

***Recent Developments Affecting Automobile  
Liability Insurance Coverage 2003 - 2004***

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***I. DEFINITION OF ACCIDENT – ARISING FROM  
OWNERSHIP OPERATION MAINTENANCE OR USE***

***A. Background***

The availability of automobile insurance to compensate for an injury - - whether for a first party claim for uninsured/underinsured coverage or for a third party claim to a tortfeasor's bodily injury coverage - - depends in the first instance upon establishment of a nexus between the insured vehicle and the accident in question. The Massachusetts (Personal) Automobile Insurance Policy only covers "accidents and losses which result from the ownership, maintenance or use of autos." An accident is defined as "an unexpected, unintended event that causes bodily injury or property damage arising out of the ownership, maintenance or use of an auto." Therefore, there must be a sufficient relationship between the use of a motor vehicle and the injuries claimed in order for coverage to apply. Recent cases concerning the parameters of automobile coverage make clear that the insurer's obligations depend not only on the nature of the injury-producing event but also upon the relationship between the insured and the event.

The Supreme Judicial Court observed in *Rischitelli v.*

*Safety Insurance Company*, 423 Mass. 703 (1996):

“Our cases have not defined circumstances in which an injury is one arising out of the use of an automobile. The expression ‘arising out of’ indicates a wider range of causation than the concept of proximate causation in tort law . . . However, the expression does not refer to all circumstances in which the injury would not have occurred ‘but for the involvement of a motor vehicle.’”

*Id.* at 704. Questions whether injuries or claims arise out of the operation, maintenance or use of an automobile necessarily involve an exercise in comparative line drawing, which requires some understanding of prior cases. Even with such an understanding, “The distinctions drawn in this area are not always obvious.”

Justice Kass has noted that facts more than black letter law dominate “arising out of” analysis; “efforts to describe the reach of ‘arising out of’ are only marginally helpful in deciphering the problem at hand. The question is less one of reach than it is of fit.”

*Id.*

In *Ruggerio Ambulance Service, Inc., v. National Grange Insurance Company*, 430 Mass. 794 (2000). In *Ruggerio*, the Administrator of the Estate of a decedent brought a wrongful death action against Ruggerio Ambulance Service Inc. The decedent called for emergency services from his home complaining of chest pains. En route to the decedent’s home, the ambulance was involved in an auto accident. A second ambulance was then

dispatched. By the time the second ambulance arrived, the decedent had stopped breathing and died on his way to the hospital. The Supreme Judicial Court, citing *Risshitelli v. Safety Insurance Co.*, 423 Mass. 703, 704 (1996), reiterated that “the expression ‘arising out of’ indicates a wider range of causation than the concept of proximate causation in tort law . . . . However, the expression does not refer to all circumstances in which the injury would not have occurred ‘but for’ the involvement of a motor vehicle.” The court went on to state, “For an injury to ‘arise out of’ an accident, there must be a sufficiently close relationship between the injury and the accident.” *Id.* at 798. The Court therefore held that because the decedent was neither involved in nor present for the ambulance accident the operation of the ambulance cannot have been the cause of the decedent’s death. *Id.* at 798.

In *White v. American Casualty Co.*, 53 Mass. App. Ct. 66 (2001), the definition of accident was considered in the context of a PIP dispute. The plaintiff, planning to pick up an acquaintance for a ride, stopped in front of the acquaintance’s house and sounded the horn. Immediately thereafter, a rottweiler jumped through an open window into the stationary vehicle and bit the plaintiff on the hand. The Superior Court entered summary

judgment in favor of the insurer, denying PIP coverage. The Appeals Court reversed.

Reiterating, that there is no bright line test indicating when an injury may be said to arise out of the use of an automobile, the Court observed that the insured was clearly using the auto just before the occurrence.

In this case, the plaintiff was engaged in picking up a passenger when the accident occurred. When he stopped in the driveway, remained in the driver's seat with the engine running, and sounded his horn, he was using a common method of signaling the arrival of a vehicle to passengers. Indeed, a horn is installed in an automobile both to alert other drivers to potential hazards and to signal the presence of the vehicle to others, be they operators, passengers or pedestrians. Like stopping the bus to pick up and discharge passengers ... , and like loading and unloading delivery trucks ... , discussed above, the plaintiff's act of pulling his vehicle into the driveway and sounding his horn to alert his intended passenger constituted a use of the automobile within the meaning of the policy.

*White v. American Casualty Co.*, 53 Mass. App. Ct. at 69.

Finally, the *White* Court concluded that the evidence permitted an inference of a causal relationship between the sounding of the horn and the dog's attack.

In this case, the rottweiler's attack on the plaintiff does not implicate the issues raised in *Rischitelli* relating to intentional criminal conduct by a human actor. Here, the issue raised is whether the attack by the rottweiler, coming as it did within seconds of a horn blast from a car that had just pulled into the driveway, was incited by the arrival of the automobile and the sounding of its horn. If so, the attack and resulting injuries can be said to have arisen out of the "use" of the automobile which set the dog in motion.

*White v. American Casualty Co.*, 53 Mass. App. Ct. at 72.

### **B. Road Rage and Other Batteries**

In *Rischitelli* the Supreme Judicial Court addressed whether or not there was uninsured motorist coverage for injuries sustained as a result of an attack by an unidentified driver following a two car accident. The plaintiff sustained injuries when, following an accident between the vehicle he was driving and another vehicle, the operator of the other vehicle physically attacked and battered the plaintiff. Following the attack, the other driver left the scene without identifying himself. Safety denied an uninsured motorist claim, contending that the plaintiff's injuries did not arise out of the use of an automobile since they were not as a result of conduct that was either necessary or integral to the use of an automobile or in any associated with or peculiar to the automobile. The Court, after reciting the policy language and the language of Chapter 175, Section 113L, concluded that the "focus is on the vehicle and not on the operator-insured" . . . and that "[t]he battery on the plaintiff was sufficiently independent of the motor vehicle accident that the losses that the plaintiff sustained arose from the intentional wrongdoing of the other driver and not from the use of an automobile." *Id.* at 707.

There have been several decisions in addition to *Rischitelli* involving the applicability of automobile insurance policies to instances of assault and battery. In *Sabatinelli v. Travelers*

*Insurance Company*, 369 Mass. 674 (1976), the Supreme Judicial Court ruled that the definition of accident did not include coverage for injuries sustained when the insured, who was seated in his automobile with the motor running, intentionally shot a pedestrian.

*Ricardo v. Trust Ins. Co.*, Civil Action No. 96-01751

(Bristol Superior Court, May 5, 1997) reached a similar conclusion. The plaintiff was operating her motor vehicle on Route 140 in New Bedford. As she approached an intersection, the plaintiff slowed her vehicle down. When she came to a stop, she noticed that a person in a car opposite to her appeared to have a weapon. The plaintiff heard a pop sound and felt a pain on the left side of her head. The plaintiff learned later that she had been shot in the head with a pellet from an airgun. The shooter and the vehicle in which he or she was riding were never identified. The plaintiff sought uninsured motorist benefits under her auto policy. The applicable provisions relating to uninsured motorist benefits in the auto policy issued to the plaintiff defined accident as “an unexpected or unintended event that causes bodily injury or property damage arising out of the ownership, maintenance or use of an auto.” The policy went on to provide that “[b]ecause this is an auto policy, it only covers accidents or losses which result from the ownership, maintenance or use of autos.” The Superior Court held that the plaintiff’s injuries were caused by the wrongdoing of

the shooter and not from the use of an automobile and therefore, held that the plaintiff was not entitled to uninsured motorist benefits.

A counterpoint exists in *Assetta v. Safety Insurance Company*, 43 Mass. App. Ct. 317 (1997), in which the issue before the Appeals Court was whether an injury sustained as a result of an object being thrown from an auto arose from the use of the vehicle. More specifically, the plaintiff pedestrian was injured when she was struck in the face by a beer bottle that was tossed out a moving vehicle's window. The pedestrian brought an uninsured motorist claim (based on a hit and run accident). Safety, relying on the same argument that was successful in *Rischitelli*, supra, contended that there was no coverage because plaintiff's injury did not result from conduct necessary or integral to the use of the auto nor was the bottle associated with or peculiar to the motor vehicle. The Court reiterated the need for a casual connection between the injury and the use of the vehicle for coverage to apply, but in this instance, the court found such a connection. The Court concluded that since the bottle was thrown out the window while the car was accelerating it is "reasonable to assume that [the motor vehicle's] movement affected both the trajectory of the bottle and the force with which it struck [the plaintiff's] face. In these circumstances, the judge was warranted in concluding that the plaintiffs' injuries

arose from the use of the underinsured vehicle.” Contrast, *Marzano v. Elaqua*, 7 Mass. L. Rptr. 644 (1997) (Injuries sustained when pedestrian threw an object through vehicle’s window were not covered since the injuries were not caused by “uninsured or hit and run auto”).

In *Robbins v. Aetna Casualty and Surety Company*, App. Ct. No. 91-P-1155, an unpublished summary disposition pursuant to Appeals Court Rule 1:28, the Appeals Court decided that the Massachusetts motor vehicle policy did not provide uninsured motorist coverage for injuries sustained by the plaintiff in a traffic-related fight. The altercation began when the operator of one vehicle stopped his vehicle across two lanes of traffic, thereby barricading and preventing the escape of the vehicle occupied by the plaintiff. There followed an altercation at the close of which the plaintiff was injured when the door of the vehicle he was occupying was closed on his ankle. The blocking car left the scene without the plaintiff recording its license number or identifying the driver. Consequently, the plaintiff sought damages under the uninsured motorist clause of the Aetna policy for the vehicle he was occupying at the time of the incident. The plaintiff contended that his injury arose from the unidentified operator’s use of the blocking vehicle as a barricade to facilitate the assault that led to the plaintiff’s injury. The Appeals Court rejected the plaintiff’s

argument and affirmed a Superior Court judgment in favor of the insurer without directly addressing the question of the manner of use of a vehicle leading to the assault and stating simply that there was no casual relationship between the use of the motor vehicle and the accident.

In *Batts v. The Travelers Insurance Company*, 8 Mass.L. Rptr. 338, the insured's estate sought uninsured motorist benefits as a result of injuries that allegedly contributed to the insured's death. The insured had parked her car outside her home and left its engine running. As she approached her vehicle an unidentified assailant pushed her up against a fence, entered her car and drove away. A Superior Court justice concluded "it is clear that the plaintiff may recover under these provisions only if the injuries to the deceased were caused by another auto. Since it is undisputed that the injuries to the deceased were not caused by another auto, but by an assailant, the defendant is entitled to summary judgment...."

In *Foley v. Nationwide Mut. Ins. Co.*, 2000 WL 1923516, a Superior Court justice examined the availability of coverage to a physical altercation at the end of a police pursuit. The intoxicated tortfeasor had been overtaken after a high-speed chase. The plaintiff police officer and the tortfeasor were standing outside of the subject vehicle. The tortfeasor then tried to get back into the

car, presumably to escape. At the same time, the police officer lunged into the car to remove the keys from the ignition. As the officer turned the vehicle off and removed the keys, the tortfeasor pushed against his arm in effort to restart the car, injuring the officer. Nationwide sought to avoid coverage on the bases that the perpetrator acted intentionally and that the injury did not arise from use of the vehicle. The Court rejected the insurer's argument based on intentional conduct, citing a series of cases establishing the proposition that for coverage purposes conduct is intentional only if it is specifically intended to cause harm or the tortfeasor is substantially certain that such harm will result from his conduct. *See, e.g., Preferred Mut. Ins. Co. v. Gamache*, 42 Mass. App. Ct. 94 (1997), *aff'd* 426 Mass. 93. Reckless conduct, although sufficient to establish the intent necessary for a battery, is not sufficient to render conduct non-accidental for purposes of avoiding bodily injury coverage. See generally *Sheehan v. Gorianski*, 321 Mass. 200, 72 N.E.2d 538, 542 (1947) (discussing differences in treatment of recklessness state of mind in insurance coverage cases as opposed to criminal cases); *Quincy Mutual Fire Insurance Company v. Abernathy*, 393 Mass. 81, 84, 469 N.E.2d 958 (1984). The Court additionally ruled that the injury arose out of the use of the vehicle. "There was a direct and immediate connection between the vehicle, the conduct of the plaintiff ... in

reaching inside to remove the keys, and the simultaneous conduct of the defendant ... in trying to get past the plaintiff and into the vehicle as he sought to escape from the scene. The critical events took place within the passenger compartment of the ... vehicle.”

In *Quincy Mut. Fire Ins. Co. v. Gorman* -- the pertinent facts of which are set forth in the Supreme Judicial Court’s related decision in *Poskus v. Lombardo’s of Randolph, Inc.*, 423 Mass. 637, 640 (1996) -- the Superior Court rejected the efforts of a homeowners insurer to avoid, as arising from the use of a vehicle, coverage for an accident occurring in a foot pursuit at the end of a police chase of the defendant’s vehicle. Gorman, the insured perpetrator had stolen a vehicle, driven the car while intoxicated, and fled the police. Officer Poskus and his partner apprehended the tortfeasor. The tortfeasor was outside of the vehicle and being approached by the police officers. In order to flee, the tortfeasor jumped over the nearby guardrail and fell down an embankment with the officers close behind. Officer Poskus was injured as he fell down the embankment onto the tortfeasor. The insurer sought to avoid paying under the tortfeasor’s homeowners policy, citing that policy’s exclusion for injuries arising from the use of a vehicle. The Superior Court rejected the insurer’s argument, reasoning that the involvement of or with the vehicle ended when

all parties were out of their respective vehicles and the foot chase was underway.

In *Roe v. Lawn*, 418 Mass. 66 (1994), the Supreme Judicial Court dealt with the issue of whether or not a sexual assault by a driver upon a passenger occurring within a livery vehicle owned and operated by a taxi company and used for school transport should be deemed to have arisen out of the “ownership, maintenance or use” of the automobile. The plaintiff brought an action against Braintree Town Taxi on a number of theories - - vicarious liability a theory of negligent hiring/entrustment, and most importantly, for the purposes of insurance coverage, for Braintree Town Taxi’s breach of its non-delegable duty as a carrier to provide for the safety of its passengers. Braintree Town Taxi brought a third party action against Aetna Casualty and Surety Co. contesting Aetna’s refusal to defend and indemnify against Mary Roe’s claims. The Supreme Judicial Court concluded that “the school bus was used in the service of a common carrier of passengers and, therefore, carried an implied promise of safe passage. . . It was this promise of safe passage which led to the plaintiff’s becoming a regular passenger on the bus.” On the basis of this duty the Court concluded that the assault arose out of the use of the school bus.

**C. Phoenix Ins. Co. v. Churchwell**  
**57 Mass. App. Ct. 612 (2003)**

In this case focusing on the motor vehicle exclusion in a homeowners' policy, the Appeals Court ruled that a parent's negligent supervision of child -- by failing to put child passenger in safety seat -- arose from use of the vehicle.

**D. *Tae v. Tae***

Illustrative of the reality that the determination of "arising out of" questions is a process more visceral than analytical is the Appeals Court's recent decision in *Tae v. Tae*, 57 Mass. App. Ct. 297 (2003).

The two plaintiffs were the minor children of the deceased defendant. The plaintiffs' mother took them to their grandmother's home, following an argument between the plaintiffs' mother and the defendant. At 3:00 A.M., the defendant drove an automobile borrowed from a friend to the grandmother's home. The defendant removed the plug on the automobile's gas tank and drained the gasoline from the tank into a bucket. He carried the gasoline into the dwelling, poured it over his body and set himself on fire. The resulting fire ignited a gas stove causing an explosion and massive fire. The defendant died and the plaintiff children were severely burned. At issue was the availability of bodily injury coverage of the defendant's own vehicle and that of the vehicle he had borrowed. The plaintiffs argued that the defendant's use of the

vehicle's fuel tank to transport the gasoline to the scene of the fire and the use of the fuel to start the fire constituted sufficient relationship with the vehicle to trigger coverage.

The Appeals Court, however, disagreed, reasoning that these circumstances were not sufficiently related to the operation of a vehicle to constitute "use" for purposes of coverage. 57 Mass. App. Ct. at 299-300. Moreover, the Court ruled, that even if vehicle were deemed to be in use, the defendants act of self-immolation was independent of such use rendering the circumstances analogous to the shooting from a stationary vehicle in the *Sabitinelli* case discussed above.

In this case, the defendant left the vehicle, went upstairs, and there immolated himself. Although the "expression 'arising out of' indicates a wider range of causation than the concept of proximate causation in tort law ... [i]n the last analysis, the court must make a judgment call." *Rischitelli v. Safety Ins. Co.*, 423 Mass. at 704, 706, 671 N.E.2d 1243. We deem the plaintiffs' injuries as insufficiently dependent on the defendant's use of the automobile to be covered by the automobile insurance policy.

57 Mass. App. Ct. at 300-01.

#### **E. Loading and Unloading as Use of a Vehicle**

Another issue coming up in the "arising out of" involves the loading and unloading of vehicles. In *Travelers Insurance Company v. Aetna Life and Casualty Company*, 410 Mass. 1002 (1991), the Supreme Judicial Court interpreted the "loading or

unloading” clause of the combination policy. This case arose when the employees of a transportation company were carrying a wheelchair bound passenger downstairs to a “chair van.” Before reaching the van, one of the employees lost his footing, causing the wheelchair and its occupant to tumble down the porch stairs. A dispute arose between Travelers, which issued the pertinent auto insurance policy, and Aetna, which had provided a general business liability policy, as to which company was liable for the resulting damage. The Supreme Judicial Court affirmed a Superior Court ruling that the accident and injuries arose out of the “loading” of the van. The court noted that it had adopted the “complete operation” approach to interpreting loading and unloading cases. Under this approach, the motor vehicle insurance will cover acts or omissions of insureds while engaged directly in the loading or unloading process, or when they should be thus engaged, or while they are doing something reasonably connected with the process. The loading operation is complete when the insured has finished all work in which he was participating or was expected to participate. See *Id.*, at 3004, *F.W. Woolworth Company v. Lumberman’s Mutual Casualty Company*, 355 Mass. 211 (1969).

The most difficult cases in the context of loading and unloading are those distinguishing preparatory acts from the

commencement of loading, compare *Travelers Insurance Company v. American Hardware Mutual Insurance Company*, 349 Mass. 768, (forklift accident during preparation) with *Improved Machinery, Inc. v. Merchants Mutual Insurance Company*, 349 Mass. 461 (forklift accident during loading process), and in determining at what point the loading or unloading process has concluded. See *F. W. Woolworth Company, v. Lumberman's Mutual Casualty Company*, 355 Mass. 211, (1969).

It is important to keep in mind, moreover, that automobile insurance coverage may extend to accidents remote in time to the loading or unloading process so long as acts or omissions during the loading or unloading process caused the injury-producing event. See e.g., *Lapointe v. Shelby Mutual Insurance Co.*, 361 Mass. 558, 281 N.E.2d 253 (1972) (propane gas explosion four hours after delivery within loading / unloading clause where improperly installed propane tank was delivered to wrong location).

**F. Metropolitan Property and Casualty Ins. Co.  
v. Santos**

In *Metropolitan Property and Casualty Ins. Co. v. Santos*, 55 Mass. App. Ct. 789 (2002), the Appeals Court applied traditional loading and unloading analysis in determining that an injury arose from the use of a motor vehicle within the terms of the Massachusetts personal auto policy. In *Santos*, the plaintiff was

standing next to a pickup truck while the vehicle owner was loading a catch of fish onto the truck with a hydraulic lift. The plaintiff was accidentally struck in the mouth by a pile of three 100 lb. fish totes carried by the lift. Metropolitan denied coverage, contending that the injury did not arise from the use of a vehicle and therefore was not caused by an accident within the definitions of the policy.

The Court rejected the argument that use included loading and unloading only in the presence of specific loading-unloading policy language and affirmed a trial court decision in favor of coverage.

"The expression 'arising out of' indicates a wider range of causation than the concept of proximate causation in tort law.... However, the expression does not refer to all circumstances in which the injury would not have occurred 'but for' the involvement of a motor vehicle." We require a "reasonably apparent" causal connection between a vehicle's use and the injury for an accident to have occurred under the policy.

\* \* \*

Given the wide range of causation encompassed by the concept of an "arising- out-of" injury, we conclude that the causal connection between the injury and the use of the automobile, being "reasonably apparent," is sufficient, and that Slavin is covered by the compulsory bodily injury to others section of the insurance policy. We also do not consider the use of the pick-up, as described above, to be "too casual" or "too remote."

*Metropolitan Property and Casualty Ins. Co. v. Santos*, 55 Mass. App. Ct. 789, 796-798.

Another issue that arose in Santos was the policy's business use exclusion. In Part 5, Optional Bodily Injury to Others, the policy specifies that the insurer will not pay for injuries caused by accidents occurring "[w]hile anyone is using a vehicle in the course of any business other than that of selling, servicing, repairing or parking autos. This exclusion does not apply to private passenger autos, pick-up trucks, vans, or similar type vehicles having a gross vehicle weight of 10,000 pounds or less and not used for the delivery or transportation of goods or materials unless such use is incidental to [the policy holder's] business of installing, maintaining, or repairing furnishings or equipment."

Because the *Santos* accident occurred in the context of commercial fishing operations, the Court concluded that optional bodily injury coverage was not available. Nonetheless, "unlike the optional BI benefits section, the compulsory BI section has no business use exclusion. Accordingly, coverage existed to the extent of the insured's \$20,000 compulsory limits. *Metropolitan Property and Casualty Ins. Co. v. Santos*, 55 Mass. App. Ct. 789, 794-95.

***II. ATVs ARE RECREATIONAL VEHICLES AND NOT  
"MOTOR VEHICLES"***

Homeowners coverage is typically subject to certain exclusions (intentional acts, etc.), including the so-called motor vehicle exclusion. In its most common form, the exclusion states that personal liability coverage does not apply to bodily injury:

arising out of: ... the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured;

The most common forms of homeowners' personal liability coverage include exceptions to the motor vehicle exclusion, including an exception for off road vehicles:

“This exclusion does not apply to:

(2) a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and

- (a) not owned by an insured; or
- (b) owned by an insured and on an insured location.

In *MacLean v. Hingham Mut. Fire Ins. Co.*, 51

Mass.App.Ct. 870 (2001), *further appellate review denied*, 434 Mass. 1108, the Appeals Court established that ATVs and other off road vehicles, at least when not used on public roads, are outside the definition of motor vehicle and thus are not “subject to motor vehicle registration.” MacLean involved a claim by a passenger who sustained injuries while riding on an ATV that was being

operated by an insured under a Hingham Mutual homeowners' policy, and that was not owned by the insured. The insurer disputed coverage, claiming that the ATV was subject to "motor vehicle registration" as a recreational vehicle under G.L. c. 90B. The Appeals Court rejected the insurer's argument and ruled in favor of coverage. The Appeals Court decided that an ATV is not a "motor vehicle" subject to motor vehicle registration, and thus that the ATV involved in the accident came within the exception to the policy's motor vehicle exclusion because it was a motorized land conveyance designed for recreational use off public roads that was not subject to motor vehicle registration, and was not owned by insured. The MacLean decision was consistent with a prior decision, *Arbella Mutual Insurance Co. v. Vynorious*, 34 Mass. App. Ct. 121 (1993), *rev. denied*, 414 Mass. 1105, in which the court interpreted a Massachusetts Auto Insurance policy to provide no uninsured motorists coverage for a snowmobile accident because snowmobiles are recreational vehicles designed principally for off road use, and are not subject to Department of Motor Vehicle registration under c. 90 when not used on public highways.

In *Farm Family Mutual Ins. Co. v. Whelpley*, 54 Mass. App. 743 (2002), the Appeals Court reaffirmed that ATVs are "recreational" motor vehicles within the contemplation of a

homeowners insurance policy exclusion for bodily injury arising from use of a recreational vehicle “occurs away from” the insured premises. In *Whelpley*, the Court determined that an ATV accident on a public way was “away from” the insured premises and therefore excluded, even if the ATV was garaged and regularly used on the insured location. 54 Mass. App. Ct. at 746.

### ***III. CASES AFFECTING HOMEOWNERS OR GENERAL LIABILITY COVERAGE FOR AUTO ACCIDENTS***

Homeowners’ coverage and general liability coverage are subject to certain exclusions (intentional acts, etc.), including the so-called motor vehicle exclusion. In its most common form, the exclusion states that personal liability coverage does not apply to bodily injury:

arising out of: (1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured; (2) the entrustment by an insured of a motor vehicle .. to any person; ...

Part (1) of the above-quoted motor vehicle/conveyance exclusion has two parts, both of which the insurer must prove in order for the exclusion to apply. First, the injury or damage must have arisen out of the ownership, maintenance, use or loading or unloading of a motor vehicle or motorized land conveyance. Second, the motor vehicle in question must have been "owned, operated by or rented or loaned to" an insured. See *American*

*National Property and Casualty Co., v. Gray*, 803 S.W.2d 693 (1990); *Merrimack Mut. Fire Ins. Co. v. Sampson*, 28 Mass. App. Ct. 353, 550 N.E.2d 901 (1990) (interpreting the application of an identical exclusion in another context; the clause "owned or operated" modifies "motor vehicle," thus confirming that the exclusion consists of two parts which must be established in order to deny coverage).

"The word `use' is clearly broader than the word `occupy.' The ordinary meaning of `use' includes the 'legal enjoyment of property that consists of its employment, occupation, exercise or practice.'" *Gordon v. Safety Ins. Co.*, 417 Mass. 687, 690, 632 N.E.2d 1187 (1994) quoting, Webster's New Third Int'l Dictionary 2523 (1961). In the *Gordon* case, the Court ruled that a person who had requested and was receiving a ride to a friend's home in a stolen vehicle, was more than just occupying the vehicle in question; he was also "using" it for his own purposes in the sense of the definitions of the auto policy.

Accordingly, there clearly exists the potential for liability to arise from "use" of a vehicle without the vehicle being "owned, operated by or rented or loaned to" the insured. The exclusionary clause should be inapplicable in such cases where the negligent user is not the owner or the operator of the vehicle and the vehicle was not rented or loaned to him. For example, the language of the

exclusion does not encompass a passenger in a motor vehicle unless the passenger is also the owner, lessee, or bailee of the vehicle. See *American Nat'l Property and Cas.Co., v. Gray*, 803 S.W.2d 693 (Tenn. App. 1990) (a passenger's homeowners' insurer was required to provide coverage because the exclusionary clause did not apply where the vehicle involved was not owned, operated, rented, or loaned to the insured passenger). Even if an insurer were to argue some other meaning, such an interpretation could not be considered clear and unambiguous as required for such an exclusion. See *Royal Globe Ins. Co. v. Schultz*, 385 Mass. 1013, 434 N.E.2d 213, (1982); *Hakim v. Massachusetts Insurer's Insolvency Fund*, 424 Mass. 275, 675 N.E.2d 1161 (1997).

In *Hingham Mut. Fire Ins.Co. v. Niagara Fire Ins.Co.*, 46 Mass. App. Ct. 500 (1999), the Appeals Court considered a dispute between an auto insurer and a homeowners' insurer as to defense obligations in a case in which a passenger caused or contributed to an accident by grabbing the steering wheel. The Court ruled that the auto insurer had a duty to defend the passenger in its insured's vehicle where the underlying complaint alleged that the passenger had grabbed the steering wheel of the car in response to a perceived emergency. Such allegations were sufficient to support the conclusion the driver impliedly consented to the passenger's use of the vehicle as required for auto coverage to apply. The

Court ruled that the passenger's homeowners' insurer shared the duty to defend because an exclusion for accidents arising out of the "operation" of a motor vehicle is ambiguous. "Operation" could be construed narrowly to include exercise of control over all the parts of the car that allow it to move, or it could be interpreted broadly to include any voluntary act that affects the movement of the vehicle. Resolving this ambiguity against the insurer, the Appeals Court construed the policy in favor of providing coverage and ordered the homeowners' insurer to contribute to the defense of the case. Thus it appears that when a tortfeasor contributes to an accident while using but not operating (or owning) a vehicle, he or she may have coverage available from *both* an auto insurance policy *and* a homeowners' or general liability policy.

In a case of passenger interference, like *Hingham Mutual*, or other circumstances in which an alleged tortfeasor is a user but not an owner or operator of the vehicle, there may be coverage from the occupied vehicle, from the optional bodily injury coverage of the passenger's household vehicles (assuming the passenger is neither from the same household nor a regular user of the accident vehicle), and from the passenger's homeowners' policy.

When evaluating the applicability of the motor vehicle exclusion, it is extremely important to determine whether the

homeowners' policy or general liability policy contains standard severability of interests language -- providing that the insurance applies separately to each insured as if he/she had a separate policy. If there is such a severability clause, the motor vehicle exclusion will not exclude coverage for an insured who is neither owner nor operator of the accident vehicle, even where the injury is produced by motor-vehicle-related negligence on the part of another insured to whom the exclusion would apply. *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986) (in presence of severability clause, parent's coverage for alleged negligent supervision not excluded even though injuries arose from motor vehicle accident in which minor child was owner/operator of vehicle); see also *Merrimack Mut. Fire Ins. Co. v. Sampson*, 28 Mass. App. Ct. 353, 550 N.E.2d 901 (1990) (negligent supervision claim brought against insured but unlike in *Marnell* exclusion found applicable because named insured was owner of vehicle); cf. *Roe v. Lawn*, 34 Mass. App. Ct. 726, 727 n 5 (1993) (with severability clause, operator of taxi company not excluded from coverage under automobile policy for intentional sexual assault by driver) *aff'd on other grounds* 418 Mass. 66 (1994)

There continues to be some confusion as to whether coverage would extend where the negligent supervision alleged actually related to supervision of the use of a vehicle.

In *Shamban v. Worcester Insurance Co.*, 47 Mass. App. Ct. 10 (1999), a case involving an off-road vehicle, the Appeals Court confirmed that, in the presence of severability language, negligent supervision claims against *non-owner* parents may be covered by homeowners' insurance, even if the failure of supervision relates to the use of a vehicle. Applying the plain language of the exclusion, the Court based its coverage determination on the fact that the subject insured neither owned nor operated the vehicle, and not on whether the negligence alleged was vehicle-related. Furthermore the court noted that allowance of coverage was further supported by language in the exception to the exclusion pertaining to off road vehicles not owned by the named insured.

In *Phoenix Ins. Co. v. Churchwell*, 57 Mass. App. Ct. 612 (2003) the Appeals Court ruled that the motor vehicle exclusion of homeowners' insurance policy barred coverage to a parent who allegedly negligently supervised her child by failing to put the child passenger in safety seat because the liability for the injury to the child arose from use of vehicle and parent's ownership of vehicle brought the parent into exclusion and distinguished the case from *Marnell* and *Shamban*.

*Aetna Cas. & Surety Co. v. Home Ins. Co.*, 44 Mass. App. Ct. 218 (1998) provides a puzzling counterpoint, seemingly irreconcilable with the later decisions of *Hingham Mutual* and

*Shamban*. The Court denied defense coverage under a homeowners' policy to the parents of driver/tortfeasor for a negligent supervision claim, reasoning that homeowners' insurance should protect only from risks associated with the home. The vehicle involved was owned by a business owned by the parents. In ruling that there was no coverage under the homeowner's policy, the Court distinguished the negligent supervision claim in this case from that asserted in *Marnel* in which coverage was found. The Court emphasized that in *Marnel*, unlike in this case, the complaint contained specific allegations that the negligent failure of the parents to supervise and to prevent their son from drinking and driving took place in the home. Yet, unlike in *Marnel* the Court in *Aetna* ignored entirely the language of the policy, which the Court conceded did not exclude coverage.

There is no limitation that homeowner's policies protect only from risks associated with the home, written in the personal liability coverages of homeowners' policies. This part of the decision should be viewed at best, as a potential back up argument for an insurer which cannot prevail based on the policy language. This case by itself should not be interpreted as necessarily representing a trend adverse to coverage, due to the absence of any policy related reasoning on this point, the fact that the issue was treated dismissively at the end of an opinion which focuses

extensively on large liability coverages, and the fact that the decision is irreconcilable with the Court's subsequent rulings in *Shamban* and *Hingham Mutual*.

An equally anomalous decision, inexplicable on the language of the subject insurance policy, was this year's Supreme Judicial Court decision in *Society for Christian Activities, Inc. v. Markel Ins. Co.*, 440 Mass. 1006 (2003). A church camp and a camp employee brought a declaratory action against camp's commercial general liability insurer to recover the settlement amount paid to a camper who was injured in accident involving an automobile owned and operated by camp. The policy included a severability-of-interests clause and contained a motor vehicle exclusion (limited to vehicles owned or operated by insured). The claim against the camp employee was based on supervision as the employee neither owned nor operated the vehicle involved in the accident. Despite exclusion language which, consistent with *Marnell* and *Shamban*, would not exclude coverage to individual insured who neither owned nor operated the accident vehicle, the Court found the policy inapplicable. Because the employer-camp and its auto insurer had paid a settlement, including claims against the employee, the Court decided that the Camp's efforts to receive payment from the general liability insurer were precluded by the motor vehicle exclusion. The decision was without reference to

any governing contract language or case-law, and appeared to be driven by the Court's concern that the Camp itself would receiving the benefit of the CGL policy even though coverage for the Camp itself was clearly excluded. It is unclear whether the decision would be different if there had been no settlement and the sought-after coverage was for the actual benefit of the defendant-employee.

#### ***IV. CASES AFFECTING UNINSURED/UNDERINSURED MOTORIST COVERAGE***

***Massachusetts Insurers Insolvency Fund v. The Premier Ins. Co. of Massachusetts,***  
*439 Mass. 318 (2003)*

The policy exclusion of uninsured/underinsured motorist coverage for named insured's household member who had a Massachusetts auto policy of her own applied to one who had her own policy at time of accident, but not at time of filing claim. As a result, when household member's UIM carrier became insolvent, insolvency did not make available other household UIM policies, but rather resulted in claim to Insolvency Fund.

***Massachusetts Insurers Insolvency Fund v. Safety Ins. Co.,***  
*439 Mass. 309 (2003)*

Where the vehicle that causes an accident is insured by the owner, but the operator of that vehicle is not separately insured, the injured party is not entitled to UM benefits under his automobile insurance policy due. As a result, where the vehicle that causes an

accident is insured by the owner, and the operator has a separate policy issued by an insurer that becomes insolvent, the Insolvency Fund is responsible for claims against the policy of the insolvent insurer.

Of great significance, in light of the Massachusetts Insurers Insolvency Fund's propensity to try to assert that with that G.L. c. 175D, § 9 (which requires exhaustion of other policies before recovery from the Fund) entitles the Fund (and its "insured") to secondary status even in joint tortfeasor settings, is the Court's specification that "The exhaustion requirement applies only when a person has a claim against his [own] insurer."

***Commerce Insurance Company v. Mendonca,***  
57 Mass. App. Ct. 522, 784 N.E.2d 43 (2002)

Uninsured motorist coverage for "hit-and-run" accidents covers situations in which the tortfeasor does not immediately flee but nevertheless leaves the accident scene without being identified; any due diligence duty to identify motorist causing a hit-and-run accident did not extend to passengers who were unaware of injury at the time of the collision. This case does not address the question of due diligence duty of owner or operator of vehicle.

***Furukawya v. Arbella Mutual Insurance Company***  
59 Mass.App.Ct. 142 (2003)

**Insurance-Underinsured Motorist – Consent to Settlement**

Underinsured motorist carrier's consent to insured's settlement with the alleged tortfeasor, does not prevent carrier from contesting liability in underinsured claim.

***Chenard v. Commerce Insurance Company***  
440 Mass. 444 (2003)

Uninsured motorist claimant, without her own auto policy, injured while occupying a household-member's car must receive uninsured motorist benefits from the policy covering the occupied vehicle, and is not entitled to recover motorist under a separate policy covering a second vehicle owned by the same household member.

This decision is unfortunate in that it allows the issuance of auto policies with coverage language narrower than that seemingly mandated by the governing statute. M.G.L. c. 175, s. 113L. Nonetheless, the *Chenard* holding is fairly narrow, and applies to direct the source of uninsured or underinsured benefits only when a claimant is not a named insured on any policy and is injured when occupying a household vehicle.

**V. CASES AFFECTING COOPERATION / EXAMINATION  
UNDER OATH**

***Lorenzo-Martinez v. Safety Insurance Company,*  
58 Mass. App. Ct. 359 (2003)**

A claimant's failure or refusal to submit to an examination under oath at request of uninsured motorist carrier is grounds for denial of coverage if the request for the examination is made in a timely manner after notice of the claim.

***Morales v. Pilgrim Insurance Company*  
58 Mass. App. Ct. 722 (2003)**

**Insurance – Breach of Contract**

Uninsured motorist carrier has the right to require separate under oath examinations of claimants injured in the same hit-and-run accident. Failure to submit to the examinations can result in denial of claims based on breach of contract.

***MetLife Auto & Home v. Cunningham,*  
59 Mass. App. Ct. 583 (2003)**

**Insurance – Contract – Self-Incrimination**

Insurer had right to disclaim insurance coverage for breach of homeowners policy's cooperation clause when insured refused to provide a statement to the insurer, claiming 5<sup>th</sup> Amendment privilege against self-incrimination. The contract in question did not specify a

right to examination under oath, and thus it appears that the reasoning of the case would be applicable to auto policies.