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THE "USED IN THE AUTOMOBILE BUSINESS" EXCLUSION OF THE STANDARD FAMILY AUTOMOBILE POLICY

I. INTRODUCTION

One of the painful results of the ownership of an automobile is the recurring need to take it to a service station or garage for repairs. After such repairs are completed, an employee of the garage will often test drive the automobile to check the completed repairs. While on such an errand, the serviceman may become involved in an automobile accident in which he is at fault.

In such a situation, it is possible for the serviceman to be covered under three insurance policies.¹ If the serviceman is himself the owner of an automobile and is insured by a Standard Family Automobile Policy, then he would receive protection under the use of a non-owned automobile provision.² At the same time, the serviceman can claim coverage under the standard omnibus clause of the owner's insurance policy,³ as it is almost universally agreed that he is driving with the permission of the named insured.⁴ Third, if the garage or service station is insured under a garage liability policy, as most large automobile establishments are, then the driver would also have coverage under its provisions.⁵

¹ See *Capece v. Allstate Ins. Co.*, 86 N.J. Super. 462, 207 A.2d 207 (1965).

² The Standard Family Automobile Policy includes the following persons as insureds under the liability coverage:

"(b) With respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer, provided the actual use thereof is with the permission of the owner;"

LeFelt v. Nasarow, 71 N.J. Super. 538, 545, 177 A.2d 315, 319, *aff'd*, 76 N.J. Super. 576, 185 A.2d 217 (1962).

³ The garage employee can claim to be an insured under the owner's family automobile policy provisions which define insureds driving the owned automobile as "(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured. . . ." *Ibid*.

⁴ In most instances the garageman is assumed to be driving with the implied permission of the named insured. See *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 132 N.W.2d 174 (1964); *Capece v. Allstate Ins. Co.*, 86 N.J. Super. 462, 207 A.2d 207 (1965). See generally Austin, *Permissive Use Under the Omnibus Clause of the Automobile Liability Policy*, 29 INS. COUNCIL J. 49 (1962); Comment, *The Omnibus Clause: Its Application in Nebraska*, 44 NEB. L. REV. 129 (1965). But see *Pollard v. Safeco Ins. Co.*, 52 Tenn. App. 583, 376 S.W.2d 730 (1963) which involved the issue of whether a garageman was a second permittee of the named insured.

⁵ The Garage Liability Policy provides legal liability coverage for busi-

While it is clear that a serviceman would be protected under any available garage liability policy, when he attempts to gain liability coverage or to require the insurance company to handle his defense under either his policy or the owner's policy, he is often met with the contention that he was using the automobile in the "automobile business" and that such use is excluded from coverage under the provisions of both Standard Family Automobile Policies. The owner's insurer may deny coverage under an exclusionary clause applicable to the use of the owned automobile, which commonly reads:

This policy does not apply . . . to an owned automobile while used in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership.⁶

The serviceman may also be denied coverage under a similar provision in his family automobile policy relating to the use of a non-owned automobile in the automobile business.⁷ Currently, all such policies define the term "automobile business" to mean "the business or occupation of selling, repairing, servicing, storing or parking automobiles."⁸

The named insured and several other classes are not affected by the owned automobile clause as they are excluded from its operation. These individuals are always provided with liability coverage if they should be held legally responsible for the use of the car, even though the driver may not be covered as an additional insured

nesses commonly known as garages, or engaged in some activity pertaining to motor vehicles. Eligible for such insurance are automobile sales agencies, including franchised and non-franchised dealers, repair shops, service stations, storage garages, public parking places, and equipment dealers. When driving a customer's automobile a serviceman is protected by a section which provides automobile liability coverage for the use in connection with garage operations of any automobile which is neither owned nor hired by the named insured, a partner therein, or a member of the same household as any such person. See generally 12 COUCH, INSURANCE 2d § 45:108 (1964).

⁶ *LeFelt v. Nasarow*, 71 N.J. Super. 538, 546, 177 A.2d 315, 319, *aff'd*, 76 N.J. Super. 576, 185 A.2d 217 (1962).

⁷ Such family automobile policies also contain a provision which excludes liability coverages to "a non-owned automobile while used in the automobile business by the named insured."

⁸ As the Standard Family Automobile Policy was originally drafted by the National Bureau of Casualty Underwriters, it defined "automobile business" merely in terms of "business," but it was subsequently amended to include "or occupation" in an attempt to include activity conducted on a regular basis but not necessarily for profit.

because the vehicle was being used in the automobile business.⁹

Both the owned and non-owned automobile exclusions are only applicable to the liability section of the Standard Family Automobile Policy, and as such relieve the insurer from the obligation to pay damages for bodily injury or property damage for which the insured or additional insureds may become legally responsible. However, an analogous provision occurs in the medical payments section,¹⁰ which serves a similar purpose although usually interpreted as a broader exclusion.¹¹

There are many other factual situations besides the one mentioned in which the use of the vehicle could be a "use in the automobile business" so as to exclude the driver from liability coverage under either his own policy or the car owner's insurance. In addition, where the garage employee is also covered under the business's garage liability plan, another question arises as to the correct apportionment of the insurance between the parties. The purpose of this article will thus be two-fold: (1) to analyze the various factual situations which have occurred under the "automobile business" exclusion and the rationales used to interpret it, and (2) to examine the effect of a garage liability plan on coverage under the exclusion.

II. HISTORY

Before the Standard Family Automobile Policy was written, most standard automobile policies had a provision added to the omnibus clause excluding from those entitled to be additional insureds any person or organization, other than the named insured, operating an automobile repair shop, public garage, sales agency, service station or public garage, with respect to any accident aris-

⁹ As a result these classes are always protected if liability should be imposed upon them, but the clause does prevent the insurer from becoming liable for judgments recovered against other additional insureds under the omnibus clause who are using the automobile in the automobile business. Cf. 7 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4372 (1962).

¹⁰ As currently written, the policy does not provide expenses for bodily injury sustained by any person other than the named insured or a relative "resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in the automobile business."

¹¹ The Medical Services part of the policy also contains a very broad exclusion avoiding medical payments to any person who is employed in the automobile business if compensated in whole or in part under any workmen's compensation law.

ing out of the operation thereof.¹² The primary purpose of such a restriction, commonly referred to as the "arising out of the operation of a repair shop" exclusion, was to prevent problems of overlapping or concurrent coverage with the special garage liability policy which was specifically designed to cover the risks attendant to the operation of such enterprises.¹³ The courts have also commented that another reason for the restriction is the increased possibility that the automobile will be driven by irresponsible persons,¹⁴ noting that there is a great difference between the insured granting permission to drive to a person known by him to be trustworthy and in delivering the automobile to a garage where any employee might be required to drive or operate the car in the course of his employment, regardless of his personal safety record.¹⁵

Such provisions have been upheld, with one notable exception,¹⁶ as not against public policy or statutory "financial responsibility" plans on the assumption that an insurance company may insert in its automobile liability policies a provision excluding liability where at the time of the accident the automobile is being

¹² *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 566, 132 N.W.2d 174, 176 (1964). See generally 7 AM. JUR. 2d *Automobile Insurance* § 125 (1963); 7 APPLEMAN, *op. cit. supra* note 9, § 4372.

¹³ *Commercial Standard Ins. Co. v. Sanders*, 326 S.W.2d 298, 300 (Tex. Civ. App. 1959). See also *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 132 N.W.2d 174 (1964).

¹⁴ *Buxton v. Randel*, 159 Kan. 245, 249, 154 P.2d 129, 131 (1964).

¹⁵ *Paine v. Finkler Motor Car Co.*, 220 Wis. 9, 16, 264 N.W. 477, 480 (1936).

¹⁶ An exception to the policy's omnibus clause for garages, service stations, or repair shops is usually held valid even where a statute requires the inclusion of an omnibus clause in automobile liability policies. *Lumbermens Mut. Cas. Co. v. Indemnity Ins. Co.*, 186 Va. 204, 42 S.E.2d 298 (1947); *Trollo v. McLendon*, 4 Ohio App. 2d 30, 211 N.E.2d 65 (1965); see 13 COUCH, *INSURANCE* 2d § 45:982 (1965). But see *Exchange Cas. & Sur. Co. v. Scott*, 56 Cal. 2d 613, 15 Cal. Rptr. 897, 364 P.2d 833 (1961) which held that the application of such an exclusion when the car was being driven with the permission of the named insured would be contrary to the state's public policy as expressed by a statute providing that a liability insurance policy shall insure the person named therein and any other person using the described vehicle with the express or implied permission of the insured against loss from liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle. While many other states have nearly identical "omnibus" statutes, including NEB. REV. STAT. § 60-534 (Reissue 1960), it is unlikely that they will follow the California example of denying applicability to such exclusions. For an examination of the California policy, see Comment, 34 So. CAL. L. REV. 209 (1961).

put to a particular use.¹⁷ The test under such provisions of the old Standard Automobile Liability Policy was the occupation or identity of the person driving the automobile, and thus if the driver was employed in one of the mentioned vocations and if the accident occurred while he was driving within the scope of his employment the insurance company was relieved from any coverage of the garage employee as an additional insured.¹⁸

However, where the person driving the car was not engaged in the operation of a repair shop, garage, parking lot, or the like, the exclusion did not apply.¹⁹ Thus, where the operator engaged in the activity only as a hobby,²⁰ where the operator was not acting within the scope of his employment,²¹ or where the business in which the operator was engaged could not be considered the type of business listed in the exclusionary clause,²² the exclusion was not applicable and coverage existed under the omnibus clause.

When the Standard Family Automobile Policy became effective in 1956,²³ it contained a new exclusionary clause applicable to

¹⁷ 45 C.J.S. *Insurance* § 834 (1946). The Nebraska Supreme Court has stated with respect to exclusionary clauses that: "The parties to an insurance contract may make the contract in any legal form they desire, and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurance insurers are entitled to have such exceptions and limitations construed and enforced as expressed." *Garrelts v. Department of Motor Vehicles*, 176 Neb. 220, 125 N.W.2d 678 (1964). *But cf. Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963) as to the controlling effect of Nebraska's "omnibus statute" over inconsistent provisions of the insurance policy.

¹⁸ 13 COUCH, *INSURANCE* 2d §§ 45:980-90 (1965); Annot., 47 A.L.R.2d 556 (1956); see, e.g., *Nyman v. Monteleone-Iberville Garage, Inc.*, 211 La. 375, 30 So.2d 123 (1947); *Kenner v. Century Indem. Co.*, 320 Mass. 6, 67 N.E.2d 769 (1946).

¹⁹ 7 APPLEMAN, *op. cit. supra* note 9, § 4372.

²⁰ *Allstate Ins. Co. v. Lake Shore Mut. Ins. Co.*, 33 Ill. App. 2d 172, 178 N.E.2d 675 (1962) (a truck driver repairing cars in his spare time in an alley garage was not operating an automobile repair shop.)

²¹ *Libero v. Lumbermens Mut. Cas. Co.*, 141 Conn. 574, 108 A.2d 533 (1954).

²² *Bituminous Cas. Corp. v. American Fid. & Cas. Co.*, 22 Ill. App. 2d 26, 159 N.E.2d 7 (1959) (a machine shop operated by a mining company where its vehicles, most of which could not be driven on state roads, was not an automobile repair shop); *Arditi v. Massachusetts Bonding & Ins. Co.*, 315 S.W.2d 736 (Mo. App. 1958) (a firm engaged in welding tanks to tank trucks was not an organization operating an automobile repair shop within the exclusion clause.)

²³ The Standard Family Automobile Policy was drafted by the National Bureau of Casualty Underwriters, 60 John St., New York 38, New York.

the use of owned and non-owned automobiles in the automobile business, which was substituted for the previous exception to the omnibus clause covering accidents arising out of the operation of repair shops or sales agencies. It has been stated that the new exclusion relating to the automobile business was not intended to accomplish any substantial change in the coverage from the previous exclusionary clauses.²⁴ However, most courts which have had an opportunity to construe the new exclusion have felt that the change in language was intended to broaden coverage by restricting the scope of the previous exclusion clause.²⁵ Rather than a consideration of the business or occupation of the person driving the car at the time of the accident, the new automobile business exclusion clause provides a test of the business the car is being used in.²⁶ As a driver may be employed in an automotive business and yet not be using the automobile in that business, the net result has been an extension of insurance coverage under the new clauses. Therefore, situations arising under the older exclusionary clauses are not controlling precedents, and such cases must be distinguished from situations involving the "used in the automobile business" exclusions.²⁷

The new requirement imposes two requisites before coverage is excluded. First, it is necessary to establish that the type of business enterprise or organization involved comes within the term "automobile business" as defined in the Standard Family Automobile Policy. Second, the automobile must be used within the "automobile business" in the context which the courts have interpreted the term "used."

III. WHAT CONSTITUTES AN AUTOMOBILE BUSINESS

The policy defines the term "automobile business" to include the business or occupation of selling, repairing, servicing, storing or

²⁴ Risjord & Austin, *Standard Family Automobile Policy*, 411 Ins. L.J. 199 (1957).

²⁵ *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 571, 132 N.W.2d 174, 179 (1964); see also *Goforth v. Allstate Ins. Co.*, 220 F. Supp. 616, 619 (W.D.N.C.), *aff'd*, 327 F.2d 637 (4th Cir. 1964).

²⁶ *LeFelt v. Nasarow*, 71 N.J. Super. 538, 549, 177 A.2d 315, 322, *aff'd*, 76 N.J. Super. 576, 185 A.2d 217 (1962).

²⁷ *Chavers v. St. Paul Fire & Marine Ins. Co.*, 188 F. Supp. 39, 43 n.5 (N.D. Ohio), *aff'd*, 295 F.2d 812 (6th Cir. 1961). See 7 APPLEMAN, *INSURANCE LAW & PRACTICE* § 4372 (Supp. 1965). For a collection of cases arising under the "used in the automobile business" exclusion, see 13 COUCH, *INSURANCE* 2d §§ 45:971-79 (1965); Annot., 71 A.L.R. 2d 964 (1960).

parking automobiles.²⁸ These categories are exclusive and if not applicable the driver would be insured as an additional insured.

To constitute a "business", the courts have required that the occupation or undertaking be engaged in with some regularity and for profit. In one of the first cases decided under the Standard Family Automobile Policy provisions, *Cherot v. United States Fid. & Guar. Co.*,²⁹ it was held that a part-time repairman who repaired automobiles as a hobby for the actual cost of the parts was not engaged in the "automobile business." The court placed heavy emphasis upon the permanency of the use involved, and whether the additional insured was engaged only in a hobby or whether he charged for his labors. Since the repairman derived no pecuniary benefit or gain from his work, the court concluded that as a matter of law he could not be engaged in the "automobile business." Thus, as was true under the old exclusion clause,³⁰ where the operator repairs automobiles only occasionally or in his spare time as a non-remunerative hobby³¹ he does not come within the exclusion and is covered under the policy.

Another approach to the question of what constitutes a "business or occupation" is to determine whether the use falls within the policy's definition of these terms. In conformity with the axiom that where an ambiguity exists an insurance contract must be construed in favor of the insured,³² the term "automobile business" has been strictly limited to the policy's definition. For instance where an accident occurred during the transportation of a customer's automobile to the service garage by a garage employee, it was held that the accident did not involve the automobile business because "transporting" was not within the policy's definition of "au-

²⁸ *LeFelt v. Nasarow*, 71 N.J. Super. 538, 546, 177 A.2d 315, 322, *aff'd*, 76 N.J. Super. 576, 185 A.2d 217 (1962).

²⁹ 264 F.2d 767 (10th Cir. 1959).

³⁰ See note 20 *supra*.

³¹ The policy in *Cherot* was before the Family Automobile Policy's definition of "automobile business" was amended to include "or occupation" so that the court was only concerned with what constituted a business. The addition of "or occupation" was probably added to cover the situation where the activity was conducted regularly but not necessarily for profit. For an indication that the amendment has affected subsequent cases, compare *LeFelt v. Nasarow*, 71 N.J. Super. 538, 177 A.2d 315 *aff'd*, 76 N.J. Super. 576, 185 A.2d 217 (1962) in which it was held that a part-time repairman was engaged in the "automobile business." However, the repairman in *LeFelt* admitted that he often accepted pay for the repair work which he did on friends' cars.

³² 12 COUCH, INSURANCE 2d § 45.9 (1964). See *Lonsdale v. Union Ins. Co.*, 167 Neb. 56, 91 N.W.2d 245 (1958).

tomobile business."³³ Since the burden is upon the insurance company to establish the exclusion,³⁴ it is incumbent upon them to prove that the terms used in the policy encompass the activity which is argued to be within the exclusion.

*Goforth v. Allstate Ins. Co.*³⁵ implied that the automotive establishment's business would not begin until the customer's vehicle reached the repair shop and that thereafter any movement would be a component of the "automobile business."³⁶ However, such a distinction has been noted and rejected in a case³⁷ which raised such a factual issue.

If the status of the business enterprise or organization cannot be considered to be one of the types listed in the definition, then the courts will hold, as under the old exclusions,³⁸ that the clause does not apply. Even where the activity in which the automobile is employed would appear to be within the terms of the definition, where it is conducted only as an incident to the employer's non-automotive business, such activity does not constitute a phase of the "automobile business." For example, a restaurant that provides parking service to its customers is not engaged in the automobile business.³⁹ This is in conformity with the principles behind the exclusion, as the clause is meant only to exclude coverage where the business establishment employing the automobile is one which would ordinarily be insured by a garage liability policy.

Although there was originally some confusion concerning whether the concept of business should be tested by the occupation of the driver, the business of his employer, or the business of the

³³ *Goforth v. Allstate Ins. Co.*, 220 F. Supp. 616 (W.D.N.C.), *aff'd*, 327 F.2d 637 (4th Cir. 1964). As no evidence was introduced at the trial of any special meaning in the automotive trade attached to the words "servicing" or "repairing," they would not be extended beyond their common meaning to include the activity of "transporting." This is not to say that the transportation of motor vehicles to and from a garage could not be included within the term "automobile business," but only that some other term must be shown by trade usage to encompass the activity or else that the term "transportation" must be included within the definition.

³⁴ *Caster v. Motors Ins. Corp.*, 28 Ill. App. 2d 363, 366, 171 N.E.2d 425, 426-27 (1961).

³⁵ 220 F. Supp. 616 (W.D.N.C.), *aff'd*, 327 F.2d 637 (4th Cir. 1964).

³⁶ *Id.* at 619.

³⁷ *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 569, 132 N.W.2d 174, 178 (1964).

³⁸ See note 22 *supra*.

³⁹ *Chavers v. St. Paul Fire & Marine Ins. Co.*, 188 F. Supp. 39 (N.D. Ohio), *aff'd*, 295 F.2d 812 (6th Cir. 1961).

insured,⁴⁰ this has been clarified by subsequent decisions⁴¹ and the addition of the word "or occupation"⁴² to the definition. It is now clear that the concept of business is to be judged by the status of the business enterprise responsible for the movement of the vehicle. This interpretation is sounder as it reflects the policy underlying the exclusion of precluding liability coverage only where the automobile would be insured under the garage liability policy of an automotive establishment. However, if the establishment is held to be an "automobile business," it is necessary to ask further whether the vehicle is being "used" in connection with such business.

IV. WHAT CONSTITUTES "USE" WITHIN THE "AUTOMOBILE BUSINESS"

The concept most changed by the Standard Family Automobile Policy is whether the automobile is being used within the automobile business. The Standard Automobile Insurance Policy's requirement that the accident "arise out of the operation of a repair shop," etc., indicated a scope of employment test, while the new provisions exclude coverage only if the automobile is being "used" in the business.

It is generally considered that the term "while used in" is at least ambiguous.⁴³ It could mean that (1) the automobile is excluded if it is simply in the possession of an employee of an automobile business, (2) the automobile is excluded only if it is used within the scope of the business, or (3) the automobile is excluded only if being driven in furtherance of the business or as an integral part of the service thereof. Since any ambiguity is construed in favor of the insured, most courts have rejected both the "custody" and the

⁴⁰ See *Insurance—What Constitutes "Use" Under Automobile Liability Policy Excluding "Use" In The "Automobile Business?"*, 16 ALA. L. REV. 184 (1963).

⁴¹ "To us, these examples make it fairly obvious that it is the type of business enterprise or organization in which the automobile is used that is envisioned by the automobile business exclusion clause in the policy, and that the occupation of the person actually driving the car is of no moment in the construction of the policy in this respect." *Chavers v. St. Paul Fire & Marine Ins. Co.*, 188 F. Supp. 39, 42 (N.D. Ohio), *aff'd*, 295 F.2d 812 (6th Cir. 1961).

⁴² Although the *Chavers* case involved a policy written before the addition of "or occupation" to the definition, the court noted the subsequent amendment and used it as support for their conclusion that the business must be analyzed in relation to the status of the business actually employing the person parking the car. *Id.* at 42 n.5.

⁴³ *E.g.*, *Wilks v. Allstate Ins. Co.*, 177 So. 2d 790 (La. Ct. App. 1965). *But see*, *Kipper Chevrolet, Inc. v. Patrons Mut. Ins. Ass'n*, 193 Kan. 637, 639, 396 P.2d 348, 350 (1964).

"scope of business" tests and required that the use of the car be in furtherance of the automobile business. As a result it is possible for the driver to be employed in one of the defined types of enterprises and yet not fall within the exclusion if the automobile is not being used in furtherance of the "automobile business." There are now a sufficient number of cases to divide the use into certain types of activity, and it is the purpose of this section to demonstrate when these activities are considered to be in furtherance of the "automobile business."

A. TRANSPORTATION TO AND FROM THE GARAGE

There have been a large number of cases in which an accident occurred while a garage employee was either transporting a customer's automobile to or from the service garage. The leading case in this area is *McCree v. Jennings*,⁴⁴ where a friend of a repairman was involved in an accident while he was returning a customer's car to the point where it was to be picked up as an accommodation to the repairman. The driver's insurer disclaimed liability on the grounds that the vehicle was a non-owned automobile used in the automobile business as it was being returned from being repaired. The court rejected the contention that the relevant test was who had possession or control, and ruled that the automobile must actually be employed for some purpose in connection with the automobile business. The return of a customer's car was not sufficiently connected with the repair business to come within the exclusion.⁴⁵

Where the garage employee himself is returning a customer's vehicle, it has been argued that such use must be a use in the automobile business as an employee of an automobile business is using the car. However, *Goforth v. Allstate Ins. Co.*,⁴⁶ a case involving an accident which occurred while a garage repairman was driving a customer's car back to the garage for further repairs, rejected such a contention noting that it is the business the car is being used in that is the determining factor, and not the business of the person using the car.⁴⁷

The majority of courts have accepted the *McCree*⁴⁸ holding

⁴⁴ 55 Wash. 2d 725, 349 P.2d 1071 (1960).

⁴⁵ *Id.* at 727, 349 P.2d at 1072.

⁴⁶ 220 F. Supp. 616 (W.D.N.C.), *aff'd*, 327 F.2d 637 (4th Cir. 1964).

⁴⁷ *Id.* at 619.

⁴⁸ *Northwestern Mut. Ins. Co. v. Great Am. Ins. Co.*, 404 P.2d 995 (Wash. 1965). While the *McCree* case did not involve any coverage under a garage liability plan since the driver was a friend of the amateur

that the activity of transporting a customer's car is not a use in the automobile business.⁴⁹ This is true even when the transportation is more closely related to the actual servicing, as when an accident occurs while a garage employee is moving a customer's car from the garage's parking lot into the garage for immediate servicing and repair.⁵⁰ While such a result may be acceptable in *McCree* where the driver was not an employee of a service garage, to so hold where the driver is a garage employee and actively engaged in the service of the business is directly contra to the policy underlying the exclusion, as it was under such business-related activity that the employee was intended to be insured only by a garage liability plan.⁵¹

A few courts have noticed this policy in holding that the transportation of customer's automobiles is an integral part of the repair shop's business. Thus, in *Underwriters Ins. Co. v. Strohkorb*,⁵² where a garage employee was transporting a customer's car from the service garage to the company's sales lot the court held that the employee was engaged in a direct and ordinary course of his employer's business and therefore the vehicle was being used in the automobile business. In other cases,⁵³ the same underlying reasoning has been applied but verbalized in terms of whether the use was incidental to the business involved. In others, from the factual situation it would appear that the court was reasoning on the same basis,⁵⁴ although not generalizing what test was to be used.

repairman, in the present case the garage employee was also insured under a garage liability policy. Therefore, the holding resulted in just the problem of concurrent coverage between a family insurer and a garage insurer which the exclusion was meant to prevent.

⁴⁹ E.g., *American Fire & Cas. Co. v. Surety Indem. Co.*, 246 S.C. 220, 143 S.E.2d 371 (1965); *Wilks v. Allstate Ins. Co.*, 177 So. 2d 790 (La. Ct. App. 1965). *Contra*, *Sanders v. Liberty Mut. Ins. Co.*, 354 F.2d 777 (5th Cir. 1965) holding that the garage employee would be regarded as the agent of the garage operator rather than of the car owner and therefore he was using the automobile in the automobile business.

⁵⁰ *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 132 N.W.2d 174 (1964).

⁵¹ It would seem that the activity of moving the customer's car into the garage could just as easily have been held to be an integral part of "servicing" or "repairing," as the movement of cars within the service establishment is an integral part of its business. Also, the added risk of numerous different repairmen driving a customer's car was one of the reasons underlying the exclusion.

⁵² 205 Va. 472, 137 S.E.2d 913 (1964).

⁵³ See *Pollard v. Safeco Ins. Co.*, 52 Tenn. App. 583, 376 S.W.2d 730 (1963).

⁵⁴ See *Kipper Chevrolet, Inc. v. Patrons Mut. Ins. Ass'n.*, 193 Kan. 637, 396 P.2d 348 (1964).

B. REPAIRING OF AN AUTOMOBILE

All the cases which have involved accidents occurring during the actual performance of repair work have held that the customer's car was not being used in the automobile business. A prime example is *Allstate Ins. Co. v. Skawinski*,⁵⁵ in which the named insured under a family automobile policy ran an automobile repair and maintenance business. While servicing a customer's vehicle, he inadvertently raced the engine crushing the customer against a wall. The insurer argued that the repairman was excluded from coverage under his family policy because he was using a non-owned automobile in the automobile business. In rejecting the contention, the court adopted a test of whether the vehicle was being employed as a part of or as a tool of the automobile business, or whether it was merely the object of the defendant's business. In finding that the customer's car was not being used as an integral part of the defendant's business, the court frustrated the intent of the exclusion clause. The opinion allows and encourages service station operators to purchase family policies with their comparatively reduced rates and at the same time become insured against the greater risks attendant to the operation of an automobile business which were intended to be covered by the higher rates of the garage liability policy.⁵⁶

The same reasoning has been applied where the garage employee was also insured under his employer's garage liability policy on the basis that a reasonable man would understand that to be used in the automobile business a vehicle must be employed for some purpose in connection with the business and not merely at the establishment to be served or repaired.⁵⁷ Other courts have also held that an automobile left in the custody of a service man for servicing or repairs is not being used in the automobile business, although more on the basis of controlling state precedents than any detailed legal rationale.⁵⁸

C. TEST DRIVING

The "used in the automobile business" exclusion has also been applied to situations where automobiles were being test driven, either to check on completed repairs or pursuant to a purchasing arrangement. The results have not been the same, varying both in

⁵⁵ 40 Ill. App. 2d 136, 189 N.E.2d 365 (1963).

⁵⁶ See the dissenting opinion in *Allstate Ins. Co. v. Skawinski*, 40 Ill. App. 2d 136, 141, 189 N.E.2d 365, 368 (1965).

⁵⁷ *Case v. Fidelity & Cas. Co.*, 105 N.H. 422, 201 A.2d 897 (1964).

⁵⁸ *Capece v. Allstate Ins. Co.*, 86 N.J. Super. 462, 207 A.2d 207 (1965).

the rationale and the underlying policy.

The leading case of *LeFelt v. Nasarow*⁵⁹ held that the test driving of a customer's automobile by a part time repairman was not a use in the automobile business. Although the court considered the part time repairman to be engaged in the automobile business,⁶⁰ the vehicle was not being used in the automobile business as the word "used" refers to the use to which the car is being put and not to the identity or occupation of the person driving it. Because the driver was a part time repairman, the case involved a contest between two family automobile insurers and the court was influenced by the lack of liability insurance which would have resulted if the use was held to be within the automobile business.⁶¹

That the courts may be influenced by the availability of garage liability insurance is shown by *Nationwide Mut. Ins. Co. v. Federal Mut. Ins. Co.*,⁶² which held that the test driving by an automobile salesman of the automobile of a prospective customer was a use in the automobile business.⁶³ The fact that the court relied upon the provisions of the garage liability policy is shown by its conclusion that as the use was clearly within the coverage of that policy, it must also be a use in the sales agency within the

⁵⁹ 71 N.J. Super. 538, 177 A.2d 315, *aff'd*, 76 N.J. Super. 576, 185 A.2d 217 (1962). *Contra*, *Trollo v. McLendon*, 4 Ohio App. 2d 30, 211 N.E.2d 65 (1965).

⁶⁰ Although the status of the amateur repairman is much like that in *Cherot v. United States Fid. & Guar. Co.*, 264 F.2d 767, 768 (10th Cir. 1959), it can be distinguished for two reasons. First, in *LeFelt* the repairman admitted that he often received pay for the repair work he did on friends' cars, and second, the addition of "or occupation" to the definition of "automobile business" in the policy would make it harder to find that the repairman was not at least in the occupation of repairing automobiles.

⁶¹ The car owner's insurer disclaimed liability under the owned automobile exclusion, while the repairman's insurer invoked the non-owned automobile clause of his policy. Therefore, if the court found that the car was being used in the automobile business, both policies would not have applied. But this is not true of the typical situation where a professional automobile business is involved, as it would usually be insured under a garage liability policy. Hence, it would seem more logical to hold that the repairman was not engaged in repairing automobiles with such regularity and for sufficient profit to be conducting the "business or occupation" of repairing. The court was not without authority under the old exclusions that an itinerant mechanic is not conducting a repair shop, *Bosshardt v. Commercial Cas. Co.*, 124 N.J.L. 54, 11 A.2d 49 (1940).

⁶² 204 Va. 879, 134 S.E.2d 253 (1964).

⁶³ The trial court found as a fact that the salesman was using the vehicle in his automobile business because the evidence established that the

meaning of the exclusion of the family automobile policy.⁶⁴ The same reasoning has resulted in the testing of a used car by a prospective customer being held a use in the automobile business.⁶⁵

D. GARAGE EMPLOYEE USING AN AUTOMOBILE TO OBTAIN PARTS

Only one case⁶⁶ has been decided under the new exclusion clause on the point of whether an automobile used to obtain parts for a garage is being used in the automobile business. Relying upon precedents involving an identical situation under the old exclusion clause, it was held that the obtaining of parts is an activity directly connected to the conduct of an automobile business and therefore the insured is excluded from liability coverage. The case has been criticized for failing to recognize any distinction between the older clauses and the present exclusionary clause,⁶⁷ but the result is nevertheless correct when judged by the standards since used by courts in other factual situations.⁶⁸ Had the driver insured his service station under a garage liability policy, he would have been covered thereunder. The result is that there has been no change from the holdings under the old exclusion clause, and it is clear that the use of a vehicle for securing or delivering equipment or supplies is a use in the automobile business.

E. LOANING OF AN AUTOMOBILE

Where the employee of a repair business or sales agency loans his personal automobile to a customer to use while the customer's car is being serviced or repaired, it is universally held that such is

dealer's purpose in driving the car was to aid him in getting an estimate of the car's worth; that he had formerly considered the car as a trading prospect; and that the testing of customers' automobiles pursuant to a trade was an important element of the sales dealership. *But cf. Pirkle v. American Liberty Ins. Co.*, 247 F. Supp. 1018 (N.D. Ga. 1965), holding that a salesman's use of a customer's automobile to drive it to an appraiser for an evaluation to be used in trade negotiations was not a use in the automobile business.

⁶⁴ *Id.* at 886, 134 S.E.2d at 257.

⁶⁵ *Hodapp v. Shelby Mut. Ins. Co.*, 166 So. 2d 772 (Fla. Ct. App. 1964). *Contra, Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 146 S.E. 2d 410 (N.C. 1966).

⁶⁶ *Walker v. State Farm Mut. Auto Ins. Co.*, 40 Ill. App. 2d 463, 190 N.E.2d 121 (1963).

⁶⁷ See *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 132 N.W.2d 174, 178 (1964).

⁶⁸ The activity of obtaining parts is often cited as an example of a use that would clearly be in the automobile business. See *e.g., Allstate Ins. Co. v. Skawinski*, 40 Ill. App. 2d 136, 189 N.E.2d 365 (1963); *Wilks v. Allstate Ins. Co.*, 177 So. 2d 790 (La. Ct. App. 1965).

not a use in the automobile business. To prevent the application of the exclusion disclaiming liability courts usually hold that such use is a personal one rather than one connected with the business.⁶⁹ Others have looked at the use from the standpoint of the driver, and as the customer is not engaged in the automobile business, neither is such use.⁷⁰ Although such a use is undoubtedly in furtherance of the company's business, it lacks the attendant added risk of the vehicle being placed in the possession of unknown drivers⁷¹ as the employee personally knows who he has lent his automobile to. In this way it is much like the personal lending of any automobile under the omnibus clause. It should be noted that this situation involves the loaning of an employee's personal automobile to a customer. It is hardly doubted that if a company car was loaned to a customer as a "courtesy car," that this would be a use in the automobile business.⁷²

It has also been held that the lending of a company demonstrator to a garage employee for his personal use is not a use in the automobile business.⁷³ The rationale that this is a purely personal use seems to be an adoption of the "scope of business" test, but may be accounted for by the slightly different wording of the clause.

V. REVISION OF THE EXCLUSION CLAUSE

When the Standard Family Automobile Policy was drafted, it was decided that the added risk attendant to the operation of a family automobile by employees of an automotive establishment would be more appropriately insured under a garage liability policy with its higher rates set to compensate for the increased risk. As a result the "used in the automobile business" exclusion was inserted to perform that function, which was formerly achieved by the "arising out of the operation of a sales agency, repair shop," etc., exclusion of the old Standard Automobile Liability Policy. While some courts have noticed this underlying policy,⁷⁴ sometimes with

⁶⁹ *Provident Ins. Co. v. Allstate Ins. Co.*, 33 Misc. 2d 530, 227 N.Y.S.2d 226 (1962).

⁷⁰ *National Farm Union Prop. & Cas. Co. v. Farmers Ins. Group*, 14 Utah 2d 89, 377 P.2d 786 (1963).

⁷¹ See note 15 *supra* and accompanying text.

⁷² *Allstate Ins. Co. v. Skawinski*, 40 Ill. App. 2d 136, 189 N.E.2d 365 (1963).

⁷³ *Commercial Standard Ins. Co. v. Sanders*, 326 S.W.2d 298 (Tex. Civ. App. 1959). Such use was held not to be in the "automobile business" because the return of the vehicle was merely a necessary consequence of the initial permission and incidental to the employee's personal use of the automobile.

⁷⁴ *E.g.*, *Universal Underwriters Ins. Co. v. Strohkorb*, 205 Va. 472, 137 S.E.2d 913 (1964); *Nationwide Mut. Ins. Co. v. Federal Mut. Ins. Co.*, 204

anomalous results,⁷⁵ the prevailing construction ignored the reasons underlying the inclusion of the clause. The rigorous requirement that the use be in furtherance of the automobile business, even where coverage under a garage liability policy was available, resulted in situations where a garage employee was driving a customer's car on business related to the automobile establishment and yet still not be excluded from coverage under the family policy.⁷⁶

To rectify this defect, in the 1963 revision of the Standard Family Automobile Policy the wording of the exclusion was changed, apparently in an attempt to return to the holdings under the Standard Automobile Liability Policy. The revised clause now excludes liability coverage to owned⁷⁷ or non-owned⁷⁸ automobiles when used by any person while employed or otherwise engaged in the automobile business. While the concept of "automobile business"⁷⁹ should remain unchanged, the emphasis of the clause has

Va. 879, 134 S.E.2d 253 (1964); *Allstate Ins. Co. v. Skawinski*, 40 Ill. App. 2d 136, 141, 189 N.E.2d 365, 368 (1963) (dissenting opinion).

⁷⁵ In *Pollard v. Safeco Ins. Co.*, 52 Tenn. App. 583, 376 S.W.2d 730 (1963), a parking lot operator was involved in an accident while he was driving a customer's car to a tire repair shop. The court held that the car was being used within the "automobile business" under the parking lot operator's family policy, but not under the customer's family policy. As its reason for denying coverage under the operator's policy, the court stated on rehearing: "As we pointed out in our original opinion such exclusionary clauses are sustained as reasonable and binding on the insured 'because of the increased hazard growing out of the use of the non-owned cars by such establishments while in their legal custody.' It would be grossly unfair to the insurer to hold that an insured engaged in the automobile business could take out a policy on his privately owned and operated car and then on the basis of the same small premium claim protection for any and all non-owned automobiles used in such business. Policies of that nature providing general coverage for such businesses carry a much higher premium rate." *Id.* at 589, 376 S.W.2d at 734.

⁷⁶ *E.g.*, *Capece v. Allstate Ins. Co.*, 86 N.J. Super. 462, 207 A.2d 207 (1965); *Hammer v. Malkerson Motors, Inc.*, 269 Minn. 563, 132 N.W.2d 174 (1964).

⁷⁷ The typical exclusion now reads: "to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business. . . ." *Dumas v. Hartford Acc. & Indem. Co.*, 181 So. 2d 841, 842 (La. Ct. App. 1965).

⁷⁸ The analogous provisions excluding non-owned automobiles reads: "to a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in (1) the automobile business of the Insured or of any other person or organization. . . ." *Birmingham Fire Ins. Co. v. Sharrow*, 249 F. Supp. 429, 430 (S.D. Fla. 1965).

⁷⁹ The policy still retains the definition of "automobile business" as the business or occupation of selling, repairing, servicing, storing or park-

changed from the use being made of the automobile to the business or occupation of the driver. Although the words "employed or otherwise engaged in" still retain a degree of ambiguity,⁸⁰ they will probably have to be limited to mean that the driver must be using the automobile within the scope of the establishment's business.⁸¹ Even so, it seems clear that such activity as repairing, transporting, road testing, or obtaining parts would be excluded. However, the loaning of an automobile to a customer, whether an employee's personal vehicle or the garage's, would not be excluded as the person driving would not be employed or engaged in the automobile business.

The revision has mainly been adopted by insurers who belong to the National Bureau of Casualty Underwriters and is not yet in universal usage.⁸² Few cases have yet appeared involving the revised clause, but additional aid in construing it can be derived from analogous provisions previously in use.⁸³ The revised clause provides a clear insight into what was intended to be accomplished by the original "use in the automobile business" exclusion. Whether it will be adopted by the unaffiliated, mainline insurers will in part depend upon the subsequent construction given to it by the courts.

ing automobiles. Therefore, the cases arising under the old clause concerning what is an "automobile business" should be controlling precedents under the revised clause. See Part III *supra*.

⁸⁰ *Dumas v. Hartford Acc. & Indem. Co.*, 181 So. 2d 841, 843 (La. Ct. App. 1965). These words could be read to exclude coverage: (1) Whenever the driver is employed or engaged in the "automobile business," (2) where the driver is using the automobile in the scope of employment of the "automobile business," or (3) only while the driver is *actually* engaged in servicing, repairing, storing or parking automobiles.

⁸¹ *Birmingham Fire Ins. Co. v. Sharrow*, 249 F. Supp. 429 (S.D. Fla. 1965). *But see Dumas v. Hartford Acc. & Indem. Co.*, 181 So. 2d 841 (La. Ct. App. 1965) which limited the clause to accidents occurring only while servicing an automobile, so that the returning of a customer's car after the repairs had been completed was not excluded.

⁸² The members of the National Bureau of Casualty Underwriters are mostly small, independent insurers. The large nonaffiliated insurers draft their own policies, although often closely following the provisions of the standard policies. These nonaffiliated insurers have not yet revised their policies to conform with the revision of the standard policy.

⁸³ See *Piliero v. Allstate Ins. Co.*, 12 App. Div. 130, 209 N.Y.S.2d 90 (1960) where an exclusion as to any person "employed in or operating an automobile business" was interpreted to require a definite employer-employee relationship so that the policy did not exclude a person working at a restaurant parking lot as a voluntary, unofficial attendant receiving only tips from customers and not supervised or controlled by the restaurant owners.

VI. CONCLUSION

The litigious history of the exclusion clause was the result of poor draftmanship and an undue adherence by the courts to the principles of construction rather than an analysis of the policy underlying the clause. The revised clause should go far to clear up the uncertainties inherent in the original exclusion. However, to insure its proper construction and legitimate effect, courts must recognize the policies which moved the insurers to insert the exclusion in the family policy.

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