

1962

Automobile Liability Insurance: Loading and Un-Loading in New York

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Automobile Liability Insurance: Loading and Un-Loading in New York, 31 Fordham L. Rev. 178 (1962).
Available at: <https://ir.lawnet.fordham.edu/flr/vol31/iss1/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

surety's rights. Public contracts, however, should not be completed at the expense of innocent materialmen and laborers. A surety, by virtue of its contract, secures the contractor's promise to pay subcontractors and, therefore, such subcontractors should prevail.

AUTOMOBILE LIABILITY INSURANCE: LOADING AND UNLOADING IN NEW YORK

The standard automobile liability policy provides that the insurance company will:

pay on behalf of the insured all sums which the insured shall become legally obligated to pay . . . because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.¹

This language is present, in one form or another, both in the basic² and family type³ policies covering private passenger vehicles, and in the comprehensive type policy⁴ covering commercial vehicles. The latter is our prime concern.

The popularly termed "omnibus" clause in private passenger⁵ and commercial vehicle⁶ policies, states that the word "insured" includes any person or organization using the vehicle or legally responsible for its use provided that such activity is with the permission of the named insured. Thus, A, using B's vehicle with B's permission in accordance with B's instructions or without violating any restrictions imposed by B, is covered by B's policy where B, had he done the act, would be covered. What constitutes a covered act, with respect to a named insured or an "omnibus" insured, necessarily involves an inquiry into the meaning of the phrase, "caused by accident and arising out of the ownership, maintenance or use of the automobile."

While disputes concerning the meaning of the word "accident" in insurance contracts have resulted in litigation in New York⁷ and elsewhere, it is generally

1. Standard Provisions for Automobile Liability Policies, Basic Automobile Liability Form, Nat'l Bureau of Cas. Underwriters, p. 3, pt. I, 5th rev. April 1, 1955 [hereinafter cited as Basic Automobile Liability Form].

2. *Ibid.*

3. Standard Provisions for Automobile Liability Policies, Family Automobile Form, Nat'l Bureau of Cas. Underwriters, p. 3. Coverage A-B, 1st rev. May 1, 1958. [hereinafter cited as Family Automobile Form].

4. Standard Provisions for Automobile Liability Policies, Comprehensive Automobile Liability Form, Nat'l Bureau of Cas. Underwriters, p. 4, pt. I, 3d rev. April 1, 1955 [hereinafter cited as Comprehensive Automobile Liability Form].

5. Basic Automobile Liability Form, p. 3, pt. III(a); Family Automobile Form, p. 3, Persons Insured (a)-(c).

6. Comprehensive Automobile Liability Form, p. 4, pt. III.

7. *Jackson v. Employers' Liab. Assur. Corp.*, 139 Misc. 686, 248 N.Y. Supp. 207 (Sup. Ct. 1931), *aff'd mem.*, 234 App. Div. 893, 254 N.Y. Supp. 1010 (2d Dep't), *aff'd mem.*, 259 N.Y. 559, 182 N.E. 180 (1932).

accepted that the word refers to an act which causes injuries⁸ other than those inflicted intentionally.⁹ Such injuries then, are "accidental . . . for the purpose of indemnity according to the quality of the results rather than the quality of the causes."¹⁰ The coverage for accidents arising out of the *ownership* of a vehicle, coupled with the "omnibus" clause, is designed to protect the insured from liability imposed by statute¹¹ due to his status as the owner of the automobile.¹² An accident arising out of the *maintenance* of the automobile is self-explanatory and would include, for example, a case where an insured, while making repairs, negligently spilled a can of gasoline causing a fire.¹³ The damage from such an accident, however, must be proximately caused by the maintenance.¹⁴

It remains then, to consider those accidents arising out of the *use* of an automobile. A covered vehicle must be used in accordance with the purposes set forth in the policy or within the operations incidental to the business stated therein.¹⁵ Use of the vehicle includes more than the mere operation of it by the insured. If, for example, a policy required that the insured be operating the vehicle at the time of the accident, no coverage would be afforded where the owner was merely present in the vehicle while another person was operating it¹⁶ unless the owner was exercising some actual physical control.¹⁷ On the other hand, one can be using a vehicle merely by riding in it as a passenger.¹⁸ With little stretch of the imagination then, it can be seen that *use* can include a multitude of activities, but in order for there to be coverage, there must be

8. *Sontag v. Galer*, 279 Mass. 309, 181 N.E. 182 (1932); *Commonwealth Cas. Co. v. Headers*, 118 Ohio St. 429, 161 N.E. 278 (1928).

9. "The meaning of the term 'accident' is reasonably well established in our courts. It ordinarily is defined as a sudden, unexpected event, identifiable in time and place The general rule is that such incidents are accidents unless the injury is intentionally inflicted by an insured or by another at his direction." *Donovan*, *Hardy Perennials of Insurance Contract Litigation*, 1954 *Ins. L.J.* 163, 164.

10. *Messersmith v. American Fid. Co.*, 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921).

11. Every owner . . . shall be liable . . . for death or injuries . . . resulting from negligence . . . by any person using or operating . . . with the permission, express or implied, of such owner. N.Y. Vehicle & Traffic Law § 388(1).

12. *Mason v. Allstate Ins. Co.*, 12 App. Div. 2d 138, 209 N.Y.S.2d 104 (2d Dep't 1960).

13. *United Mut. Fire Ins. Co. v. Jamestown Mut. Ins. Co.*, 242 App. Div. 420, 275 N.Y. Supp. 47 (4th Dep't 1934), *aff'd mem.*, 267 N.Y. 576, 196 N.E. 587 (1935).

14. *Steir v. London Guar. & Acc. Co.*, 227 App. Div. 37, 237 N.Y. Supp. 40 (1st Dep't), *aff'd mem.*, 254 N.Y. 576, 173 N.E. 873 (1929).

15. *Euto v. (American) Lumbermen's Mut. Cas. Co.*, 247 App. Div. 613, 288 N.Y. Supp. 232 (4th Dep't 1936). In this case the policy expressly limited the insurer's liability to loss occurring from the use of a truck in connection with the insured's sand and gravel business. Thus, no coverage was afforded when the truck was involved in an accident while being used in snow removal.

16. *Witherstine v. Employers' Liab. Assur. Corp.*, 235 N.Y. 168, 139 N.E. 229 (1923).

17. *O'Connell v. New Jersey Fid. & Plate Glass Ins. Co.*, 201 App. Div. 117, 193 N.Y. Supp. 911 (3d Dep't 1922), *aff'd mem.*, 235 N.Y. 583, 139 N.E. 744 (1923).

18. *Jones v. New York Cas. Co.*, 23 F. Supp. 932 (E.D. Va. 1938).

a use¹⁹ with the permission,²⁰ express or implied,²¹ of the owner. Thus, what constitutes use of an automobile, is not always clear and ultimately is a question of fact.²² Of particular significance are cases involving the loading or unloading of a vehicle. While loading²³ and unloading²⁴ have been held to represent a covered use even in the absence of the so-called "loading and unloading" clause, it is this clause, found in policies covering commercial vehicles,²⁵ which continues to be the "source of considerable dispute and litigation."²⁶

I. LOADING AND UNLOADING: THE CLAUSE AND THE EFFECT

A. *Extended Coverage*

The "loading and unloading" clause is, with rare exception, found in all policies covering commercial vehicles. Obviously, under such a clause, should the driver of a covered vehicle, while engaged in the act of loading or unloading, injure a third party, the policy would protect him in the same way as if he were driving the vehicle when the accident occurred.²⁷ Whether you consider

19. See note 14 *supra*.

20. *Farrell v. Shelby Mut. Ins. Co.*, 18 Misc. 2d 459, 189 N.Y.S.2d 66 (Sup. Ct. 1959).

21. *Coons v. Massachusetts Bonding & Ins. Co.*, 12 App. Div. 2d 701, 207 N.Y.S.2d 819 (3d Dep't 1960).

22. Compare *Roche v. United States Fid. & Guar. Co.*, 247 App. Div. 335, 287 N.Y. Supp. 38 (2d Dep't), *aff'd mem.*, 273 N.Y. 473, 6 N.E.2d 410 (1936), with *Steir v. London Guar. & Acc. Corp.*, 227 App. Div. 37, 237 N.Y. Supp. 40 (1st Dep't), *aff'd mem.*, 254 N.Y. 576, 173 N.E. 873 (1929).

23. A subcontractor, by means of a crane, loaded the vehicle covered by an automobile policy which did not contain a loading and unloading clause. As the vehicle was on its way to the highway, a rock fell from it injuring another. The court held that the loading was a use of the vehicle, and, therefore, the one who loaded it was covered under the automobile policy. *D'Aquilla Bros. Contracting Co. v. Hartford Acc. & Indem. Co.*, 22 Misc. 2d 733, 193 N.Y.S.2d 502 (Sup. Ct. 1959).

24. Where a pedestrian was struck and injured by an iron beam being moved across the sidewalk from a truck into a building, the automobile policy covered this use of the vehicle. *Panhandle Steel Prods. Co. v. Fidelity Union Cas. Co.*, 23 S.W.2d 799 (Tex. Civ. App. 1929). Similarly, where a woman being transported on a cot from her home to an ambulance fell, the accident was within the use of the ambulance. *Owens v. Ocean Acc. & Guar. Corp.*, 194 Ark. 817, 109 S.W.2d 928 (1937).

25. Comprehensive Automobile Liability Form, Condition No. 4, p. 5 states the "use of an automobile includes the loading and unloading thereof."

26. Hassett, *Loading and Unloading, Addresses at Meeting of Insurance Law Section, New York State Bar Ass'n, Rochester, N.Y., Oct. 31, 1959*. One writer describes the clause, as the "subject" instead of the cause of disputes in that the language is not ambiguous as a matter of phraseology, but rather, "the continual disputes and litigation are attributable . . . to the wide diversity of situations to which that language is pertinent." *Donovan, Hardy Perennials of Insurance Contract Litigation*, 1954 *Ins. L.J.* 163, 164.

27. See *Kemnetz v. Galluzzo*, 8 Misc. 2d 513, 163 N.Y.S.2d 998 (Sup. Ct. 1957) where the truck operator dumped topsoil from the insured vehicle and then, while moving it to its final place of delivery by means of a payloader, injured the plaintiff, such activity was a use of the vehicle within the loading and unloading clause. See also *B & D Motor Lines, Inc. v. Citizens Cas. Co.*, 181 Misc. 985, 43 N.Y.S.2d 486 (N.Y. City Ct. 1943), *aff'd mem.*, 267 App. Div. 955, 48 N.Y.S.2d 472 (1st Dep't), appeal denied, 268 App. Div. 755, 49 N.Y.S.2d

the "loading and unloading" clause as being "intended as a coverage extension. . . ."²⁸ or, since loading and unloading is included in use of the vehicle anyway,²⁹ as a mere sales advantage,³⁰ it is clear that the clause, as it has been interpreted, creates some extension in coverage.³¹

As courts began construing the meaning of this clause, two theories became apparent, namely the "coming to rest"³² and the "complete operation"³³ doctrines. Under the former rule, unloading ceases when the article removed from the vehicle has actually come to rest, and the vehicle is no longer engaged in the process of unloading.³⁴ Conversely, loading commences when the article has started on an uninterrupted movement towards being placed on or in the vehicle.³⁵ Under the latter doctrine, *use* has been extended to mean the entire process of transportation, *i.e.*, coverage extends from the moment the goods leave their resting place until they reach their final destination.³⁶

274 (1st Dep't 1944) where the insured's truckers were using a jigger to transport cartons from the truck to the consignee's place of business and the jigger collided with the plaintiff, such was a use of the vehicle within the loading and unloading clause. Cf. Maryland Cas. Co. v. Tighe, 29 F. Supp. 69 (N.D. Cal. 1939), *aff'd*, 115 F.2d 297 (9th Cir. 1940).

28. Fieting, *The Loading and Unloading Coverage*, 182 *Weekly Underwriter* 1112 (1960).
29. D'Aquila Bros. Contracting Co. v. Hartford Acc. & Indem. Co., 22 Misc. 2d 733, 193 N.Y.S.2d 502 (Sup. Ct. 1959); see also Owens v. Ocean Acc. & Guar. Corp., 194 Ark. 817, 109 S.W.2d 928 (1937); Panhandle Steel Prods. Co. v. Fidelity Union Cas. Co., 23 S.W.2d 799 (Tex. Civ. App. 1929).

30. Mautz, *The Loading and Unloading Clause*, 27 *Ins. Counsel J.* 150 (1960).

31. August A. Busch & Co. v. Liberty Mut. Ins. Co., 339 Mass. 239, 158 N.E.2d 351 (1959); Ferry v. Protective Indem. Co., 155 Pa. Super. 266, 38 A.2d 493 (1944); Pacific Auto. Ins. Co. v. Commercial Cas. Ins. Co., 108 Utah 500, 161 P.2d 423 (1945).

32. Pacific Auto. Ins. Co. v. Commercial Cas. Ins. Co., 108 Utah 500, 503, 161 P.2d 423, 424 (1945).

33. *Id.* at 505, 161 P.2d at 425.

34. See Stammer v. Kitzmiller, 226 Wis. 348, 276 N.W. 629 (1937) where a truck driver delivering beer opened a hatchway on the sidewalk and a pedestrian fell into the basement. Since the beer had come to rest, the vehicle was held to be no longer connected with it, and, therefore, the accident did not occur in the process of unloading the truck. See also Kaufman v. Liberty Mut. Ins. Co., 264 F.2d 863 (3d Cir. 1959), reversing 160 F. Supp. 923 (W.D. Pa. 1958); American Cas. Co. v. Fisher, 195 Ga. 136, 23 S.E.2d 395, reversing 67 Ga. App. 784, 21 S.E.2d 306 (1942).

35. Ferry v. Protective Indem. Co., 155 Pa. Super. 266, 38 A.2d 493 (1944). In that case, a truck driver left his vehicle at the curb and went into the basement of a building to remove ashes. In opening the door, while resting the ash can on a cellar step, he caused a pedestrian to fall and be injured. The court held that the instrumentality which caused the accident was the cellar door, and this, under the facts, did not come within the process of loading the truck. See also Annot., 160 A.L.R. 1259, 1264 (1946).

36. Thus where a barrel of beer had been taken from the truck and placed on the sidewalk preparatory to being taken through the customer's cellar door, and a pedestrian was injured when the door was opened, the injury was considered covered under the unloading clause of the automobile policy. State ex rel. Butte Brewing Co. v. District Court, 110 Mont. 250, 100 P.2d 932 (1940). See also Coulter v. American Employers' Ins. Co., 333 Ill. App. 631, 78 N.E.2d 131 (1948). Compare Ferry v. Protective Indem. Co., 155 Pa. Super. 266, 38 A.2d 493 (1944).

The distinction between the two theories may be seen in the different results reached in their application to similar fact patterns. Thus, where goods were removed from the vehicle and placed on the sidewalk, under the "coming to rest" rule, they were considered unloaded,³⁷ while under the "complete operation" doctrine it was held that,

unloading . . . was a continuous operation from the time the truck came to a stop . . . and the [article] . . . was delivered to the customer. The unloading . . . cannot be said to have been accomplished when the [article] . . . was placed upon the sidewalk.³⁸

Although it is possible, to have the same result under the "coming to rest" rule³⁹ as under the "complete operation" doctrine,⁴⁰ as in a situation where the unloading would be complete in either case, the theories are nonetheless distinguishable. However, the "coming to rest" rule "is losing its strength and is fast being replaced even in jurisdictions once considered its champion. . . . [T]he 'complete operation' doctrine has almost pre-empted the field."⁴¹ With respect to this broader view, the New York Court of Appeals has stated that it "impresses us as sounder, as more fully carrying out the aim of the policy—to cover the entire operation of making commercial pickups and deliveries in the business of the insured carrier."⁴² Accordingly, in New York, there is coverage under the "loading and unloading" clause, where a person is injured due to the negligence of the trucker or his employees, after the load has been placed on the sidewalk and is being further transported.⁴³ Likewise, coverage exists where the accident occurs within a building a considerable distance from the vehicle,⁴⁴ or even in certain circumstances, where the transported material has been completely unloaded, but at the wrong address.⁴⁵

B. *The Big Parlay*

The "omnibus" clause defines an "insured" as one using, or legally responsible for the use of the vehicle with the insured's permission.⁴⁶ When the "omnibus" clause is combined with the "loading and unloading" clause, it results in an extension of coverage to any person using the vehicle by loading or unloading it. Thus, under the "complete operation" doctrine where the employee

37. *Franklin Co-op. Creamery Ass'n v. Employers' Liab. Assur. Corp.*, 200 Minn. 230, 273 N.W. 809 (1937).

38. *State ex rel. Butte Brewing Co. v. District Court*, 110 Mont. at 256, 100 P.2d at 934.

39. *Stammer v. Kitzmiller*, 226 Wis. 348, 276 N.W. 629 (1937).

40. *Cosmopolitan Mut. Ins. Co. v. Liebmann Breweries, Inc.*, 27 Misc. 2d 838, 212 N.Y.S.2d 457 (Sup. Ct. 1961).

41. *Risjord, Loading and Unloading*, 13 Vand. L. Rev. 903, 904 (1960).

42. *Wagman v. American Fid. & Cas. Co.*, 304 N.Y. 490, 494, 109 N.E.2d 592, 594 (1952).

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

44. *B & D Motor Lines, Inc. v. Citizens Cas. Co.*, 181 Misc. 985, 43 N.Y.S.2d 486 (N.Y. City Ct. 1943), *aff'd mem.*, 267 App. Div. 955, 48 N.Y.S.2d 472 (1st Dep't 1944).

45. *Mohawk Valley Fuel Co. v. Home Indem. Co.*, 8 Misc. 2d 445, 448, 165 N.Y.S.2d 357, 361 (Sup. Ct. 1957).

46. See notes 5 & 6 *supra*.

of a consignee was carrying cabinets across a sidewalk from where the truck driver had deposited them, and a pedestrian was injured, the consignee's employee was covered by the trucker's automobile policy because he was considered to be using the vehicle at the time of the accident.⁴⁷

The leading case on such extended coverage is *Wagman v. American Fid. & Cas. Co.*⁴⁸ There, two employees of a clothing store were rolling garment racks from a store to the curb where a truck operator lifted them onto his truck. The plaintiff, an employee of the clothing store, was standing at the curb counting garments and generally supervising the pickup. On his way back to the store, he bumped into and injured a pedestrian on the sidewalk. The court held that under the "complete operation" doctrine the plaintiff was engaged in loading the vehicle and, thus, was entitled to protection as an "omnibus" insured. In finding that he was covered by the vehicle's policy, the court noted that had the plaintiff been employed by the trucker, and not the storekeeper, "the evidence would unquestionably have warranted . . . [a] finding that his activities in supervising and checking the pickup . . . had been part of the overall process of loading the vehicle."⁴⁹ In addition, the fact that he was on his way back to the store, "would not suspend the coverage."⁵⁰ As one writer has said: "Without necessarily conceding that the New York Court of Appeals was correct in holding . . . [that the plaintiff] was loading the truck,"⁵¹ this case is a perfect example of the extended coverage provided by the combination of an "omnibus" clause and a "loading and unloading" clause.

C. Problems of Concurrent Coverage

1. Employee Exclusion

There is a division of authority on the question of whether an automobile policy covers an "omnibus" insured where the injured party is the trucker's employee.⁵² This is due to an exclusion in the policy which makes it inapplicable where an employee of the insured is injured in the course of employment and benefits for these injuries are required to be provided for by workmen's compensation laws.⁵³

Initially, New York courts held that in such a situation coverage would be denied the "omnibus" insured under the exclusion since it would be denied the named insured if the suit were against him.⁵⁴ Today, however, the exclusion

47. *Lowry v. R. H. Macy & Co.*, 119 N.Y.S.2d 5 (Sup. Ct. 1952).

48. 304 N.Y. 490, 494, 109 N.E.2d 592, 594 (1952).

49. *Id.* at 495, 109 N.E.2d at 594.

50. *Ibid.*

51. *Risjord*, supra note 41, at 933.

52. *Gozigian, Who Is "The Insured" In The Employee Exclusion Clause?*, 10 Syracuse L. Rev. 118 (1958).

53. "This policy does not apply . . . (c) . . . to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law . . ." Comprehensive Automobile Liability Form, p. 5.

54. *Standard Sur. & Cas. Co. v. Maryland Cas. Co.*, 199 Misc. 658, 100 N.Y.S.2d 79 (Sup. Ct. 1950), *aff'd*, 281 App. Div. 446, 119 N.Y.S.2d 795 (4th Dep't 1953).

applies only where the claimant is an employee of the person against whom the claim is made—the “omnibus” insured—and, since an injured trucker’s employee is not such an employee, the “omnibus” insured will not be denied coverage.⁵⁵ The reasoning behind this is that:

To hold that the exclusion clause was intended to deny coverage to an additional insured who did not and could not carry workmen’s compensation insurance to protect himself . . . would seem to be contrary to what actually was intended.⁵⁶

This point, however, should be made academic by the addition of a “Severability of Interests”⁵⁷ provision in the standard policy, but “unfortunately, some of the courts haven’t yet discovered that purpose.”⁵⁸

2. Comprehensive General Liability

Generally, the “premises occupier”⁵⁹ will have a comprehensive general liability policy⁶⁰ which insures against accidents⁶¹ but which rarely covers its employees. Such a policy also covers the ownership, maintenance and use, including the loading and unloading, of automobiles when the accident occurs on the premises or the ways immediately adjoining.⁶² In addition to this, the “premises occupier” may have an automobile policy, either separately⁶³ or in combination with its general liability policy,⁶⁴ which may cover the use of hired⁶⁵

55. *Greaves v. Public Serv. Mut. Ins. Co.*, 4 App. Div. 2d 609, 168 N.Y.S.2d 107 (1st Dep’t 1957), *aff’d*, 5 N.Y.2d 120, 155 N.E.2d 390, 181 N.Y.S.2d 489 (1959); *Morgan v. Greater N.Y. Taxpayers Mut. Ins. Ass’n*, 305 N.Y. 243, 112 N.E.2d 273 (1953).

56. 4 App. Div. 2d at 612, 168 N.Y.S.2d at 109-10.

57. “The term ‘the insured’ is used severally and not collectively . . .” *Comprehensive Automobile Liability Form*, p. 6.

58. *Brown & Risjord, Loading and Unloading: The Conflict Between Fortuitous Adversaries*, 29 *Ins. Counsel J.* 197, 209 (1962).

59. For the purposes of simple illustration, this term shall be used to include premises owners, consignors, consignees, and any one from whom the goods are being picked up by the trucker or to whom they are being delivered.

60. *Standard Provisions for General Liability Policies, Comprehensive General Liability Form*, Nat’l Bureau of Cas. Underwriters, 3d rev. July 6, 1955 [hereinafter cited as *Comprehensive General Liability Form*].

61. “Insuring Agreements . . . To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person and caused by accident.” *Id.* at 4.

62. “This policy does not apply . . . (c) . . . to the ownership, maintenance, operation, use, loading or unloading of . . . (2) automobiles if the accident occurs away from such premises or the ways immediately adjoining. . .” *Ibid.*

63. *Comprehensive Automobile Liability Form*.

64. *Standard Provisions For General—Automobile Liability Policies, Comprehensive General-Automobile Liability Form*, Nat’l Bureau of Cas. Underwriters, 2d rev. July 6, 1955 [hereinafter cited as *Comprehensive General-Automobile Liability Form*].

65. “The unqualified word ‘insured’ includes . . . any person while using . . . a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. . .” *Comprehensive Automobile Liability Form*, p. 4; *Comprehensive General-Automobile Liability Form*, p. 5.

or nonowned automobiles.⁶⁶ It is provided in a general liability policy that if the insured is covered by any other insurance, in the event of a loss, the policy will cover only to the proportion that the total amount of coverage bears to the total amount of coverage of the other available insurance.⁶⁷ This is prorating the loss. The standard automobile policy covering commercial vehicles⁶⁸ and the combination general liability automobile policy⁶⁹ contain this same condition, and in addition, provide that if the loss arises out of use of a hired automobile insured on a cost of hire basis,⁷⁰ or a nonowned automobile, the policy shall not be prorated, but rather shall be in excess of other available insurance.⁷¹

In light of such abundant coverage and its attendant conditions, consider the situation where a truck driver or third party is injured due to the negligence of the "premises occupier's" employee who is engaged in loading or unloading. Where the liability of the "premises occupier" is more than vicarious, it would be covered concurrently by both its general liability policy and the trucker's automobile policy. That is to say, it would be the named insured under the former and an "omnibus" insured under the latter. The loss would then be prorated among both insurance carriers.⁷² This assumes, of course, that the trucker's vehicle was not a hired or nonowned vehicle for, if such were the case, the automobile policy would be in excess of other available insurance. The "premises occupier" in this situation cannot recover over against its employee because both are joint tort-feasors.⁷³

On the other hand, where the liability of the "premises occupier" is vicarious only, the stage may be set for a "battle between fortuitous adversaries."⁷⁴ Here,

66. "The unqualified word 'insured' includes . . . any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured." *Ibid.*

67. "If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability . . . bears to the total applicable limit of liability of all valid and collectible insurance against such loss." Comprehensive General Liability Form, Condition No. 12, p. 6. Thus, if the general liability policy provides coverage to \$20,000 and an auto policy with coverage to \$40,000 covers the same loss, the general liability carrier will pay \$20 to every \$40 paid by the auto carrier. Conversely, if the auto policy only has coverage to \$10,000, the general liability carrier will pay \$20 to every \$10 paid by the auto carrier.

68. Comprehensive Automobile Liability Form, Condition No. 14, p. 6.

69. Comprehensive General-Automobile Liability Form, Condition No. 14, p. 8.

70. "[T]he words 'cost of hire' mean the amount incurred for hired automobiles, including the entire remuneration of each employee of the named insured engaged in the operation of such automobiles subject to an average weekly maximum remuneration of \$100, provided that such amount shall not include any amount incurred for the hire of any such automobiles which are subject to compulsory insurance requirements of any federal or public authority. . . ." Comprehensive Automobile Liability Form, Condition No. 1(1), p. 5; Comprehensive General-Automobile Liability Form, Condition No. 1(6), p. 7.

71. See notes 68 & 69 *supra*.

72. *Spurlock v. Boyce-Harvey Mach. Inc.*, 90 So. 2d 417 (La. Ct. App. 1956).

73. *Id.* at 428-29.

74. *American Fid. & Cas. Co. v. St. Paul-Mercury Indem. Co.*, 248 F.2d 509, 511 (5th Cir. 1957).

as in *Wagman*,⁷⁵ the "premises occupier," guided by its general liability carrier, would bring a third party action against its negligent employee who would not be covered by the policy. The employee, in turn, would seek coverage under the automobile policy as an "omnibus" insured. The "premises occupier" would be covered concurrently by its general liability policy and the trucker's automobile policy. However, it could recover against the active tort-feasor, its employee, who would be covered only under the automobile policy. By doing this, the automobile carrier would have to bear the whole loss,⁷⁶ while if the employee were not brought into the suit, the loss would be prorated.⁷⁷ To seek a full recovery against the automobile carrier without joining the employee, the "premises occupier" would be "asking for relief that it may never be entitled to obtain."⁷⁸ Affirmative proof is required to show that the employee was negligent, notwithstanding the fact that the "premises occupier" is held derivatively liable because of its employee's negligence.⁷⁹ This somewhat tortured form of litigation, coupled with the fact that the general liability carrier lurks in the background guiding its insured's action against its employee, and the latter's suit against the automobile carrier, has not passed without uncomplimentary comment.⁸⁰

Of course, if the "premises occupier's" employee is covered as an insured under the general liability policy, coverage by both carriers would be prorated whether liability was vicarious or not. Again, we are assuming that the trucker's vehicle is not hired or nonowned. Should the "premises occupier" have coverage for hired vehicles on a cost of hire basis,⁸¹ or nonowned vehicles,⁸² the coverage would be in excess and would be used only when the trucker's policy had been exhausted.⁸³

75. 304 N.Y. 490, 109 N.E.2d 592 (1952).

76. *Ibid.*; accord, *Pacific Employers Ins. Co. v. Hartford Acc. & Indem. Co.*, 228 F.2d 365 (9th Cir. 1955); *Pleasant Valley Lima Bean Growers & Warehouse Ass'n v. Cal-Farm Ins. Co.*, 142 Cal. App. 2d 126, 298 P.2d 109 (Dist. Ct. App. 1956).

77. *Lamberti v. Anaco Equip. Corp.*, 16 App. Div. 2d 121, 226 N.Y.S.2d 70 (1st Dep't 1962).

78. *Id.* at 126, 226 N.Y.S.2d at 74.

79. *Id.* at 126, 226 N.Y.S.2d at 74-75.

80. See generally *Brown & Risjord*, *supra* note 58.

81. See notes 65 & 70 *supra*.

82. See note 66 *supra*. Note, however, that as regards nonowned vehicles, such must be used by an executive officer of the named insured for coverage to exist at all.

83. See note 71 *supra* and accompanying text. In *Bituminous Cas. Corp. v. Travelers Ins. Co.*, 122 F. Supp. 197 (D. Minn. 1954) the court held that the hired auto coverage applied under the facts, but decided that the loss would be prorated. This was due to the fact that the policy of the "premises occupier" was peculiarly worded so that coverage was in excess as to nonowned autos but not as to hired autos. The court also stated that the "other insurance" condition applied only to other insurance purchased by the "premises occupier," but in fact, it applies to any other insurance available to any possible insured. See *Woodrich Constr. Co. v. Indemnity Co. of No. America*, 252 Minn. 86, 89 N.W.2d 412 (1958). See generally *Clampett*, *Coverage Under the Automobile Liability Policy and Under the Comprehensive General Liability Policy When an Employee of the Former's Named Insured Is Injured Through the Negligence of the Latter's Insured During a Loading or Unloading*

II. THE PRESENT STATUS OF NEW YORK LAW

A. Generally

As previously noted, New York follows the "complete operation" doctrine, *i.e.*, extending loading or unloading to cover the entire process of making commercial pickups and deliveries.⁸⁴ Furthermore, in the leading case on the subject,⁸⁵ the New York Court of Appeals has recognized that the "omnibus" clause may be parlayed with the "loading and unloading" clause to extend coverage to a third party other than an employee of the trucker. Under "complete operation," unloading continues until the material being unloaded reaches its final destination,⁸⁶ even if the accident occurs within the building in which the consignee is located⁸⁷ or where the delivery is complete and the material is deposited at a wrong address.⁸⁸ However, even under this broad interpretation, there is a point at which a court may find the loading or unloading either completed⁸⁹ or *not yet begun*.⁹⁰ The mere fact that loading or unloading occurred will not compel coverage where there is no proof of negligence in the process.⁹¹

B. Where the Driver Is Injured

In cases where a truck driver is injured, the exclusion clause does not bar coverage to an "omnibus" insured.⁹² Thus, where a "premises occupier's" employee is negligent in loading, causing injury to the truck driver, he will be cov-

Operation, 25 Ins. Counsel J. 19 (1953); Gowan, Liability Insurance—"Loading and Unloading," 1951 Ins. L.J. 745; Gowan, Loading and Unloading—Hired Cars—Concurrent Coverage—Industry Recommendations, 26 Ins. Counsel J. 93 (1959); Gowan, Products Liability Insurance—Duplicate Policies—Concurrent Coverage—Industry Recommendations—Loading and Unloading, 26 Ins. Counsel J. 411 (1959).

84. Hudson River Concrete Prods. Corp. v. Callanan Rd. Improvement Co., 5 App. Div. 2d 49, 163 N.Y.S.2d 801 (3d Dep't 1957); Kemnetz v. Galluzzo, 8 Misc. 2d 513, 163 N.Y.S.2d 998 (Sup. Ct. 1957); Krasilovsky Bros. Trucking Corp. v. Maryland Cas. Co., 54 N.Y.S.2d 60 (N.Y. City Ct. 1945); B & D Motor Lines, Inc. v. Citizens Cas. Co., 181 Misc. 985, 43 N.Y.S.2d 486 (N.Y. City Ct. 1943), *aff'd mem.*, 267 App. Div. 955, 48 N.Y.S.2d 472 (1st Dep't 1944).

85. Wagman v. American Fid. & Cas. Co., 304 N.Y. 490, 109 N.E.2d 592 (1952).

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

87. B & D Motor Lines, Inc. v. Citizens Cas. Co., 181 Misc. 985, 43 N.Y.S.2d 486 (N.Y. City Ct. 1943), *aff'd mem.*, 267 App. Div. 955, 48 N.Y.S.2d 472 (1st Dep't 1944).

88. Mohawk Valley Fuel Co. v. Home Indem. Co., 8 Misc. 2d 445, 165 N.Y.S.2d 357 (Sup. Ct. 1957) which holds that delivery is not complete until the goods reach their final destination.

89. Cosmopolitan Mut. Ins. Co. v. Liebmann Breweries, Inc., 27 Misc. 2d 838, 212 N.Y.S.2d 457 (Sup. Ct. 1961).

90. General Acc. & Life Assur. Corp. v. Jarmuth, 150 N.Y.S.2d 836 (Sup. Ct. 1956). Compare J. Scheer & Son Co. v. Travelers Indem. Co., 229 N.Y.S.2d 248 (Sup. Ct. 1962), with Pellicano v. Royal Indem. Co., 229 N.Y.S.2d 654 (Sup. Ct. 1962).

91. Employers Mut. Liab. Ins. Co. v. Aetna Cas. & Sur. Co., 7 App. Div. 2d 853, 181 N.Y.S.2d 813 (2d Dep't 1959).

92. See note 55 *supra*.

ered.⁹³ There are two cases, however, where a truck driver was injured and coverage was denied to a consignee and consignor, respectively.

In *Moore-McCormack Lines, Inc. v. Maryland Cas. Co.*,⁹⁴ a truck driver was loading bags of naphthalene from a pier and was injured in the process. He brought an action against the shipowner alleging negligence in improperly packaging and storing the bags and in permitting the naphthalene to be subjected to exposure from the elements.⁹⁵ The shipowner settled the action and then sought reimbursement under the trucker's policy claiming to be an "omnibus" insured under the "loading and unloading" clause.⁹⁶ The court found that there was no negligence on the part of the driver in loading the goods nor was it alleged,⁹⁷ and, therefore, there was no liability under the "loading and unloading" clause.⁹⁸

In *Eastern Chems., Inc. v. Continental Cas. Co.*,⁹⁹ a truck driver carried chemicals to the plaintiff's plant and began unloading the vehicle. During the process, but at a time when there was no unloading taking place, one of the containers on the truck exploded and injured the truck driver. The driver sued Eastern, the consignee and manufacturer, who in turn sought coverage under the trucker's policy as an "omnibus" insured.¹⁰⁰ Because the injured driver had expressly disclaimed any negligence in the unloading process and because he based his cause of action against Eastern on the allegation that the latter was negligent in shipping inherently dangerous matter, the court held that Eastern was not covered by the policy.¹⁰¹ Citing *Moore-McCormack*,¹⁰² the court stated that there must be some negligence in the unloading process for there to be coverage.¹⁰³ It intimated, however, that it is not necessary for an employee of the consignee to be engaged in unloading in order for the consignee to qualify as an "omnibus" insured.¹⁰⁴ This point may be somewhat obscured by the wording in the policy which requires that an "omnibus" insured be *using* the vehicle. But even in the absence of an affirmative act, a person will be covered as an "omnibus" insured if he is legally responsible for the use of the vehicle.¹⁰⁵ One who is negligent in failing to exercise supervision then, can be an "omnibus" insured under the

93. *Ibid.*

94. 181 F. Supp. 854 (S.D.N.Y. 1959).

95. *Id.* at 855.

96. *Id.* at 856.

97. *Ibid.*

98. *Id.* at 857. The court cited as authority *Employers Mut. Liab. Ins. Co. v. Aetna Cas. & Sur. Co.*, 7 App. Div. 2d 853, 181 N.Y.S.2d 813 (2d Dep't 1959).

99. 23 Misc. 2d 1024, 199 N.Y.S.2d 48 (Sup. Ct. 1960).

100. *Id.* at 1024, 199 N.Y.S.2d at 49.

101. *Id.* at 1027, 199 N.Y.S.2d at 52.

102. *Ibid.*

103. *Ibid.*

104. There was apparently no employee of Eastern engaged in the unloading, and, therefore, the court said "there can be no doubt that Eastern would be an additional assured . . . if the accident . . . was caused by some negligent act in the 'loading or unloading.'" *Id.* at 1026, 199 N.Y.S.2d at 51.

105. *Tri-State Concrete, Inc. v. Nationwide Mut. Ins. Co.*, 5 App. Div. 2d 384, 172 N.Y.S.2d 123 (3d Dep't 1958).

policy.¹⁰⁶ In fact, it has been held that a consignor's attaching of a heater to the vehicle to protect the material being shipped is a use of that vehicle.¹⁰⁷

It can be observed from *Eastern* and *Moore-McCormack* that where the truck driver is injured and no negligence in the loading or unloading operation is alleged, or negligence in the operation is expressly denied, the consignee or consignor will not be covered as an "omnibus" insured. It should also be noted that where no employees of the consignee or consignor are involved in the operation, the trucker will never allege negligence in the loading or unloading for fear that he would be barred as being contributorily negligent. It is a much safer course, indeed, to allege some other source of negligence. Is something else, however, to be extracted from these cases? Suppose the container in *Eastern*, while it was being unloaded by the manufacturer's employee, had exploded and injured the truck driver or a third party. Does it seem reasonable that the trucker's automobile policy should protect the manufacturer? Both *Eastern*¹⁰⁸ and *Moore-McCormack*¹⁰⁹ hold that there must be negligence in the loading or unloading. The mere fact that an employee of the manufacturer enters the picture should not change the conclusion. It would seem there should be a causal connection¹¹⁰ between the loading or unloading operation and the injury. While the policy requires only that the accident arise "out of the . . . use" including loading and unloading, and not that it be caused by the use, it would seem that *Eastern* and *Moore-McCormack* qualify the policy to the extent that the accident must arise out of the *negligent use*.

C. Instrumentality

The instrumentality cases involve situations where some instrument or piece of equipment is used in the loading or unloading operation. Again, if the trucker or his employee is negligent in using an instrumentality, there is, of course,

106. *Id.* at 387, 172 N.Y.S.2d at 126.

107. *Ar-Glen Corp. v. Travelers Ins. Co.*, 8 Misc. 2d 589, 167 N.Y.S.2d 332 (Sup. Ct. 1957).

108. 23 Misc. 2d 1024, 199 N.Y.S.2d 48.

109. 181 F. Supp. 854.

110. "Assuming that we are inclined in this State toward the 'complete operation' theory in determining what constitutes the loading of a vehicle, these words are not a formula that embraces everything that may have been done prior to the immediate effort of leading. The line of demarcation must be reasonably drawn. . . . [T]he risk . . . created . . . was not one which accompanied this loading, and was therefore not one which would be within the contemplation of the insurer and the carrier in entering into the insuring agreement." *Wagman v. American Fid. & Cas. Co.*, 304 N.Y. 490, 498-99, 109 N.E.2d 592, 596 (1952) (dissenting opinion). "[I]n holding that the vehicle insurance coverage continues until delivery is completed, none of the leading decisions . . . purport to extend the unloading clause coverage to acts or omissions of the consignee or other third persons which are not reasonably or normally a part of the delivery function. . . . We must not lose sight of the fact that we are dealing with a policy primarily written to cover liability in connection with the . . . use of a vehicle. . . . Moreover, there is clear authority for the limiting of the coverage to accidents which are causally related to the use and unloading of the vehicle." *Lamberti v. Anaco Equip. Corp.*, 16 App. Div. 2d 121, 126-27, 226 N.Y.S.2d 70, 75-76 (dissenting opinion).

coverage.¹¹¹ However, the cases where the one using the instrumentality is an "omnibus" insured present a problem. In *Lamberti v. Anaco Equip. Corp.*,¹¹² the injured party was the driver of a transit-mix concrete truck. The truck delivered concrete mixed on the truck to the job-site where it was poured into the bucket of a crane operated by an employee of a subcontractor. While being hoisted, the bucket tipped and some concrete fell and injured the driver who was standing on his truck waiting to refill the bucket.

The driver recovered in a suit against the subcontractor and the latter appealed the dismissal of its third party action against the insurance carrier seeking coverage as an "omnibus" insured under the policy issued to the truck owner. The court said:

The issue can be stated very simply. Did the accident occur in the course of the "unloading" of the truck? If it did then . . . [the subcontractor] was an insured under the liability policy [of the trucker] . . .¹¹³

Citing the broad interpretation in *Wagman*, the court found that the accident occurred in the course of unloading, and that the subcontractor was an "omnibus" insured under the trucker's policy. The dissenting opinion urged that the unloading was completed prior to the accident because the matter of getting the concrete to a specified part of the building was no concern of the truck carrier.¹¹⁴ This argument was logically answered by the majority which noted that, by the very nature of that material it is essential that it be taken directly from the . . . truck to the place at which it becomes a permanent portion of the construction . . . [and] it is for that very reason that a transit-mix truck is used in this . . . operation.¹¹⁵

While recognizing the "complete operation" doctrine, the dissent also argued that there must nevertheless be some causal connection, which in this case was broken when the consignee took full and exclusive possession and control of the goods after they left the truck.¹¹⁶ Without denying that there should be some type of casual connection between the use, as demonstrated by the unloading, and the injury sustained, the contention that this connection is broken when the consignee takes full and exclusive possession and control of the goods is at odds with the reasoning of *Lowry v. R. H. Macy & Co.*¹¹⁷ There, the consignee, who had full and exclusive possession and control of the goods, injured a pedestrian while carrying the goods across the sidewalk, and still, he was covered by the trucker's policy.

111. *Kemnetz v. Galluzzo*, 8 Misc. 2d 513, 163 N.Y.S.2d 998 (Sup. Ct. 1957); *Kraslovsky Bros. Trucking Corp. v. Maryland Cas. Co.*, 54 N.Y.S.2d 60 (N.Y. City Ct. 1945); *B & D Motor Lines, Inc. v. Citizens Cas. Co.*, 181 Misc. 985, 43 N.Y.S.2d 486 (N.Y. City Ct. 1943), *aff'd mem.*, 267 App. Div. 955, 48 N.Y.S.2d 472 (1st Dep't 1944).

112. 16 App. Div. 2d 121, 226 N.Y.S.2d 70 (1st Dep't 1962).

113. *Id.* at 123, 226 N.Y.S.2d at 72.

114. *Id.* at 128, 226 N.Y.S.2d at 77. The dissent urged this contention but noted that consideration must be given to "the nature . . . of the merchandise . . . [and] the normal custom and practices concerning delivery of the same . . ." *Ibid.*

115. *Id.* at 125, 226 N.Y.S.2d at 73-74.

116. *Id.* at 127, 226 N.Y.S.2d at 76.

117. 119 N.Y.S.2d 5 (Sup. Ct. 1952).

In *R. H. Macy & Co. v. General Acc. Assur. Corp.*,¹¹⁸ a truck was backed to a platform where skids were supplied by Macy's employees. One of the skids which was near the truck was defective. The seller's employee was standing on the defective skid, "as yet unused, and momentarily [he] stepped off it. When he did so the defect therein caused him to fall."¹¹⁹ There was no mention of a "loading and unloading" clause in the trucker's insurance policy, but the court held that Macy was covered under the automobile policy as a "user of the vehicle."¹²⁰ It stated: "[T]he contention that the policy was not intended to cover Macy's negligence in furnishing a defective skid overlooks the fact that the skid was then factually utilized to facilitate the unloading operation."¹²¹

Both *Lamberti* and *General Accident* followed the "complete operation" doctrine and employed the device, originally promulgated in *Wagman*, of combining the "omnibus" with the "loading and unloading" clause. The *Lamberti* case is certainly in line with the reasoning of *Eastern* and *Moore-McCormack*, namely, the accident must arise out of the negligent loading or unloading. And, assuming the court was correct in holding that the skid was being "factually utilized" in the unloading, *General Accident* also follows the requirements set out in *Eastern* and *Moore-McCormack*. In *Lamberti* the appellate division extended coverage to an "omnibus" insured using an instrumentality.¹²² The *General Accident* case represents a further extension in that there, the supreme court provided coverage for an "omnibus" insured who used a defective instrumentality in unloading. Had the skid in *General Accident* not been defective, there would be no difference between this case and *Lamberti*.

D. The Distinction

Utilizing the reasoning of *General Accident*, it follows that if in that case the loading platform had collapsed due to Macy's defective construction or maintenance, overloading not being a factor, Macy would be covered under the automobile policy as one engaged in an unloading operation. Furthermore, if the goods were being transported up a flight of stairs which collapsed, since the unloading was not complete until they reached their final destination, Macy would be covered. And if the crane in *Lamberti* were defective and had caused the damage, coverage would still be afforded. Indeed, might not coverage be afforded even to a consignee whose defective sidewalk resulted in an injury to a trucker engaged in unloading?¹²³

118. 4 Misc. 2d 89, 148 N.Y.S.2d 10 (Sup. Ct. 1955).

119. Id. at 90, 148 N.Y.S.2d at 12.

120. Id. at 91, 148 N.Y.S.2d at 12. Due to Macy's failure to fulfill the policy conditions as to cooperation and notice, coverage was denied, there being "no obligation on the part of the defendant, General Accident. . ." Id. at 92, 148 N.Y.S.2d at 14.

121. Id. at 91, 148 N.Y.S.2d at 12.

122. This extension was not without precedent. See *Lowry v. R. H. Macy & Co.*, 119 N.Y.S.2d 5 (Sup. Ct. 1952). Where the party using the instrumentality to load or unload is the trucker or his employee, coverage has long been recognized. See note 111 supra.

123. In such a case, the injured party would probably not allege negligence in the unloading, as in *Moore-McCormack Lines, Inc. v. Maryland Cas. Co.*, 181 F. Supp. 854 (S.D.N.Y. 1959), or specifically deny that there was any negligence in the operation, as in

Such reasoning ignores the absence of a causal connection between the unloading operation and the accident.¹²⁴ In *General Accident* and the instances hypothesized, it was the defective skid, loading platform, stairs, and crane that caused the accident and not the negligent unloading. While it is true that the policy only requires that the accident *arise out of* the use and not that it be *caused* by it, there should also be some type of causal connection between the two. This has been recognized in other jurisdictions,¹²⁵ as well as in the dissenting opinions in *Wagman* and *Lamberti*.¹²⁶ Even in New York, where injury is sustained during the unloading operation, and it is claimed that the "injuries occurred through causes wholly unrelated to 'loading and unloading' . . . on the basis of such a claim . . . there is no coverage. . . ."¹²⁷ In fact, in a case where a plaintiff, while walking towards a bus, was injured when she fell over a stanchion and chains, it was held that "the maintenance and operation of the buses was not the proximate cause of the accident. . . ."¹²⁸

But what test should be used in determining whether the accident was caused by the loading or unloading operation, or by some other factor? The test, of course, should be the intent of the parties to the insurance contract, namely, the trucker and his insurer. Mr. Justice Cardozo, while sitting on the New York Court of Appeals, stated:

General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, express or fairly to be inferred, that counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract *intended* us to go. The causes within their contemplation are the only causes that concern us.¹²⁹

Eastern Chems., Inc. v. Continental Cas. Co., 23 Misc. 2d 1024, 199 N.Y.S.2d 48 (Sup. Ct. 1960).

124. One writer notes that "the courts have inquired into the question of causal relationship, and have pointed out that a causal relationship must exist between the loading or unloading and the damages sustained. That this is not more frequently discussed . . . would seem more reasonably attributable to the court's belief that the requirement has been met in the particular case in which it is not discussed, rather than to a rejection of the requirement." Note, *The Scope of Loading and Unloading Clauses in Automobile Insurance Policies*, 1 N.Y.L.F. 95, 97 (1955).

125. *Maryland Cas. Co. v. United Corp.*, 35 F. Supp. 570 (D. Mass. 1940); *Pacific Auto. Ins. Co. v. Commercial Cas. Ins. Co.*, 108 Utah 500, 161 P.2d 423 (1945); *Handley v. Oakley*, 10 Wash. 2d 396, 116 P.2d 833 (1941). New Jersey has held that there is a causal connection if the loading or unloading is the efficient cause of the accident. *Maryland Cas. Co. v. New Jersey Mfrs. Cas. Ins. Co.*, 48 N.J. Super. 314, 137 A.2d 577 (Super. Ct.), *aff'd*, 28 N.J. 17, 145 A.2d 15 (1958) (per curiam). See Note, *The Scope of Loading and Unloading Clauses in Automobile Insurance Policies*, 1 N.Y.L.F. 95 (1955).

126. See note 110 *supra*.

127. *Eastern Chems., Inc. v. Continental Cas. Co.*, 23 Misc. 2d 1024, 1027, 199 N.Y.S.2d 48, 52 (Sup. Ct. 1960). In this case the injured party made the claim and the decision was keyed to the allegations in the complaint.

128. *Forgion v. Travelers Ins. Co.*, 171 Misc. 163, 164, 12 N.Y.S.2d 26, 27 (N.Y. City Ct. 1939), *aff'd mem.*, 260 App. Div. 1031, 24 N.Y.S.2d 366 (2d Dep't 1940).

129. *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 87 (1918).

It is hardly likely that one taking out a policy to cover the operations of his vehicle would, as a reasonable businessman, have the expectation and purpose of covering consignors and consignees for their negligence in maintaining unsafe premises or equipment. Nor does it seem reasonable to believe that it was the intention of the parties to the insurance policy to cover, in particular, one who negligently stored naphthalene, as in *Moore-McCormack*, or one who negligently shipped a dangerous chemical, as in *Eastern*. While perhaps insurance companies should expect, in view of the decisions, that policies will be interpreted broadly, it cannot be said that they should expect all the results that have been hypothesized as consistent with *General Accident*; nor even that they should expect the same result as reached in *General Accident* itself, were a similar set of facts to recur. The court in that case, it is submitted, was in error. It extended coverage so far beyond the intention of the parties to the insurance contract that it vitiated their purpose. The circle of coverage should be extended to include *Lamberti*, and no further.

One argument which might be advanced to extend coverage to an "omnibus" insured in a situation such as we have been considering, is that the "loading and unloading" clause is ambiguous. Ambiguities in an insurance contract are resolved in favor of the insured, presumably including an "omnibus" insured.¹³⁰ But it is also submitted that the clause is not ambiguous.¹³¹

III. CONCLUSION

While insurance carriers may agree that coverage under the "loading and unloading" clause should not, and will not, be extended to one other than the trucker or his employee who causes an accident by furnishing or using defective equipment or premises, *General Accident* notwithstanding, they have sought to protect each other from claims to the contrary.

Representing a large number of insurance companies, the Combined Claims Committee¹³² has made recommendations for the handling of certain concurrent coverage problems, such as situations involving loading and unloading. Where a vehicle is being loaded or unloaded at a customer's premises and the driver or a third party is injured by reason of the negligence of the employees of the customer, the Committee has recommended that the auto carrier should cover.¹³³ Where an accident occurs in loading or unloading the vehicle by reason of the defective equipment provided by the customer, the Committee has recommended that the carrier of the insured owning the defective equipment should bear the

130. An automobile policy excluding loading and unloading coverage was held to be ambiguous and construed against the insurance company in *Muller v. Sun Indem. Co.*, 276 App. Div. 1028, 96 N.Y.S.2d 140 (2d Dep't 1950), aff'd, 302 N.Y. 634, 97 N.E.2d 760 (1951). See also *Tonkin v. California Ins. Co.*, 294 N.Y. 326, 62 N.E.2d 215 (1945); *Hartol Prods. Corp. v. Prudential Ins. Co. of America*, 290 N.Y. 44, 47 N.E.2d 687 (1943).

131. Donovan, *Hardy Perennials of Insurance Contract Litigation*, 1954 *Ins. L.J.* 163.

132. The Combined Claims Committee is composed of executives from three trade associations: The Association of Casualty and Surety Companies, The National Association of Mutual Casualty Companies, and the National Association of Independent Insurers.

133. Recommendations of Combined Claims Committee on Handling of Certain Concurrent Coverage Problems, Letter of July 21, 1958.

liability.¹³⁴ Thus, if a crane being used in loading or unloading causes injury, the carrier of the owner of the crane should cover.¹³⁵ However, the Committee has not as yet issued any recommendations regarding accidents caused by a defective condition on the premises, such as a weak staircase, a broken sidewalk and so forth.¹³⁶ Furthermore, the Committee is completely powerless to force even those companies which agree to follow its recommendations, to abide by them. The Committee has pointed out that the recommendations "are advisory only . . . have no force of law and by indicating an intention to follow them . . . no company is committing itself. . . ."¹³⁷ Further, they are not expected to be followed contrary to local law.¹³⁸

Policy revision, however, rather than recommendations for handling these situations under present policy provisions would seem to be the better solution. But this is not a new suggestion.¹³⁹ It seems simple enough to prevent the extension of coverage beyond the apogee¹⁴⁰ of the arc, by adding to the automobile policy an exclusion which would make the policy inapplicable to anyone using, loading or unloading the vehicle, other than the named insured or his employee, who uses as a means, any defective instrumentality or premises. Undoubtedly, there is a practical roadblock to policy revision, namely, a meeting of the minds of the automobile, general liability, combination and insurers in general. This obstacle, however, is not insurmountable, and indeed, if a revision operated only to avoid coverage to an "omnibus" insured who is responsible for defective equipment or premises, there is no reason why it could not be undertaken unilaterally. Such a revision should not affect a policy's attractiveness to the public, in that it does not delete previously provided coverage to the named insured and, in fact, fulfills his intention to avoid paying premiums for a risk which should be borne wholly by the party responsible for the defective equipment or premises.

Members of the insurance industry feel that "the courts have aggravated the problem by extending the sphere of the loading and unloading processes to

134. *Ibid.*

135. One writer on the subject feels that the Committee's recommendations should be amended to have the carrier for the owner of any mechanical equipment used in loading or unloading afford primary coverage, whether the equipment was defective or not, and whether or not the accident resulted from the sole negligence of the operator of such equipment. Gowan, *Loading and Unloading—Hired Cars—Concurrent Coverage—Industry Recommendations*, 26 *Ins. Counsel J.* 93, 99 (1959).

136. Such conditions may come under loading and unloading by virtue of being "factually utilized to facilitate the . . . operation." *R. H. Macy & Co. v. General Acc. Fire & Life Assur. Corp.*, 4 *Misc. 2d* 89, 91, 148 *N.Y.S.2d* 10, 12 (*Sup. Ct.* 1955).

137. Recommendations of Combined Claims Committee of Certain Concurrent Coverage Problems, Letter of March 4, 1959.

138. This is not to say that the Committee's recommendations have no effect. The Committee, itself, is a meritorious undertaking helping to reduce inter-company litigation. It relies on the good faith of the member companies subscribing to its recommendations.

139. Alexander, *Border Lines of Automobile Liability Coverage—Loading and Unloading Claims*, 147 *Weekly Underwriter* 460-63 (1942).

140. See, e.g., *Lamberti v. Anaco Equip. Corp.*, 16 *App. Div. 2d* 121, 226 *N.Y.S.2d* 70 (1st Dep't 1962).

sometimes unrealistic limits."¹⁴¹ It has been said, somewhat belligerently, that "when it comes to construing policies, give a judge as much as a superfluous apostrophe and he'll hang his hat on it."¹⁴² However, the industry is also aware that "the result manifestly is not wholly chargeable to the courts. It must be shared by the automobile insurers who have, by the loading and unloading clause,"¹⁴³ been responsible for such extended coverage. Knowing then what the law is, and what could conceivably follow in the way of extended coverage,¹⁴⁴ the insurance companies should not be heard to cry "foul" at some adverse verdict construing the "loading and unloading" clause, in the absence of a real effort on their part to revise their policies and avoid such results.

141. Fieting, *The Loading and Unloading Coverage*, 182 *Weekly Underwriter* 1269 (1960).

142. Alexander, *supra* note 139, at 46.

143. Fieting, *supra* note 141.

144. E.g., *R. H. Macy & Co. v. General Acc. Fire & Life Assur. Corp.*, 4 Misc. 2d 89, 148 N.Y.S.2d 10 (Sup. Ct. 1955). Although Moore-McCormack and Eastern both state that there must be negligence in the loading or unloading operation, the court in Lambert stated: "The means by which the material is removed from a truck is of no particular consequence, whether the removal be effected by a rack, by hand or by a crane. . . . The sole test is whether the means used was in the process of unloading." 16 App. Div. 2d at 124, 226 N.Y.S.2d at 73.