquayo, 29 F. Supp. 561 (S.D. Cal. 1939); Eastern Transp. Co. v. Liberty Mut. Cas. Co., 101 N.H. 407, 144 A.2d 911 (1958); United States Fid. & Guar. Co. v. Bachman, 256 App. Div. 1042, 10 N.Y.S.2d 704 (1939), *motion for leave to appeal denied*, 257 App. Div. 1043, 14 N.Y.S.2d 494 (1939); Annot., 31 A.L.R. 298 (1953).

Henthorn v. M.C.G. Corp., 1 Wis. 2d 180, 83 N.W.2d 759 (1957).

The insured had a tractor removed from his policy because of its disabled condition. Without further notice to the insured the tractor was later repaired, used with an insured trailer, and became involved in an automobile collision resulting in four deaths. It was held that the tractor was not a newly acquired vehicle and that the exclusion applied because it was owned by the insured and not covered by like insurance with the same insurer. *Central Produce Co. v. Commercial Standard Ins. Co.*, 122 F.2d 1021, (6th Cir. 1941) (per curiam). Similarly, the exclusion was held effective where an uninsured hired tractor was used by the named insured together with an insured trailer. *Service Mutual Ins. Co. v. Chambers*, 289 S.W.2d 949 (Tex. Civ. App. 1956).

Summary: The exclusion may apply to a named insured because he owned or hired the uninsured automobile or trailer used at the time of the accident, but there may be coverage for an omnibus insured who did not own or hire the involved vehicle at the time of the event. The insuring agreement, the class of insured, the severability condition and other pertinent provisions, must be studied in each case to determine whether or not the exclusion applies.

IV. EMPLOYEE EXCLUSION

This policy does not apply: "(d) under coverage A, to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefore are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured."

This clause is known as the "Employee Exclusion." It applies whenever the relationship of master and servant or employee and employer exists between the injured claimants and the employer demanding coverage under his policy. There is one exception to the foregoing statement and this is specifically mentioned in the exclusion clause. It does not apply to domestic employment unless the event or injury is covered under a workmen's compensation law.

The cases revolve around four central questions: Who are employees? Who are employers (insureds)? What is the scope of domestic employment? What is the scope of the employment status? These have all been and continue to be active controversial issues that are usually jury questions. We must turn to the court decision for reliable advice on this employment relationship.

1. Who Is the Employee?—The employee is usually a person who

works for wages or a calculated income when performing the duties he has been hired to do. Independent contractors, officers, and some other agents, are not employees.

In the following cases, and under some policy provisions different from the employee exclusion quoted herein, the courts have held that the employee-employer relationship existed so that the exclusion applied: a borrowed servant;[5] co-employees of the named insured (cross employee exclusion);[6] men being transported to and from their place of employment because of the employment agreement;[7] a 14-year-old boy who sold ice cream bars from a motor scooter at whatever price he could get after paying the dairy a wholesale price for the product;[8] a person riding in an automobile with his partner-employer to get coffee on a coffee-break (action solely against partner might be covered).[9] The employment status has been found present whether it was regular, continuous, incidental or temporary.[10]

The courts have held that the exclusion did not apply to the persons in the following situations: partnership excluded but not the partners;[11] city street commissioner not a co-employee of a city employee;[12] voluntary firemen injured by a city fire department truck and employee;[13] ticket agent riding a bus on a pass in the course of a personal visit;[14] deputy sheriff injured in the sheriff's automobile while it was operated by the owner;[15] a student who operated the school's truck during summer time in consideration of credit on his tuition;[16] a person who paid two dollars to accompany the named insured in an automobile to witness the settlement of a disputed dental bill;[17] a penitentiary inmate who was injured by another inmate with the state's bulldozer (held to be forced labor, not employment);[18] driver operating Cadillac from Minnesota to California in consideration of free transportation plus payment for gasoline and

5. City of Wichita Falls v. Travelers Ins. Co., 137 S.W.2d 170 (Tex. Civ. App. 1940).
6. Malisfski v. Indemnity Ins. Co. of North America, 135 F.2d 910 (4th Cir. 1943).
7. State Farm Mut. Auto. Ins. Co. v. Brooks, 136 F.2d 807 (8th Cir.) *cert. denied,* 320 U.S. 768 (1943).
8. Cassidy v. Peters, 50 Wash. 2d 115, 309 P.2d 767 (1957).
9. Krause v. Western Cas. & Sur. Co., 3 Wis. 2d 61, 87 N.W.2d 875 (1958).
10. National Union Indemn. Co. v. Miniard, 310 S.W.2d 793 (Ky. 1958).
11. Oklahoma Farm Bureau Ins. Co. v. Mouse, 268 P.2d 886 (Okla. 1953).
12. Home Indem. Co. of N.Y. v. Village of Plymouth, 146 Ohio St. 96, 64 N.E.2d 248 (1945).
13. Indemnity Ins. Co. of North America v. Town of Milford, 127 F. Supp. 394 (D. Conn. 1943), *aff'd,* 218 F.2d 602 (2d Cir. 1954).
14. Campbell v. American Fid. & Cas. Co., 212 N.C. 65, 192 S.E. 906 (1937).
15. Johnson v. United States Fid. & Guar. Co., 93 Ga. App. 336, 91 S.E.2d 779 (1956).
16. Standard Acc. Ins. Co. v. Swift, 92 N.H. 364, 31 A.2d 66 (1943).
17. Sills v. Sorenson, 192 Wash. 318, 73 P.2d 798 (1937).
18. Turner v. Peerless Ins. Co., 110 So. 2d 807 (La. Ct. App. 1959).

minor repairs.[19] Similarly, the exclusion has not been applied in a case where one neighbor exchanged haying operations with another farmer and injured a third neighbor while doing the work with a truck;[20] where a 16-year-old boy agreed to transport the named insured to a sanatorium for twenty-five dollars plus his return bus fare;[21] and in a case involving sharecroppers who helped each other harvest tobacco, with an agreement that the insured would pay four dollars per day to those who worked more on his crop than on their own, when one of these persons was run over by the insured's truck.[22]

The courts are not in agreement concerning the employment status of illegally employed minors. In Louisiana they have been held not to be employees while in Illinois and Alabama they are considered employees and have been held entitled to benefits under the workmen's compensation laws.[23] This rule of contract law must be reviewed in the jurisdiction where the issue arises. A majority of the states passing on the matter have held such persons to be employees.

2. *What Is Domestic Employment?*—"Domestic employment" is not excluded unless the "benefits therefore are in whole or in part either payable or required to be provided under any workmen's compensation law." In the case of *Hall v. United States Fidelity & Guaranty Co.* the employer Hall was a practicing physician who chose to live on a tract of agricultural land, to cultivate it and to raise livestock. He paid his employee, Burley, seventy-five dollars and furnished his room and board in the family residence. Burley worked in the residence, the barn, the garden and on the farm. On the day of his injury the employee and employer were trying to start the jeep with the aid of the Studebaker (both owned by Hall) and Hall negligently squeezed Burley between the two cars. No workmen's compensation act was involved. Hall contended with his two automobile liability insurers that Burley was a domestic employee and when they denied coverage he filed a declaratory judgment action to test the issue. A divided intermediate appellate court in Ohio affirmed the trial court's holding that Burley was a domestic employee when the accident occurred and that the event was covered under both liability clauses. 107 Ohio App. 13, 155 N.E.2d 462 (1957).

A New York court has defined a domestic employee or servant to be: "A servant who primarily is employed in and about the mainte-

19. White v. Gifis, 172 F. Supp. 296 (D. Minn. 1959).
20. Patty v. State Farm Mut. Ins. Co., 228 F.2d 363 (6th Cir. 1955).
21. National Sur. Corp. v. Windham, 74 So. 2d 549 (Fla. 1954).
22. Kentucky Farm Bureau Mut. Ins. Co. v. Snell, 319 S.W.2d 462 (Ky. 1958).
23. Scarpelli v. Travelers Indem. Co., 248 F.2d 791 (7th Cir. 1947); Ward v. State Farm Mut. Auto. Ins. Co., 241 F.2d 134 (5th Cir. 1957); New Amsterdam Cas. Co. v. Soileau, 167 F.2d 767, 6 A.L.R.2d 128 (5th Cir. 1948).

nance of the home itself. He may live under the roof, taking his meals there or he may be domiciled elsewhere and report to the home daily for work in and about the house where his meals are furnished. Such a person is a household servant, working within the house for the upkeep thereof and the care, comfort and convenience of the occupants therein." *In re Johnson's Estate,* 156 Misc. 689, 282 N.Y. Supp. 806 (Surr. Ct. 1935).[24]

The test of this phase of the exclusion is two-fold: (a) Is it domestic employment? (b) Are there any benefits required or provided for under any workmen's compensation act? The controversy is usually a fact issue to be decided from all the circumstances peculiar to the individual case. The judicial trend would appear to be a liberal view which will include domestic employment, especially if it is so contended by the employee or employer. It is to be remembered that the courts rather than an administrative board created by a workmen's compensation act shall determine if any benefits are provided or required under such an act when litigation results to test coverage on this point under the automobile policy. This may make a material difference in those jurisdictions where the liberal rule of the workmen's compensation acts would not apply.

3. Who Is the Employer (Insured)?—The term "insured" may connote the named insured, omnibus or additional insured, or a combination of the legal relationship of these two and their respective employees. An example of the latter is the case in which an employee of the first named insured is injured by another named insured or in which an employee of an omnibus insured is injured by such omnibus insured.

Considerable confusion developed in the courts before the insertion of the severability condition in the automobile liability policy. In standard form policies the condition reads as follows: "The term 'the insured' is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability." This new condition in the policy has made it clear and certain that the named insured and the omnibus or additional insureds are to be treated separately, and that the exclusions or other coverage tests should apply to the particular insureds seeking coverage. These coverage tests have been applied in the following situations.

(a) Employee of Omnibus Insured.—The policy in this case was issued in Tennessee to one Fowler. New was employed by Patterson, Woodfield and Weber, who did business under the trade name of the

24. See also Barres v. Watterson Hotel Co., 196 Ky. 100, 244 S.W. 308 (1922); 27 B C.J.S. *Domestic* (1959); 99 C.J.S. *Workmen's Compensation* § 32 (1958).

Oak Ridge Quartet. While operating Fowler's insured automobile with Fowler's permission and on his business, Patterson had an accident which resulted in an injury to New, who was then on the job for the Oak Ridge Quartet. New recovered a judgment against Patterson, Fowler and others for $8,750. The others paid New $4,454.27 and he then filed a garnishment action against Fowler's automobile liability insurer for $4,295.73. The court held that New was not an employee of Fowler and that the exclusion therefore did not apply. *New v. General Casualty Co.*, 133 F. Supp. 955 (M.D. Tenn. 1955). This was a claim under an older policy which lacked the severability condition, but the court followed the better rule of separating the classes of insureds from the coverage issue.

In *Webb v. American Fidelity & Casualty Co.*, the policy was issued to Sophie Davidson. Webb was an employee of her husband, Louis Davidson. While Louis was using Sophie's automobile to transport Webb home from work, as provided by her employment contract, an accident occurred in which she was injured. Webb obtained a judgment against both Sophie and Louis, and then filed garnishment proceedings against the insurer. The Florida Supreme Court affirmed a lower court holding that Webb's injury was excluded since she was an employee of "the insured" injured while engaged in the insured's business, whether her employer, Louis, was an insured under the omnibus clause or was the named insured. 148 Fla. 714, 5 So. 2d 252 (1941).

(b) Employee of Named Insured.—While the named insured, Harrill, was operating his insured truck with his employee riding in the front right seat in the course of his employment the truck hit a train and the employee was killed. The administrator of the deceased employee's estate filed an action against the railroad and Harrill. A demand was made on his insurer to defend Harrill and pay any judgment which might be recovered against him. In a declaratory judgment action brought by the insurer the court held that the employee exclusion applied, stating that it was put in the policy "to exempt employees of the insured." *Pennsylvania Threshermen & Farmers' Mut. Cas. Co. v. Harrill,* 106 F. Supp. 332 (E.D.N.C. 1952).[25]

(c) Employee of Named Insured Injured by Omnibus Insureds.—While unloading the named insured's truck on the premises Pillsbury Mills, Inc. (omnibus insured) Perry, an employee of the named insured, was injured by negligent conduct on the part of certain Pillsbury Mills employees (also omnibus insureds). When Perry

25. See also Clinchfield R.R. v. United States Fid. & Guar. Co., 263 F.2d 932 (6th Cir. 1959); Simpson v. American Auto. Ins. Co., 327 S.W.2d 519 (Mo. Ct. App. 1959).

filed suit against Pillsbury Mills and two of its employees for his injuries, the *general* liability insurer of Pillsbury Mills (Travelers Ins. Co.) filed a declaratory judgment action against the *automobile* liability insurer of the named insured (Ohio Farmers Indemnity Co.) asking the court to determine whether the automobile liability insurer was obligated under its policy to defend all the defendants in the negligence action and to pay any judgment against them up to the policy limit. The defense was the employee exclusion and on the basis of that clause the court sustained the automobile insurer's plea that under no circumstances was the policy intended to cover employees of the named insured. The opinion did not indicate whether or not the policy contained the severability condition. On this issue it is obviously a minority opinion. *Travelers Ins. Co. v. Ohio Farmers Indemnity Co.*, 262 F.2d 132 (6th Cir. 1958).

Annis, an employee of the Transport Company (named insured) was injured by an explosion at the loading docks of the Standard Oil Company (omnibus insured) at El Paso while a truck belonging to Capital Transport was being loaded with diesel fuel by Standard. Annis sued Standard for his injury and Standard requested Transport's automobile liability insurer to defend them, filing a declaratory judgment action to test the coverage issue when the insurer refused to do so. Standard's general liability insurer contended that the automobile policy covered this loading accident because of the permissive use being made of the truck and that Annis was not an employee of Standard. The Texas Court of Civil Appeals held that the employee exclusion did not apply to Standard and that the insurer therefore had a duty to defend Standard and pay any judgment within the policy limits. The Texas Supreme Court reversing that decision stated: "The clear and umambiguous terms of the policy lead us to hold that no employee of the named insured engaged in the named insured's business can recover on the named insured's policy against anyone included as an additional insured." *Transport Ins. Co. v. Standard Oil Co.*, 337 S.W.2d 284, 290 (Tex. 1960), *reversing* 324 S.W.2d 331 (Tex. Civ. App. 1959).

The cases decided by the courts on this question of who is the "insured" are legion but the prevailing view, under the standard and family automobile forms issued during the past fourteen years, is that the accident or event is covered if the exclusion and conditions do not apply to the particular insured claiming coverage.

4. What Is the Scope of the Employment Status?—Many other cases under the employee exclusion concern contested issues about the employment status during lunch hours, recreation periods, coffee breaks, going to and from work, returning to the job from personal

missions, and the like. The general rule appears to be that the relationship of employee-employer continues if the activity is provided for in the employment contract or in other instances where the employee is in some degree engaging in the employer's business.

(a) Lunch hour.—Ball, an employee of the named insured, was injured during her lunch hour by her employer's truck. This was treated as a fact issue and the Florida court held the employee was not on the job when injured. *London Guaranty & Accident Co. v. I. C. Helmly Furniture Co.*, 153 Fla. 453, 14 So. 2d 848 (1943).

(b) Coffee break.—An employee riding in an automobile belonging to a partner of his employing firm on the way to a restaurant for coffee during his coffee break was held to be on the job under the "personal comfort" doctrine when injured. *Krause v. Western Casualty & Surety Co.*, 3 Wis. 2d 61, 87 N.W.2d 875 (1958).

(c) Transportation not furnished.—The president of the named insured and Buise, its sheet metal superintendant, were enroute from Atlanta to Valdosta in the employer's truck to check a customer's air conditioning system when an accident occurred in which Buise was injured. The Georgia court held that Buise was not on the job until he reached Valdosta, apparently because the employment contract did not provide transportation to and from the place of work. *Firemen's Fund Indemnity Co. v. Buise*, 98 Ga. App. 223, 105 S.E.2d 373 (1958).

(d) Personal mission.—An off-duty mailman was riding in an auto pointing out the source of some customers to an agent of the car's owner when he was injured. The Tenth Circuit Court of Appeals held that the mailman was employed neither by the agent nor by the owner of the automobile. *B. & H. Passmore Metal & Roofing Co. v. New Amsterdam Casualty Co.*, 147 F.2d 536 (10th Cir. 1945).[26]

Much litigation has resulted in an effort to clarify the various issues arising from the employee exclusion. A number of excellent references are available for the practitioner.[27]

V. EMPLOYEE COMPENSATION OR BENEFITS

This policy does not apply: "(e) Under coverage A [bodily injury liability] to any obligation for which the insured or any carrier as his insured may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or any similar law . . . ."

26. See also Maryland Cas. Co. v. Rickenbaker, 146 F.2d 751 (4th Cir. 1944).
27. RISJORD & AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES 170-74 (1957); Annot., 50 A.L.R.2d 78 (1956).

Like the clause discussed in the preceding section, this is an employee exclusion, but this clause is limited to cases where benefits or compensation may be allowed under some law arising out of employer-employee relationship. The purpose of the exclusion is to avoid overlapping or duplicate coverage. In order to understand the manner in which the courts treat the problems that arise from this clause it is necessary to turn to a select few of the cases dealing with this exclusion.

Illustrative case material.—Petsch was a rancher who did not consider himself subject to the Wyoming Monopolistic Workman's Compensation Act. Therefore he purchased a standard automobile liability and farmer's comprehensive liability policy from State Farm with high limits. He was encouraged by the insurer's agent to believe that these policies would protect him from claims by his employees "no matter how they get hurt." Helms, an employee, was injured while loading the insured truck and Petsch offered to pay medical expenses only up to $500. Helms filed a claim and was awarded $2400 by a Wyoming district court under the workman's compensation law; Petsch hired an attorney and contested the claim. He then sued under the policy for the payments made to Helms and for other damages. The court held the claim excluded, finding no fraud, no waiver, and no estoppel, stating "[I]t is clear that as a matter of law there can be no recovery." *State Farm Mutual Automobile Ins. Co. v. Petsch,* 261 F.2d 331, 336 (10th Cir. 1958).

Maryland Casualty issued a comprehensive general liability policy to the South Jersey Port Commission; Manufacturers Casualty issued its automobile liability policy to Bair. Kelly, an employee of Bair, drove the insured truck to the Camden Marine Terminal, operated by the Port Commission, to be loaded with rolls of paper. There Cherry, an employee of the Port Commission, negligently injured Kelly while loading the truck. Manufacturers Casualty refused to defend the Port Commission and Cherry when Kelly sued them, after Kelly had qualified for benefits under the New Jersey Workman's Compensation Law. Maryland Casualty settled Kelly's claim for $20,000 and then sued Cherry, Bair, Kelly, the Port Commission and Manufacturers Casualty for reimbursement. *Held:* The workman's compensation exclusion did not apply, because the wrongdoer—Cherry—seeking coverage was not an employer of the injured—Kelly. To put it another way, the workman's compensation obligation exclusion was not applicable since neither Cherry nor the Port Commission had any obligation to Kelly under any workman's compensation law, disability benefits law or any similar law. Maryland Casualty therefore recovered its payment. *Maryland Casualty Co. v. New Jersey Manu-*

facturers Casualty Ins. Co., 28 N.J. 17, 145 A.2d 15 (1958).

The vehicle operator's license of the named insured had been revoked. In order to have it reinstated, he purchased an automobile liability policy which complied with Pennsylvania's Financial Responsibility Law. Montgomery was killed in an accident which occurred while he was riding in the insured car. His widow received benefits under the New York Workmen's Compensation Law, and then prosecuted an action against the named insured, obtaining a judgment for $10,000. A suit then followed against the liability insurer to collect the $5,000 policy limit, and it was held that the event was covered. The workmen's compensation obligation exclusion did not apply because the deceased was not an employee of the named insured or operator of the automobile. The court added; "[The insurance company] might have adopted the language of the definition in the act and said that the policy did not apply to *any one* covered by any Workmen's Compensation Law or could have been silent entirely on the subject, but since it did not do either it is bound by the terms of its own policy . . . ." *Montgomery v. Keystone Mutual Casualty Co.*, 357 Pa. 223, 53 A.2d 539, 542 (1937). (Emphasis added.)

The named insured was in business hauling milk from his customers' farms to a milk processing plant in Winona, Minnesota. He hired his sister, Viola, to assist him in the work, which included the use of the insured truck. Upon completion of the work at the processing plant each day, her days' work was at an end, and she was free to do as she might desire. The processing plant was about a mile from her home in a sparsely settled part of the city and in places there were no sidewalks. Ordinarily she rode on her brother's truck to a point about one and a half blocks from her home, but at times she would go to the city's business area or elsewhere. On five or six occasions when the weather was bad her brother would take her across the railroad tracks to within half a block of her home. The day of the accident was such an occasion; she was injured while riding with the named insured en route home when the truck was struck by a train. In her action against the named insured for her injuries the court concluded that her trip in the truck was gratuitous, permissive, and a mere favor which was not performed in furtherance of the insured's business. A declaratory judgment action followed to test coverage under the brother's automobile liability policy in order to determine whose obligation it was to pay the $5,000 judgment. The brother had neither complied with the Minnesota workmen's compensation law nor qualified as a self insurer, so no claim was entered under that law. On this basis the Minnesota court held that the claim was covered under the policy and that the workmen's compensation obligation and employee exclusions did not apply.

Hardware Mutual Casualty Co. v. Ozmun, 217 Minn. 280, 14 N.W.2d 351 (1944).[28]

Summary.—Whether the injured party is in fact entitled to workmen's compensation benefits so as to fall within this exclusion depends upon the particular circumstances. It seems obvious, after a study of the foregoing cases, that identical facts may call for different results at various times in various jurisdictions. The objective of the underwriters in the use of the exclusion was to eliminate claims of employees hurt on the job under conditions where other lawful benefits are provided for the same event because of the employment relationship.

VI. Property Damage

This policy does not apply: "(f) Under coverage B [property damage liability] to injury to or destruction of property owned or transported by the insured other than a residence or private garage injured or destroyed by a private passenger automobile covered by this policy."

The purpose of this exclusion is to omit coverage of property that is damaged or destroyed by the insured and which is likely to be covered by other insurance provisions or forms. The cases discussed below are examples of its use and application. A summary of them may be succinctly stated thus: The exclusion denies coverage for any insured only with respect to damage to property owned by, rented to, in charge of, or transported by the insured. The sole exception involves damage to a resident or private garage by a covered private passenger automobile.

Illustrative cases—(a) Owned—Transported.—A father and son were named insureds in a policy covering an automobile owned by the son. Just prior to the renewal date of the policy the father told the insurance agent to delete his name from the policy since he had no further interest in it. The policy was renewed, delivered, and the premium was paid by the son, but the father's name was again shown as a named insured. An agent of the son then operated the insured car and collided with an automobile operated by the father. When the insurer refused to pay the resulting property damage claim, the father and son filed suit to reform the policy. The court held that the policy should not be reformed and the loss was thus excluded. *Purcell v. Metropolitan Casualty Co.*, 260 S.W.2d 134 (Tex. Civ. App. 1953). This loss would be covered now under the

28. In addition to cases cited see also Jewstraw v. Hartford Acc. & Indem. Co., 280 App. Div. 150, 112 N.Y.S.2d 727 (1952); Annot., 50 A.L.R.2d 78 (1956).

1955 standard and family automobile forms due to the severability condition therein.

(b) Transported.—The named insured transported cream in the insured truck, had an accident and lost cream worth $1178. He attempted to avoid the "transported" phrase of the exclusion by alleging that an endorsement had been pasted over it in the policy so that he could not see it. Nonetheless the court denied his claim. *Travelers Ins. Co. v. Wright,* 309 Ky. 158, 216 S.W.2d 909 (1949).

Named insured sold his old truck with an attached concrete mixer to Hine. He requested and received permission from Hine to retain possession and use of the old truck for the time being, and to turn it over to Hine when he no longer required it. It continued to be registered in his name. Finally he told Hine to pick it up. Hine did not do so, however, and the insured ordered his employees to tow the truck from the middle of his yard to one end of it. The brakes on the truck were in bad condition and in moving it an accident occurred resulting in substantial damage to the truck. Hine obtained a default judgment against the named insured and then sued the insurer. *Held:* The truck was not covered because it was still "in charge of insured" when the accident took place. Furthermore the court stated that the truck was not being "transported" because "transported" means carried or conveyed from one place to another. *Hine v. American Mutual Liability Ins. Co.,* 20 Conn. Supp. 455, 139 A.2d 500 (C.P. 1958).

However, in a Missouri case the court excluded a cross claim for property damage caused by the negligence of the named insured's employee while operating a customer's tank truck on a public highway. The court concluded: "The Massachusetts' policy likewise excluded liability for this loss, excluding injury to property 'in charge of or *transported* by the insured;' and the damaged tractor was at the time 'in charge of and transported by' its insured Brooks." *Arditi v. Massachusetts Bonding & Ins. Co.,* 315 S.W.2d 736, 742 (Mo. 1958). (Emphasis added.)

(c) In Charge of—Rented to.—An automobile operated by the named insured, but owned by another, was held to be "in charge of the insured" and the exclusion was applied, even though the owner and his wife were riding in the car at the time of the accident. *Speier v. Ayling,* 158 Pa. Super. 404, 45 A.2d 385 (1946).

Named insured was engaged in performing a grading and paving contract and needed more than its twelve dump trucks to complete the job. It therefore made oral arrangements with Holloway to use two of his trucks which were fully operated and maintained by him. Named insured paid $4.66 per hour per truck and also provided work-

men's compensation coverage for Holloway's truck drivers which was charged back to him. The right of control issue was controverted. A truck owned by the named insured collided with and negligently damaged a Holloway truck. *Held:* The named insured never had possession of the Holloway truck so it was not *rented,* and Holloway never put the truck in named insured's *charge,* but reserved to himself complete possession and charge of the truck at all times. Therefore the exclusion did not apply. *Rice Brothers, Inc. v. Glens Falls Indemnity Co.,* 121 Cal. App. 2d 206, 263 P.2d 39 (1953).

The named insured was in the trucking business and was issued a policy under the Wisconsin Motor Carrier Act. A tractor-trailer he had leased from Faust was damaged in a collision with a train while one of named insured's employees was operating it. In Faust's suit against the named insured and his automobile liability insurer for the damage it was held that the exclusion applied—since the vehicle was *rented to,* in charge of and *transported* by the insured. Further, the court concluded that the Motor Carrier Act did not require the liability policy to cover damage to vehicles under the control and supervision of the motor carrier operator or his agents. *Faust v. Dawes,* 257 Wis. 353, 43 N.W.2d 365 (1950).

In a Pennsylvania case the named insured was issued an operator's policy and filed it as required by the financial responsibility act. He damaged Sky's automobile while operating it without the owner's permission. Sky obtained a judgment against the named insured and sued his insurer when it was returned unsatisfied. The loss was held to be covered. The court concluded that the automobile was not "in charge of" the named insured at time of accident because he had no legal right to exercise dominion over it but was merely a trespasser with no right to use the automobile. *Sky v. Keystone Mutual Casualty Co.,* 150 Pa. Super. 613, 29 A.2d 230 (1942).

The named insured operated a motor freight transport business from a large garage. He sub-leased an allocated space in the garage to Cohen & Powell to store or park one of their trucks. While the truck was parked in the leased space it was negligently damaged by named insured. In Cohen & Powell's suit against the insurer, seeking payment of the judgment which they had obtained against the named insured, it was held, that the truck was not "in charge of" insured and that the loss was therefore covered. The court concluded, also, that the exclusion did not apply because the insured had no right to exercise dominion or control over the damaged property. *Cohen & Powell, Inc. v. Great American Indemnity Co.,* 127 Conn. 257, 16 A.2d 354, 131 A.L.R. 1102 (1940).

A customer's automobile fell from a grease lift in the named insured's service station in Rhode Island. The insurer refused to pay for

this damage, and in the ensuing action the court found the property "in charge of" insured and thus not covered. The court added that "in charge of" meant in possession and control of. This control was said to be present even though the truck driver of owner was at accident site during entire period of the service. *Aglione v. American Automobile Ins. Co.*, 143 A.2d 148 (R.I. 1958).

The insertion of the one exception in this exclusion was a public relations effort by the insurance industry to cover the occasional and usually small damage to the insured's garage door or other parts of his residence caused by the family's private passenger automobile covered by the policy.[29]

VII. NUCLEAR ENERGY

There are two forms prepared for use by the liability insurers relating to the Nuclear Energy Liability Exclusion. They are the "broad" and "limited" forms. The limited form is usually used in the automobile liability policies by printing it in the policy with the other exclusions or by endorsement that is attached to it. The following is the text of the limited form.

This policy does not apply: "to bodily injury or property damage with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability."

VIII. INTERNATIONAL INJURIES

The 1947 and 1955 standard automobile policy forms provided bodily injury liability coverage, if caused "by accident," etc. The family special and package automobile policy form of 1956-1958 and 1959 omitted the term "accident" from its insuring agreement, but added the intentional injuries exclusion. This exclusion also replaces the assault and battery condition used in the 1947 and 1955 above mentioned forms.

The new exclusion provides that the policy does not apply "to bodily injury or property damage caused intentionally by or at the direction of the insured."

In a Wisconsin case the policy was issued to Hanson. Peterson was a police officer at Eau Claire who was riding in a squad car, operated

29. 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4328 (1942).

by another officer, following Hanson's speeding automobile. When Hanson was forced to stop, Peterson jumped out of the squad car and ran up to an open door of the Hanson car. In an effort to avoid arrest, Hanson suddenly backed his car and the open door hit Peterson causing his injuries. The court held this was not an intentional act and the exclusion did not apply. *Peterson v. Western Casualty & Surety Co.*, 5 Wis. 2d 535, 93 N.W.2d 433 (1958).

A Hawaii case under a comprehensive general automobile liability policy, involving a comparable exclusion but in the assault and battery condition, held the deliberate acts of an insured who beat up, injured and otherwise assaulted a hotel detective were not covered. *Abbott v. Western National Indemnity Co.*, 165 Cal. App. 2d 302, 331 P.2d 997 (1958).

In Louisiana an omnibus insured intentionally and wilfully ran over a man with the insured automobile, thereby killing him. The court held that the excluding provision in the assault condition had reference to the named insured only and held the event covered. *Jernigan v. Allstate Ins. Co.*, 269 F.2d 353 (5th Cir. 1959).[30]

IX. Conclusion

This study is not intended to be all inclusive of the excluding provisions affecting the automobile liability coverages in the various form policies and endorsements. The objective has been rather to identify the most controversial and important exclusions in the automobile policies issued during the past twenty-five years and discuss them in the light of some of the decisions that have interpeted the contract terms.[31]

30. See also Sheehan v. Goriansky, 321 Mass. 200, 72 N.E.2d 538, 173 A.L.R. 497 (1947); Annot., 173 A.L.R. 503 (1948).

31. The practitioner in this area is especially recommended to the following. Risjord & Austin, Automobile Liability Insurance Cases (1957); 7 Appleman, Insurance Law & Practice (1942); 45 C.J.S. *Insurance* §§ 829-36 (1946).