Liability Coverage

Section 107. Part A of the personal auto policy (PAP) contains the provisions relating to liability coverage. This section of the policy consists of the liability insuring agreement, supplementary payments provisions, exclusions, and clauses dealing with the limit of liability, out of state coverage, financial responsibility, and other insurance.

Promise To Pay Legal Liability and Provide Defense

Section 108. The first paragraph of the insuring agreement contains two pledges from the insurer: the first is to pay damages for which the insured becomes legally responsible, and the second is to defend the insured in a lawsuit seeking those damages. These two pledges are not without conditions.

The insurer promises to pay damages for bodily injury (BI) or property damage (PD) for which any insured becomes legally responsible because of an auto accident. A If the injuries or damages occur because of the insured's products or work, or because of the insured's ownership of land or a store, the personal auto policy is not going to respond to a claim made against the insured. Furthermore, the damages have to be caused by an accident. Accident is not a defined term on the PAP, but the word centers on the unexpected or the unanticipated; in other words, the event that causes the BI or PD has to be unforeseen and unplanned on the part of the insured in order for the PAP to apply.

As for defending the insured in a lawsuit, the insurer will do so but reserves for itself the right to settle any claim or lawsuit as it considers appropriate; that is, the insurer can settle a claim or lawsuit against the insured without the consent of the insured. This means that an insured can not impede a settlement by refusing to settle or by standing on principle and insisting on his day in court. The insured can assist in the investigation, settlement, or defense of any claim or lawsuit (in fact, this is a specified duty of the insured after an accident or loss), but when it comes to an actual settlement, that is in the hands of the insurer.

In exchange for this control of the defense, the insurer declares that it will pay all defense costs it incurs. The defense costs are paid in addition to the policy's limits of liability. If the limits of liability are $300,000, that amount is available for indemnification; an attorney's fee of $10,000 plus court costs of $2,000 will not reduce the limit of liability by the $12,000.

Another restriction on the promise to defend is that the duty of the insurer to settle or defend ends when the limit of liability for the coverage has been exhausted by payment of judgments or settlements. Now, this does not mean that the insurer can just deposit the policy limits into an escrow account and walk away from the defense of the insured. The duty to defend the insured exists until the actual payment of a judgment against the insured or of a settlement with a claimant exhausts the limit of liability. As an example of this principle, the case of *Continental Insurance Company v. Burr*, 706 A.2d 499 (1998) stands out.

In this case, an insured in Delaware caused an accident in which one person was killed and several were injured. The insurer deposited the auto policy limits into court, and the limits were dispersed among the injured claimants. However, one claimant did not settle and filed a lawsuit against the insured. The insurer filed a declaratory judgment claiming that its duty to defend ended with its depositing of the policy limits into court for settlement. The Supreme Court of Delaware decided that the insurer was wrong, that the duty to defend did not end until policy limits were paid to settle all claims. The policyholder had a reasonable belief that he would be defended until all claims were resolved, and this particular incident still had a claim outstanding.

The last limitation on the promise to defend in this paragraph notes that the insurer has "no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy". This serves to clarify the insurer's duty to defend. The general rule is that the insurer's duty to defend is triggered by the allegations of the complaint against the insured, regardless of the apparent facts or the insurer's interpretation of facts in a particular loss. If, for example, a fraudulent suit is filed against the insured, the insurer is still required to defend so long as the lawsuit alleges bodily injury or property damage that could conceivably be covered under the terms of the policy. However, a suit claiming the insured committed an intentional assault with the express intention of causing bodily injury is not considered to be an allegation that is covered by the policy (regardless of the truth or falsity of the allegation), and so the insurance company would be on solid ground should it decide not to mount a defense.

Liability Coverage Arising Out of the Use of a Car?

Section 109. An insured put his dog in the back of the car and went grocery shopping. After the insured had finished buying groceries, a store clerk helped him out to the car.

While the clerk was putting the groceries into the car, the dog bit the clerk. A claim was made against the insured for bodily injury, and the insured presented the claim to his auto insurer. The insurer denied coverage because it said there was no injury arising out of the use of the car. The insured sees it otherwise and wants the auto insurer to reconsider. Should the PAP cover the claim?

There have been contradictory court decisions over this question of the use of an auto. In *Keppler v. American Family Mutual Insurance Company*, 588 N.W.2d 105 (1999), the Iowa Supreme Court decided that a causal connection between the injury and the use of the vehicle had to exist before insurance coverage could apply. In that case, a dog that was in a parked van bit a boy, and a lawsuit followed. The Supreme Court held that the insured's van was merely the site where the injury happened and that the van did not cause the injury. Because there was no connection between the injury and the use of the vehicle, there was no coverage under the terms of the auto policy.

On the other hand, an appeals court in New Jersey decided that a claim for a dog bite that occurred while the dog was in the open rear deck of the pickup truck was covered under

an auto policy. In *Diehl v. Cumberland Mutual Fire Insurance Company*, 686 A.2d 785 (1997), the court found a substantial connection between the use of the vehicle and the dog bite. It said that the dog bite occurred while the dog was in the truck; the bite was facilitated by the height and open design of the truck; and so the bite was a natural and foreseeable consequence of the use of the truck. Therefore, the injury arose out of the use of the vehicle, and the auto policy should apply.

Even though these two cases had different outcomes, there is a common thread—there has to be some causal connection between the injury and the use of the vehicle. The court in the prior case saw no connection and the court in the latter case did. Of course, this doesn't settle the dispute over what use of an auto means. Does it mean that the vehicle itself has to cause the injury? Or does it mean the vehicle only needs to be the site of the injury? The final answer is subject to judicial interpretation and the facts of each individual case.

Also, it should be noted that use need not be equated with actual operation of a vehicle in all cases. A passenger of a car can be using the car, or a person not actually occupying the car can be using it, as may be the case when a domestic servant runs an errand for an employer. A case in point is *BATS, Inc. v. Shikuma*, 617 P.2d 575 (1980), in which the Hawaii court of appeals held that a rented van while being returned to its owner by a friend of the insured was being used by the insured even though the insured was not an occupant of the van at the time of the accident. In reaching its decision, the court analyzed two factors:

(1) whether the vehicle was under the supervision and control of the insured, and
(2) whether the vehicle was being operated to serve a purpose of the insured.

Answering both questions in the affirmative, the court ruled that the insured was entitled to payment under his auto physical damage insurance, which covered damage to nonowned autos being operated or used by the insured.

Who Is an Insured?

Section 110. The second paragraph of the insuring agreement discusses the issue of just who is an insured under the liability coverage part of the personal auto policy. There are four categories of "insureds".

First are the named insured and family members for the ownership, maintenance, or use of any auto or trailer. The "named insured" and "family member" are defined terms that were discussed in Module 1, but there are other words in this category that merit discussion.

The phrase any auto or "trailer" is a rather omnibus term. It means that the named insured or a family member can use any auto—owned or nonowned—and still be considered an insured under the terms of the PAP.

It means that if a neighbor is running an errand for the named insured using his own car has an at-fault accident, the named insured will have liability coverage under his or her own PAP should the injured party somehow be able to bring the named insured into a lawsuit. Of course, the actual insurance coverage for the named insured is subject to any applicable exclusion, but the principle is there: the ownership, maintenance, or use of any auto means just that—any auto.

The word *use* is not defined on the PAP, but it can cause many a lawsuit over whether injury or property damage was caused through the use of an auto.

The second category of "insured" includes any person using the named insured's covered auto. The PAP defines the phrase "your covered auto", which was discussed in Module 1.However, just about anyone who uses the named insured's covered auto will receive liability coverage as an insured under the named insured's PAP.

Of course, the key phrase is just about anyone since the scope of this category does have its limits, and those limits can be found in the exclusions section of this part of the auto policy.

For example, there is no liability coverage under the PAP for any insured while employed or otherwise engaged in the business of selling or repairing vehicles. If the named insured takes his covered auto to the shop for repairs, the repairman may test drive it. If the repairman causes an accident, the named insured's auto policy will apply for the named insured (as owner of the covered auto), but not for the repairman. The repairman is considered an insured, but the exclusion voids his potential coverage. Another example: liability coverage is not provided for any insured using a vehicle without a reasonable belief that that insured is entitled to do so. If a thief steals the named insured's covered auto and causes an accident, the thief will not have liability coverage under the named insured's PAP even though he is considered an insured.

The third category of "insured" includes any person or organization for liability arising out of any insured's use of the covered auto on behalf of that person or organization. Thus, for example, if the named insured drives his or her covered auto on the business of his or her employer, the employer is covered an insured to the extent of its liability for an auto accident. And, such coverage is on a primary basis.

Any other person or organization is also the subject of the fourth category of insureds. In this case, the person or organization is covered as an insured for the named insured's or family member's use of any auto or trailer other than the covered auto—and other than any auto or trailer owned by the person or organization. If, for example, the named insured drives a fellow employee's car on their employer's business, this clause considers the employer an insured under the named insured's PAP in the event the employer becomes involved in a claim or lawsuit arising out of the named insured's operation of the nonowned car.

Note that the liability coverage part of the PAP applies separately to each insured who is seeking coverage or against whom a claim or lawsuit is brought. This is the severability of interests or separation of insureds feature that is found in current liability policies. The liability insuring agreement of the PAP is the source of its severability of interests feature. In the personal auto policy, the liability insuring agreement specifies that the insurer will cover the liability of any insured and will settle or defend any claim or suit.

Neither here nor elsewhere does the policy prevent claim or suit by one insured against another.

Supplementary Payments

Section 111. The supplementary payments made under the terms of the PAP are in addition to the limit of liability. In other words, if the insurer makes any supplementary payments, the limit of liability available for payment or settlement of a claim is not going to be reduced by the amount of that supplementary payment.

There are five supplementary payments noted on the PAP and they are paid on behalf of *an insured;* this means the named insured, family members, and any others who meet the definitions of "insured" as listed on the PAP.

The first supplementary payment is up to $250 for the cost of bail bonds. The payment is for when bonds are required for accidents resulting in bodily injury or property damage that is covered under the auto policy; a bail bond for a speeding or other moving operation violation is not covered.

The second supplementary payment is for premiums on appeal bonds and bonds to release attachments in any suit defended by the insurer. This payment assures the insured that if an appeal of an adverse judgment is made, the insurer will pay the costs involved; the insured need not worry about that subject.

The third payment is for interest accruing after a judgment is entered in any suit defended by the insurer. The insurer is telling the insured that if a lawsuit is lost and a judgment is entered against the insured, any interest that builds up on that unpaid judgment will be paid as a supplementary payment. So, for example, if the insurer decides to appeal the judgment and thus delays paying the plaintiff, thereby running up interest charges, this clause states that the insurer is responsible for paying those interest charges.

The insurer promises to pay up to $200 a day for loss of earnings of an insured if that insured attends hearings or trials at the request of the insurer. This supplementary payment applies only to loss of earnings, not other income.

The last supplementary payment is a rather all-inclusive one—other reasonable expenses incurred at the request of the insurer. The key word here is *reasonable,* and that must be interpreted on a case by case basis. For example, if the insurer wants the insured to take pictures of the accident scene, a reasonable expense would include film and development

costs. However, it would not be a reasonable expense if the insured hired a professional photographer to do the job.

Exclusions

Intentional Injury

Section 112. The first exclusion deals with insureds who intentionally cause injury or damage. Note that the wording of this exclusion differs from the expected or intended injury language that is found in the exclusions on the commercial general liability coverage form. Often, courts interpret the expected or intended phrase to mean that the exclusion does not apply unless the insured expects or intends the injury. In other words, even if the act is intended by the insured, the exclusion will not apply unless the insurer can show that the insured also intended the resultant injury. The phrasing of the parallel exclusion on the PAP (that is, intentionally causes) attempts to be clearer and more to the point.

Of course, the exclusion on the general liability policy also makes an exception for BI resulting from the use of reasonable force to protect persons or property, a self-defense exception. The PAP does not mention this exception.

Does Intentional Injury Exclusion Apply to a Carjacking?

Section 113. The insured is driving his covered auto and stops at a red light. Another car pulls directly in front of the insured, blocking his path. The occupant of the other car points a gun at the insured. In an attempt at self-defense, the insured steps on the gas pedal and rams into the other car. The other car is damaged and the would-be assailant is killed. If the assailant's family files a lawsuit for wrongful death against the insured, will the PAP respond to the suit?

The personal auto policy does not list any exception to the intentional injury exclusion. The insured can claim that he only intended to knock the other car out of his way and did not intend to cause any injury or damage, but a reasonable man can not expect to run into a car and not cause damage and possible injury. In this instance, the insurer would have grounds to deny coverage. However, bad publicity might make an insurer think twice about choosing that course. And, of course, a court could still very well decide that the insured intentionally ran into the other car but did not intentionally cause the death of the would-be thief. The insurer would have to weigh the options in this scenario and judge whether a declination of coverage would be worth the troubles it may cause.

Damage to Owned Property Exclusion

Section 114. Exclusion two denies liability coverage for any insured for property damage to property owned or being transported by that insured. The principle that underlies this exclusion is that "you can not be liable to yourself". If the insured negligently destroys his car, that insured can not make a claim against himself or sue

himself for the damages. Direct physical damage coverage is the appropriate insurance treatment for this exposure.

Care, Custody, or Control Exclusion

Section 115. The third exclusion is the PAP's version of the care, custody, or control exclusion. The PAP will not provide liability coverage for any insured for property damage to property rented to, used by, or in the care of that insured.

There are two important points to note about this exclusion. First, there is an exception in that the exclusion does not apply to property damage to a residence or private garage. For example, if the insured accidentally runs his car into the car port of his apartment building, the insured's PAP will respond to the landlord's claim. (Note that this exception is for nonowned property; exclusion two still prevents coverage for damage to property owned by the insured.)

The second point to remember is that this exclusion applies to an insured who damages property rented to, used by, or in the care of that same insured. A personal auto policy can, of course, have more than one insured in its liability insuring agreement. So, if Mr. Smith is a named insured on the PAP and accidentally runs into and damages the property of his son who is also an insured under the PAP, the son can make a claim against Mr. Smith and the PAP will respond.

Is Damage to Husband's Company Car Covered?

Section 116. An insured has two cars—a company car, insured by his employer, and his wife's car, insured in a different agency under a personal auto policy. While backing her car out of the garage, the insured's wife hit the company car parked in the driveway and damaged it. The PAP insurer declined to pay for the damage due to the care, custody, or control exclusion. The issue is whether that exclusion applies since the company car was not in the spouse's care and she was not operating it.

The exclusion does not apply. The car that was damaged by the wife was not rented to, used by, or in the care of the wife at the time of the accident. The PAP's care, custody, or control exclusion is specific in applying only to that insured who has the damaged property in his or her care. Just because the wife is a named insured along with the husband on the PAP does not mean that everything in his care or used by him is automatically considered in the care of the wife. Both are separate insureds and have to be treated that way under the terms of the personal auto policy when it comes to coverage and exclusions.

Liability to an Employee of the Insured Exclusion

Section 117. The fourth exclusion applies to liability coverage for any insured for bodily injury to an employee of that insured. The exclusion does not apply to BI to a domestic employee unless workers compensation benefits are required or available for

that domestic employee. This exclusion makes the point that employees who are injured in the course of employment should receive benefits from the workers compensation system and not a liability policy.

Note that the employee has to be the employee of *that insured* who causes the injury in order for the exclusion to apply. For example, if the named insured owns a business and is driving his employee to a business call and has an at-fault accident, the named insured's PAP will not respond to a claim for bodily injury against the named insured from the employee. However, if an employee of the named insured is driving the named insured's covered auto on that business call and has an at-fault accident that injures a fellow employee, the PAP of the named insured will respond to a BI claim. This is because the injured employee is not the employee of that insured—the fellow employee, who is an insured because he was using the named insured's covered auto—who caused the bodily injury.

One more point about this exclusion. The exception applies to domestic employees who are not covered by workers compensation. This exception to the exclusion should be viewed in light of the fact that virtually all states either require workers comp coverage or permit employers to buy the coverage for domestic employees. Very few states actually exclude domestics from the workers comp system. However, if that is the case, and the named insured-employer injures the maid or the nanny through an auto accident, the injured domestic employee can make a claim against the named insured-employer and the PAP will respond.

Public or Livery Conveyance Exclusion

Section 118. The next exclusion deals with liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance. The intention of this exclusion is to deny coverage in those situations where it is obvious that the insured is holding the vehicle out for hire to the general public. The exclusion is to apply when the insured makes the vehicle available for use by the general public or attempts to make a profit through the hiring out of his vehicle. This exclusion is not meant to apply to instances such as using a private passenger auto for deliveries of pizza or newspapers.

Business Use Exclusions

Section 119. Exclusions 6 and 7 under paragraph A of the PAP deal with using autos in a business. Exclusion 6 is for any insured while employed or otherwise engaged in the business of selling, repairing, servicing, storing, or parking vehicles designed for use mainly on public highways. Exclusion 7 is for any insured maintaining or using any vehicle while that insured is employed or otherwise engaged in any business not described in exclusion 6. The purpose of these two exclusions is to make the case that the personal auto policy is not supposed to be used to cover a business auto exposure; that is the function of the commercial auto coverage forms. However, exclusions 6 and 7 do have some exceptions.

Exclusion 6 does not apply to the ownership, maintenance, or use of the covered auto by the named insured, any family member, or any partner, agent, or employee of the named insured or any family member. An example of exclusion 6 and its exception follows:

If the named insured takes his covered auto into a repair shop, the repairman is an insured when he takes the covered auto out onto the road for a test drive. However, if the repairman has an at-fault accident, the named insured's PAP will not apply to the repairman because of exclusion 6. The named insured will have coverage should he be brought into a claim or lawsuit through his ownership of the covered auto.

Exclusion 7 does not apply to the maintenance or use of a private passenger auto, a pickup or van, or to a trailer used with such vehicles. An example of exclusion 7 and its exception follows:

The named insured owns a lawn care service. If he uses a dump truck to make deliveries of mulch or shrubs to a customer, the personal auto policy will not respond to a claim for BI or PD if the use of the dump truck causes an at-fault accident. However, if the named insured uses his private passenger auto to deliver a contract proposal to a prospective client, the PAP will apply to a liability claim arising out of an at-fault accident. The reason for this is the exception to the exclusion for the use of a private passenger auto, pickup or van, or a trailer used with such vehicles.

Reasonable Belief Exclusion

Section 120. Exclusion 8 can be a very controversial exclusion. This exclusion precludes liability coverage for any insured using a vehicle without a reasonable belief that that insured is entitled to do so. The exception is for a family member using the named insured's covered auto owned by the named insured. The key phrase in this exclusion is *reasonable belief.* Since that phrase is not defined on the auto policy, it is subject to interpretation. This is where the controversy comes in.

When Does Reasonable Belief Exclusion Apply?

Section 121. An insured's son, age 16, was driving his parents' car one night. He took his friends to a concert and, after it was over, the group went to a restaurant. Upon leaving the restaurant, the son allowed the girlfriend of one of his friends to drive the car; she was only 14. The girl promptly drove the car into another car in the restaurant parking lot and injured that car's driver. The injured driver sued over his injuries. The insured's insurer refused to defend or cover the girl because it said she did not have a reasonable belief that she was entitled to drive the car. The question is: should she have coverage because the son gave her permission to drive the car and he is an insured as a family member?

A liberal interpretation of the reasonable belief exclusion would say that since an insured under the auto policy gave permission for the girl to drive, she thought she could do so. However, this train of thought has limitations.

One limitation can be found in the case of *Raines, et. al. v. Auto-Owners Insurance Company,* 703 N.E.2d 689 (1998). In that case, an Indiana appeals court based its decision on the rule that "one who has permission of an insured to use his auto continues as such a permittee while the car is in his (or her) possession even though that use may later prove to be for a purpose not contemplated by the insured". However, the court went on, a limitation on this scope of permission is "when an owner places restrictions on the use of the vehicle, violations of such use restrictions may terminate the initial permission." In other words, if the son's parents had told him that no one else could drive the car, he had no right to allow anyone else to drive the car. In such a case, the son's permission to the girl is not valid. Since there is no mention of whether the parents had put restrictions on the son's use of the car, this limitation on the scope of coverage may not be relevant to the case, so let's move on to another, and more valid, limitation.

In the case of *Baker v. Liberty Mutual Insurance Company*, 143 F.3d 1260 (1998), a Federal court of appeals interpreting California law found that a 15-year-old was not a permissive driver because she was under age and had no driver's license. That court said that the car was not loaned to a legal driver and that an underage driver would be breaking the law by the very act of driving. In other words, an underage driver is not covered because he or she can not legally drive and so can not reasonably believe he or she is entitled to do so. In the above example, the driver was a 14-year-old and too young to obtain a driver's license. Now, even though teenagers may have a different mindset than adults, she could not have a reasonable belief that she was entitled to drive and she should not have liability coverage under the son's auto policy.

It should be noted that under the exception to this exclusion, if the son in the coverage scenario were the 14-year-old, he would be considered an insured and have coverage. Even though he would be an underage driver with no license, the insurer has decided, through the wording of the exception that with a family member there is no reasonable belief requirement. And, note that the exclusion is limited specifically to *that insured* using a vehicle without a reasonable belief of entitlement. Thus, in the coverage scenario, the son's parents are insureds and are covered for the ownership and use of the auto even though the 14-year-old girl would not have liability coverage.

Nuclear Exclusion

Section 122. In the last exclusion under paragraph A, there is no liability coverage for any insured for BI or PD for which that insured is an insured (or would be an insured) under a nuclear energy liability policy. Due to the very nature of the exposures, a nuclear energy liability policy issued by one of the nuclear insurance pools is the way to cover liability for nuclear damages. The personal auto policy is simply not intended to duplicate the coverage offered by nuclear energy liability policies.

Paragraph B Exclusions

Off-Road Vehicles

Section 123. The first exclusion is for any vehicle that has fewer than four wheels or is designed mainly for use off public roads. The exceptions are for when such vehicles are being used by an insured in a medical emergency, or if such vehicles are trailers or nonowned golf carts. The insurer wants to make the point here that the personal auto policy is meant for automobiles, that is, motor vehicles that have four wheels and that are used on public roads as a means of transportation. Vehicles such as motorcycles or dune buggies should not be considered autos nor automatically insured as autos under the personal auto policy. (Coverage for these vehicles can be added to the PAP through the use of endorsements.)

The exceptions to the exclusion should not be overlooked. Many insureds use bikes and dirt bikes and motorcycles for recreational and fitness purposes. IAn insured who is riding his dirt bike on a park trail may see someone get hurt. If he rushes off to get help but crashes into some hikers with the dirt bike, it is comforting to know that the insured's auto policy will provide liability coverage for him should the need arise. Also, if the insured is driving a (nonowned) golf cart on the course and hits someone with the cart, it helps to know that the PAP will apply to a claim against the insured. These exceptions recognize that insureds use the vehicles described in the exceptions and that they face liability exposures through this use. The PAP now stands as an important safeguard for insureds in such circumstances.

Furnished for Regular Use

Section 124. The second exclusion under Paragraph B of the PAP is for any vehicle, other than the named insured's covered auto, that is owned by the named insured or furnished or available for the named insured's regular use. The key phrase—furnished or available for the regular use of—is not a new phrase, nor is it untested legally.

In *Waggoner v. Wilson*, 507 P.2d 482 (1972), the Colorado court of appeals was called upon to decide whether an insured's use of a car fell under a policy exclusion of coverage for any nonowned car furnished or available for the frequent or regular use of the insured.

The insured had had an accident in a nonowned auto that she was driving. She had used the car on two or three occasions before the accident, always obtaining the keys and permission from the owner first. Although the court noted that *furnished* and *available* are not synonymous—*furnished* implied actual use, but *available* implied potential use—it nevertheless construed *available* to require that the potential use of the auto be to a substantial degree under the control of the insured. The court concluded that a car is not *available* when the keys and specific permission must be obtained each time use of the car is desired.

And, in *Hughes v. State Farm*, 236 N.W.2d 870 (1976), a nonowned car had been used by the insured about six or eight times during a period of nine months. Because the

insured had had to request permission before each use and was even denied permission on several occasions, the Tennessee Supreme Court deemed the car not to be furnished or available for the insured's use.

Another example involves autos made available through carpools, such as those kept by corporations, government agencies, and other organizations. Even though the named insured may not have used a particular pool auto regularly, his or her regular access to some car from the pool makes, in effect, any auto driven under this arrangement a furnished auto. Courts have generally upheld this interpretation. See *Galvin v. Amica Mutual Insurance Company*, 417 N.E.2d 34 (1981) for a summary of court cases so holding.

When does a short-term rental car become furnished or available for regular use? Unfortunately, there is no single objective guideline for answering this question, but it seems unlikely that a rental of a few days or even up to two or three weeks would be viewed as *regular use*. For example, in *Factory Mutual Liability Insurance Company v. Continental Casualty Company,* 267 F.2d 818 (1959), a United States court of appeals applying Florida law held that a three week rental of an auto did not constitute regular use.

Exclusion B. 3 is similar to exclusion B. 2, except that it applies to vehicles owned by or furnished or available for the regular use of any family member. An exception exists for the named insured while maintaining or occupying such vehicles. This exception is designed to eliminate the potentially troublesome situation in which named insureds (usually parents) might find themselves, that is, without liability insurance following an accident involving their use of a car owned by another household member.

The use of the words maintaining or "occupying" in the exception to the exclusion should be noted. By doing this, the insurer is requiring the named insured to physically be in or upon the vehicle in question—or to be in the process of maintaining it—in order for the exception to take hold. Thus, if the named insured, a father for example, directs his son to drive the son's car to the store to purchase an item for the father, it can not be said that the father is occupying the car. This possibility could exist if the exception stated that the exclusion did not apply to the named insured while he *uses* a vehicle owned by a family member. Since use is not a defined term as is "occupying", it could be interpreted in favor of the named insured, thereby giving him coverage. A court could say that the father was really using the car because he directed the son to run an errand to solely benefit the father. Except for the directed, albeit not physical, use of the car by the named insured, the accident would not have happened. The phraseology in the exception should preclude any such interpretation.

Racing Exclusion

Section 125. The final exclusion in paragraph B is for any vehicle located inside a facility designed for racing for the purpose of competing in or practicing or preparing for any prearranged or organized racing or speed contest. This exclusion simply makes the

point that a high risk exposure such as auto racing should be insured under a specialty policy and not the standard personal auto policy. However, note the weakness of the exclusion in that the use of the phrase "located inside a facility designed for racing" limits the applicability of the exclusion. So, if the insured uses his covered auto to race on public roads, this activity is not specifically excluded under the PAP.

One reason for this lack of an exclusion may be the public policy that on-road drivers should be insured. There is no exception for racing activity on public roads (such as impromptu drag racing), just as there is no exclusion eliminating damage done by intoxicated drivers. Public policy demands the driving public have insurance coverage.

Selected Other PAP Liability Clauses

Section 126. The audio-visual portion of this module discussed the Limit of Liability and Out of State Coverage clauses. Other clauses at the end of the liability coverage section discuss financial responsibility and other insurance.

Financial Responsibility

Section 127. This clause declares that when the auto policy is certified as future proof of financial responsibility, the policy shall comply with the law to the extent required. Financial responsibility laws require drivers who have been involved in accidents or who have been convicted of certain offenses (such as driving under the influence) to maintain proof of financial responsibility for future reference. Most people in this situation use liability insurance as such proof, and this clause aids their cause. For example , if the limits of liability required by the financial responsibility law increase during the policy period, the policy will be interpreted as providing those limits.

Other Insurance

Section 128. The other insurance clause describes the extent of recovery when other applicable liability insurance applies to a covered loss. In accidents covered by the named insured’s policy and other liability insurance, the named insured’s policy pays no more than its share on a pro-rata basis.

However, insurance provided for vehicles not owned by the named insured is excess over any other collectible insurance covering the loss. The key term here is *collectible*. As an example, if the named insured is driving his son’s car and has an accident, the son’s insurance should be primary. However, if the son had allowed his insurance to lapse, there is no other *collectible* insurance and the named insured’s coverage becomes primary.