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SOME PHASES OF OMNIBUS AUTOMOBILE LIABILITY INSURANCE

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Insurance officials often feel that the underwriting of specific individuals is at least theoretically feasible and that the underwriting of their associates, employees, and friends is not, and therefore that automobile liability insurance should cover only the person to whom the policy is issued. The underwriting facts of life are that the automobile liability policy covers not only the named insured, i.e., the policyholder, but also certain other persons not named in the policy but insured by it, if they bear a specified relationship to the automobile in question.

I. STANDARD PROVISIONS

The 1963 revision standard family automobile liability policy insures:

(a) with respect to an automobile owned by the named insured and covered by the policy:
  (1) the named insured and any resident of the same household,
  (2) any person using the automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and,
  (3) any other person or organization but only with respect to his or its liability because of acts or omissions of a person insured under (a) (1) or (2) above;

(b) with respect to a non-owned automobile (as defined):
  (1) the named insured,
  (2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and,
  (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b) (1) or (2) above.

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II. OWNED AUTOMOBILE

A. Spouse

The spouse of the named insured is treated by the policy for most purposes as the named insured, if a resident of the same household.

Section 163, (3) of the New York Insurance Law provides that the policy shall not be deemed to insure against the liability of any insured because of injury to or death of the spouse unless the policy expressly provides such coverage. In a declaratory judgment action to determine coverage for an injury to a woman passenger in the named insured's automobile, the insurer argued that the named insured and the woman passenger had been living in an "open and notorious relationship" which qualified her as a "spouse" and thus, because of the statute, disqualified coverage for injury to her under the policy. The court held that the relationship between the two was one of "meretricious companionship" to which the statute did not apply and suggested that, since the policy provided that the spouse and her "resident relatives" were "insured," it was doubtful that the insurer "stands ready to afford its coverage to claims against one like this female defendant and her household relatives." If so, it breeds a hornet's nest for itself.[1] Perhaps the court had more foresight than the insurance company!

B. Passenger

A passenger is clearly using the automobile by virtue of his presence and, if his use causes an injury, he is insured by the policy.

When the operator of an automobile stopped it to visit with a woman, who stood outside the automobile with her hands on it, and a passenger slammed the previously ajar back door on the hands of the woman, a Louisiana court of appeal held that the passenger was "using" the automobile, and was thus insured under the omnibus clause of the policy covering the automobile.[2]

A recent case involved the question of "use" by a passenger of an automobile owned by his employer, the custody of which was assigned to the employee. While the employer's automobile was driven by a woman with the employee riding as a passenger, the employer's automobile struck another car from the rear and knocked it into the lane of oncoming traffic where it was struck broadside by an oncoming truck. Four persons in the other car were injured, three of them fatally. In an action to recover for the injury and deaths brought against the employer's insurer there was evidence that the employee-passenger sat next to the driver in the car and "pestered her"; that he grabbed the steering wheel just before the accident and thus prevented the driver from turning to the right so as to miss the vehicle ahead; and that the employee-passenger knocked the driver's foot off the brake so that she could not stop before striking the car ahead. A United States District Court for the Western District of Louisiana entered a judgment against the insurer, holding (inter alia) that, since the jury had

1 United States Fire Ins. Co. v. Cruz, 230 N.Y.S.2d 779 (S. Ct. 1962), R. & A. Case 2567.
2 Bolton v. North River Ins. Co., 102 So. 2d 544 (La. App. 1958), R. & A. Case 1614.

found that the employee-passenger was "using" the automobile at the time of the accident, he was an additional insured under the policy.[3] The result seems appropriate, since a passenger is certainly "using" the automobile and here the accident apparently resulted from the passenger's "use."

Another passenger case involved a taxicab. A woman brought action against her husband and (under a city ordinance) the insurer of a taxicab, alleging the insurance and that, while she was alighting from the taxicab, after she had ridden in it with her husband, her husband negligently closed the door on her hand causing injuries. The insurer appealed from an order overruling its demurrer to the complaint. The Supreme Court of South Carolina affirmed, holding that, under the facts alleged, the husband was "using" the automobile and the accident arose out of the negligent "unloading" thereof.[4] This was a three to two decision. While there was some confusion in the two opinions as to whether "permission" was sufficiently alleged, and while, of course, permission should have been alleged, there would seem to be little doubt that the closing of the door of the taxicab by the husband was an act within the implied permission of the named insured. If permission was appropriately alleged, there is no question that the majority opinion was correct since it appears that the husband was "using" the automobile and therefore was an omnibus insured under the policy covering the taxicab.

3 Thibodeaux v. Brown Oil Tools, Inc., 192 F. Supp. 495 (W.D. La. 1961), R. & A. Case 1614.
4 Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961), R. & A. Case 2313.

C. *Stranger*

Since the omnibus clause of the basic automobile liability policy extends coverage generally to *any* person using, and *any* person or organization legally responsible for the use of the owned automobile, some of the most interesting cases involve the *use*, usually loading or unloading, of the automobile by a stranger to it, that is, one neither the owner nor the operator nor a member of its crew. The coverage questions are manifold. The stranger is usually an employee of a consignor or consignee of goods shipped in the truck who is often insured under a general liability or a non-ownership automobile policy. If the accident involved the use, loading, or unloading of an automobile, the non-ownership policy will cover its named insured but not his employee, and the general liability policy will cover its named insured if the accident occurs on premises owned, rented, or controlled by him, but will not cover his employee.

If the consignor or consignee, as the case may be, is held liable under respondeat superior for an injury caused by his employee in using, loading, or unloading the automobile, he will have a right-over against the negligent employee who, in turn, is insured *only* under the automobile liability policy. If the injured happens to be the truck driver or other employee of the owner of the automobile, the automobile insurer may contend that there is no coverage under the automobile liability policy because the injured is an employee of the named insured so that the Employee Exclusion applies. The Employee Exclusion excludes coverage for injury to an employee of *the insured* and the automobile insurer may contend that the term *the insured* always includes the named insured so as to preclude coverage for *any* insured with respect to injuries to an employee of the named insured.

A recent federal decision in Idaho illustrates this problem. One insurer issued its comprehensive automobile liability policy (including non-ownership coverage) to a contractor. Another insurer issued its automobile liability policy to the owner of a transitmix concrete truck. The concrete truck was dispatched to deliver and unload concrete at a construction site of the contractor. An employee of the contractor was helping the truck driver unload the concrete truck when the truck driver was injured. The truck driver brought action in an Idaho court against the contractor and his employee. In a declaratory judgment action between the insurers, the United States District Court for the District of Idaho, Eastern Division, declared that the automobile insurer of the truck, and not the non-ownership insurer of the contractor, was obliged to defend the damage action and pay any judgment which might result, holding (1) that, if the contractor was liable for the alleged negligent act of his employee, he could recoup his losses from the negligent employee, (2) that, if the employer might recoup his losses, then his insurer may subrogate and collect from the negligent employee or the employee's insurer, (3) that the insurer ultimately liable should be obligated to defend in the first instance, (4) that the non-ownership policy covered the named insured-contractor but not his employee, (5) that, since the employee was "using" the truck, the truck policy covered

the employee and, since the contractor was a person "legally responsible" for the use of the truck by his employee, the truck policy also covered the contractor, and (6) that, since any loss must ultimately fall on the truck insurer as the sole insurer of the contractor's employee, there was no "other insurance" available and the truck insurer was obligated to defend both the contractor and his employee.[5]

While the court mentioned that the contractor's coverage under his non-ownership policy was "excess" over his coverage under the truck policy, the same result should have been reached had the contractor's policy been a general liability policy which would not have been "excess." This for the reason that the ultimate liability was that of the contractor's employee, the negligent actor, and *he* was insured by the truck policy *only*. That was the case with the same result in the leading companion New York cases on the subject, *Wagman* and *Bond Stores*[6] which have been much cussed and discussed[7] over the years.

It is to be noted that, in the Idaho federal case, while the injured truck driver was an employee of the named insured in the truck policy, the district court did not mention the Employee Exclusion. Possibly the question was not raised. Since the automobile policy excludes injury to an employee of "the insured," the question, if raised, would have been *Who Is "The Insured"?* Or, granted that any particular insured is denied coverage for injury to his employee, is coverage denied to any particular insured where the injury is to an employee (not of *that* insured but) of some other insured? In the early days of the standard automobile policy, 1936 to 1940, that question bothered the insurance industry. The question was precisely raised for the first time at a meeting in Chicago in 1940 of the Joint Forms Committee which had prepared and promulgated the standard provisions, for compulsory use by the member companies of (what are now respectively known as) the National Bureau of Casualty and Surety Companies and the American Mutual Insurance Alliance, and which were voluntarily used by most of the independent companies. After some discussion, one of the two members of the original drafting sub-committee stated authoritatively that the word "insured," as used in the Employee Exclusion and elsewhere in the exclusion, conditions and other limiting provisions of the policy, meant (and meant only) the particular person claiming coverage, or the particular person coverage for whom was at issue, so that, so far as the Employee Exclusion was concerned, it applied to deny coverage for *any* insured *only* with respect to injury to *his* employees.

This interpretation was repeated for the members of the National Bureau by successive general counsels of the Bureau,

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5 Travelers Ins. Co. v. General Cas. Co. of America, 187 F. Supp. 234 (D. Idaho 1960), R. & A. Case 2096.

6 Wagman v. American Fid. & Cas. Co., 304 N.Y. 490, 109 N.E.2d 592 (1952), *affirming* 279 App. Div. 933, 112 N.Y.S.2d 662 (1952), *affirming* Mem. 201 Misc. 325, 108 N.Y.S.2d 854 (S. Ct. 1951), R. & A. Case 149; and Bond Stores, Inc. v. American Fid. & Cas. Co., 133 N.Y.S.2d 297 (S. Ct. 1954), R. & A. Case 1204.

7 See, e.g., Risjord, *Loading and Unloading*, 13 Vand. L. Rev. 903, 932-933 (1960); Brown and Risiord, *Loading and Unloading: The Conflict Between Fortuitous Adversaries*, 29 Ins. Counsel J. 197, 203-205, 211-212 (1962).

the late Elmer W. Sawyer (who, by the way, was the other of the two members of the original drafting sub-committee) and James B. Donovan, by bulletins respectively dated February 26, 1941 and June 10, 1954, and was reemphasized by officials of two Bureau Companies, Dykes[8] in 1958, and Gowan[9] in 1963, and by other writers, some learned[10] and some not.[11]

The interpretation which was always intended was expressed and made a part of the standard provisions program in the 1955 editions of the various standard provisions under the title "Severability of Interests"[12] and was improved and clarified in the 1956 family automobile and later standard provisions.[13]

There are at least fourteen variations of the issue where one insured claims coverage for liability for injury to an employee of another insured, the most common being the situation where an omnibus insured (often a stranger to the truck crew) claims coverage under the automobile policy for injury to an employee (often the truck driver) of the named insured (usually the truck owner). On that *one* issue, there appear to be nine jurisdictions[14] properly confining the Employee Exclusion to situations where the injured is an employee of the particular insured claiming coverage: Arkansas,[15] California,[16] Louisiana,[17] Minnesota,[18] New

8 Dykes, *The Underwriting Intent*, 25 Ins. Counsel J. 27 (1958).

9 Gowan, *Provisions of Automobile and Liability Insurance Contracts*, 30 Ins. Counsel J. 96, 100 (1963).

10 Thomas, *Other Provisions — Declarations and Conditions*, 1955 Proceedings, Section of Insurance Law, American Bar Association 56, 65.

11 Risjord and Austin, *Who Is "The Insured"?* Fed. of Ins. C. Quarterly 52, 24 U. Kan. City L. Rev. 65 (1955-56); Risjord, *Underwriting Intent*, 7 Fed. of Ins. C. Quarterly 41; Risjord, *The Automobile Liability Policy Today*, 1956 Proceedings, Section of Insurance Law, American Bar Association, 61, 90; Risjord and Austin, *Who Is "The Insured" Revisited*, 28 Ins. Counsel J. 100 (1956); Risjord, *1960 Highlights of Automobile Insurance Law*, 12 Fed. of Ins. C. Quarterly 41, 56; Brown and Risjord, *Loading and Unloading: The Conflict Between Fortuitous Adversaries*, 29 Ins. Counsel J. 197, 207-211, 216 (1962).

12 "The term 'the Insured' is used severally and not collectively."

13 "The insurance . . . applies separately to each insured against whom claim is made or suit is brought."

14 Federal cases are classified by state since the federal jurisdiction is invariably diversity, so that, since 1938, on matters involving substantive law, the federal court is bound to follow state law, Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

15 Curran Development Co. v. Security Ins. Co., 194 F. Supp. 727 (W.D. Ark. 1961); Curran v. Security Ins. Co., 195 F. Supp. 562 (W.D. Ark. 1961), R. & A. Case 2319; *contra* Employers Mut. Liab. Co. v. Houston Fire & Cas. Co., 194 F. Supp. 828 (D. La. 1961), 213 F. Supp. 738 (D. La. 1963), R. & A. Case 2310.

16 Kaifer v. Georgia Cas. Co., 67 F.2d 309 (9th Cir. 1933), R. & A. Case 936; Rollo v. California State Auto. Ass'n, 323 P.2d 531 (Cal. App. 1958), R. & A. Case 1580; Pleasant Valley Lima Bean Growers and Warehouse Ass'n v. Cal-Farm Ins. Co., 142 Cal. App. 2d 126, 298 P.2d 109 (1956), R. & A. Case 156.

17 Stewart v. Liberty Mut. Ins. Co., 256 F.2d 444 (5th Cir. 1958), R. & A. Case 1603; Pullen v. Employers Liab. Assur. Corp., 230 La. 687, 89 So. 2d 373 (1956), *reversing* 72 So. 2d 353 (La. App. 1954), R. & A. Case 932; Spurlock v. Boyce Harvey Mach., Inc., 90 So. 2d 417 (La. App. 1956), R. & A. Case 132.

18 Travelers Ins. Co. v. American Fid. & Cas. Co., 164 F. Supp. 392 (D. Minn. 1958), R. & A. Case 1667, *applying* Wisconsin law.

Jersey,[19] New York,[20] Oregon,[21] Pennsylvania,[22] and Wisconsin,[23] thirteen have misapplied the exclusion to deny coverage in situations where the companies intend that there be coverage: Alabama,[24] Florida,[25] Georgia,[26] Illinois,[27] Indiana,[28] Kentucky,[29] Maryland,[30] Mississippi,[31] Missouri,[32] South Dakota,[33] Tennessee,[34] Texas,[35] and Washington.[36] Ohio is in doubt — two state courts have properly held that the exclusion does not apply,[37] but, in a later case, the Sixth Circuit on appeal from the United States District Court for the Eastern District of Ohio applied the exclusion.[38] Twenty-seven jurisdictions seem to be uncommitted. It is amazing that the courts, usually disposed to decide coverage questions against the insurer wherever possible, are tending more and more to disregard the stated *Underwriting Intent* of the companies and to hold that there is no coverage under situations where the companies expect to grant coverage.

D. United States of America

Since the automobile policy purports to cover, as insured, any person or organization which may be liable for the acts or

19 Maryland Cas. Co. v. New Jersey Manufacturers Cas. Ins. Co., 28 N.J. 17, 145 A.2d 15 (1958), *affirming* 48 N.J. Super. 314, 137 A.2d 577 (1958), *which reversed* 43 N.J. Super. 323, 128 A.2d 514 (1957), R. & A. Case 1398.

20 City of Albany v. Standard Acc. Ins. Co., 7 N.Y.2d 422, 165 N.E.2d 869, 198 N.Y.S.2d 303 (1960), *reversing* 8 App. Div. 2d 247, 187 N.Y.S.2d 242 (1959), R. & A. Case 1816; Greaves v. Public Service 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), *which reversed* 156 N.Y.S.2d 754 (Special Term 1956), R. & A. Case 935.

21 Canadian Indem. Co. v. State Auto. Ins. Ass'n, 174 F. Supp. 71 (D. Ore. 1959), R. & A. Case 1837; Cimarron Ins. Co. v. Travelers Ins. Co., 224 Ore. 57, 355 P.2d 742 (1960), R. & A. Case 2085.

22 Gulf Ins. Co. v. Mack Whse. Corp., 212 F. Supp. 39 (E.D. Pa. 1962), R. & A. Case 2691; Bethlehem Steel Co. v. Continental Cas. Co., 208 F. Supp. 354, 356 (E.D. Pa. 1958-1959), R. & A. Case 2592.

23 Shanahan v. Midland Coach Lines, 268 Wis. 233, 67 N.W.2d 297 (1954), R. & A. Case 805; Sandstrom v. Clausen's Estate, 258 Wis. 534, 46 N.W.2d 831 (1951), R. & A. Case 925.

24 American Fid. & Cas. Co. v. St. Paul-Mercury Ind. Co., 248 F.2d 509, 515 (5th Cir. 1957), *reversing* St. Paul-Mercury Ind. Co. v. American Fid. & Cas. Co., 146 F. Supp. 39 (M.D. Ala. 1956), R. & A. Case 503; *but see* Comments of Judge John R. Brown who wrote this opinion for the Fifth Circuit: Brown and Risjord, *Loading and Unloading: The Conflict Between Fortuitous Adversaries*, 29 Ins. Counsel J. 197, 216 (1962); and Brown, *concurring*, American Ag. Chemical Co. v. Tampa Armature Works, 315 F.2d 856 (5th Cir. 1963), R. & A. Case 2749. Michigan Mut. Liab. Co. v. Carroll, 271 Ala. 404, 123 So. 2d 920 (1960), R. & A. Case 2109.

25 Michaels v. United States Fid. & Guar. Co., 129 So. 2d 427 (Fla. 1961), R. & A. Case 2259.

26 Fireman's Fund Indem. Co. v. Mosaic Tile Co., 101 Ga. App. 701, 115 S.E.2d 263 (1960), R. & A. Case 2051.

27 Ferrell v. State Auto Ins. Ass'n, 303 F.2d 897 (7th Cir. 1962), R. & A. Case 2548; Michigan Mut. Liab. Co. v. Continental Cas. Co., 297 F.2d 208 (7th Cir. 1961), R. & A. Case 2404; General Acc. Fire & Life Assur. Corp. v. Brown, 181 N.E.2d 191 (Ill. App. 1962), R. & A. Case 2470; Heape v. Bituminous Cas. Co., 182 N.E.2d 918 (Ill. App. 1962), R. & A. Case 2519.

28 Clark v. Travelers Ind. Co., 313 F.2d 160 (7th Cir. 1963), R. & A. Case 2732; United States Fid. & Guar. Co. v. American Fid. & Cas. Co., 299 F.2d 215 (7th Cir. 1962), R. & A. Case 2450.

29 Liquid Transporters, Inc. v. Travelers Ins. Co., 308 F.2d 809 (6th Cir. 1962), R. & A. Case 2636; Kelly v. State Auto Ins. Ass'n, 288 F.2d 734 (6th Cir. 1961), R. & A. Case 2250; Travelers Ins. Co. v. Ohio Farmers Ind. Co., 157 F. Supp. 54 (W.D. Ky. 1957), *aff'd* 262 F.2d 132 (6th Cir. 1958), R. & A. Case 1538.

30 Indemnity Ins. Co. of N.A. v. Malisfski, 46 F. Supp. 454 (D. Md. 1942), *aff'd* Malisfski v. Indemnity Ins. Co. of N.A., 135 F.2d 910 (4th Cir. 1943), R. & A. Case 797.

31 Benton v. Canal Ins. Co., 241 Miss. 493, 130 So. 2d 840 (1961), R. & A. Case 2278; Continental Cas. Co. v. Pierce, 170 Miss. 67, 154 So. 279 (1934), R. & A. Case 953.

32 Campbell v. American Farmers Mut. Ins. Co., 238 F.2d 284 (8th Cir. 1956), R. & A. Case 792; Hanover Ins. Co. v. Massachusetts Bonding Dept., Travelers Ind. Co., 210 F. Supp. 765 (E.D. Mo. 1962), R. & A. Case 2666; Simpson v. American Auto. Ins Co., 327 S.W.2d 519 (Mo. App. 1959), R. & A. Case 1877.

33 Birrenkott v. McManamay, 65 S.D. 581, 276 N.W. 725 (1937), R. & A. Case 937.

34 Humble Oil and Refining Co. v. American Fid. & Cas. Co., 212 F. Supp. 953 (E.D. Tenn. 1962), R. & A. Case 2718.

35 Transport Ins. Co. v. Standard Oil Co. of Texas, 161 Tex. 93, 337 S.W.2d 284 (1960), *reversing* Standard Oil Co. of Texas v. Transport Ins. Co., 324 S.W.2d 331 (Tex. Civ. App. 1959), R. & A. Case 1802.

36 Associated Indem. Corp. v. Wachsmith, 2 Wash. 2d 679, 99 P.2d 420 (1940), R. & A. Case 422.

37 Employers Liab. Assur. Corp. v. Liberty Mut. Ins. Co., 167 N.E.2d 142 (Ohio C.P. 1959), R. & A. Case 2008; Travelers Ins. Co. v. Buckeye Union Cas. Co., 160 N.E.2d 874, (Ohio C.P. 1959); *aff'd* 112 Ohio App. 386, 173 N.E.2d 173 (1961); *aff'd* 172 Ohio St. 507, 178 N.E.2d 792 (1961), R. & A. Case 1866.

38 American Fid. & Cas. Co. v. Indemnity Ins. Co. of N.A., 308 F.2d 697 (6th Cir. 1962), *affirming* 195 F. Supp. 648 (S.D. Ohio 1961), R. & A. Case 2324.

omissions of any other person insured by the policy, the question has arisen whether the United States is a "person or organization" so insured under a policy issued to cover the automobile of a government employee using his automobile on government business. New Hampshire has held that the United States is neither a "person" nor an "organization" and is therefore not insured under the omnibus clause of such a policy,[39] but two federal courts in later cases have held that the United States is an "insured" under the omnibus clauses of automobile policies issued to cover automobiles owned and used in the postal service by mailmen.[40]

After those cases the Federal Tort Claims Act was amended to, in effect, make an action against an employee of the United States an action against the United States, itself, under the Tort Claims Act.[41] Apparently, one of the purposes of the legislation was to reduce the premium charges required for insuring automobiles owned by government employees and used in government service. The insurance response is an endorsement to limit the coverage no longer needed. The endorsement reads as follows:

> It is agreed that the policy does not apply under the Liability Coverages to the following as insureds:
>
> 1. The United States of America or any of its agencies;
> 2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States Government while acting within the scope of his office or employment, if the provisions of Section 2679 of Title 28, United States Code (Federal Tort Claims Act), as amended, require the Attorney General of the United States to defend such person in any civil action or proceeding which may be brought for such bodily injury or property damage, whether or not the incident out of which such bodily injury or property damage arose has been reported by or on behalf of such person to the United States or the Attorney General.

No cases have yet been reported interpreting this endorsement or its effect on coverage for the mailmen, the United States or others.

III. NON-OWNED AUTOMOBILE

The most unusual case on record with regard to omnibus coverage as applied to a non-owned automobile arose in Colorado. A passenger in the automobile involved in the accident ("accident car") was insured in a policy issued to him covering his liability arising out of the use of a non-owned automobile and covering as "insured" any person or organization "legally responsible" for such use. The driver of the "accident car" had no policy of his own. The "accident car" was covered by a policy running to its owner and, of course, containing an omnibus clause affording coverage to any-

39 Farm Bureau Mut. Auto. Ins. Co. v. Manson, 94 N.H. 389, 54 A.2d 580 (1947), R. & A. Case 97.
40 Irvin v. State Auto Ins. Ass'n, 148 F. Supp. 25 (D. S.D. 1957), R. & A. Case 1404; Rowley v. American Cas. Co., 140 F. Supp. 295 (D. Utah 1956), R. & A. Case 583.
41 28 U.S.C.A. § 2679 (1962).

one "using" it with permission. The prospective "driver" and "passenger" spent the evening at the home of the owner of the "accident car." The "passenger" obtained permission to use the "accident car" to drive the "driver" home, but they left the owner's house with the "driver" operating the car. There was a collision, with injuries to persons in another car. The injured sued the "driver," the "passenger," and the "owner" of the "accident car." The "owner" was dismissed on motions by the injured. Apparently for lack of proof that the "driver" was the agent of the "passenger," the court dismissed the action as against the "passenger," and entered judgment against the "driver" alone. After collecting the policy limit from the "owner's" insurer, the judgment creditors sued the "passenger's" insurer claiming that the passenger was "using" the (as to him) non-owned automobile.

The District Court for the City and County of Denver (the same judge who had dismissed the damage suit as against the "passenger" on the ground that the driver was not his agent) entered judgment against the "passenger's" insurer, holding tnat, since the "passenger" was "using" the (as to him) non-owned automobile, the "driver" was a person "legally responsible" for the "use" of the "accident car" by the "passenger," and that the "driver" was accordingly covered, as an "insured" under the "passenger's" policy![42] During appeal by the "passenger's" insurer, the cases were settled, so that (unfortunately) they never reached the Supreme Court of Colorado.

Under the policy, the legal obligation of the insured (to be covered) must arise out of the *use* of the automobile. While the "passenger," as *using,* was covered, he was held not liable. The "driver" would have been covered to the extent that he was "legally responsible" *for* the *use* of the automobile by the "passenger." The "passenger" was undoubtedly *using* the automobile, but how could the "driver" have been "legally responsible" for *that* use by the "passenger" when the same court had held that even the "passenger" was not liable for *his* "use"? How can one be vicariously liable for the use by another who was not at fault and is not liable for his own use? The "driver's" legal responsibility arose from the *"driver's" use* of the automobile and, as to *that* use, he was not insured under the "passenger's" policy.

Partly to avoid a recurrence of the result in that Colorado case, the recent revisions of the standard provisions have tried to make it clear that the "person or organization" to be insured under parts (a) (3) or (b) (3) (as set forth early in this article) is insured only with respect to liability because of the acts or omissions of a person insured under (a) (1) or (2) or (b) (1) or (2), as the case may be, and is not (as was held in Colorado) insured for liability arising from his *own* acts or omissions.

It must be remembered that, if the "driver" here, with no policy of his own, was covered for *his* use of the non-owned automobile under the family policy of the "passenger," merely because the "passenger" *was in the vehicle,* then in another case where there

42 Alberta v. Kling, Civil No. B-26531, B-25830, and B-26842 District Court, City and County of Denver (1960), R. & A. Case 2169.

might be five "passengers," each with a family policy, riding in the vehicle, another "driver," without a policy of his own, would be covered under each of the five "passenger" policies with policy limits five times the average policy limit on the five "passenger" policies, and all in addition to and in excess of his coverage under the "owner's" policy, if any.