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The "Temporary Substitute Automobile" An Unowned-Owned Vehicle

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THE "TEMPORARY SUBSTITUTE AUTOMOBILE" AN UNOWNED-OWNED VEHICLE

I. INTRODUCTION

It is probably safe to say that every automobile insurance policy which is being written today includes a definition of a temporary substitute automobile. The present phrasing of the clause came into existence with the writing of family type automobile policies which began to appear about 1956.[1] Although the definition will vary somewhat from policy to policy, a typical provision states:

> "Temporary Substitute Automobile" means any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.[2]

The reason the language is included in the policy, stated in a positive way, is

> . . . to extend coverage temporarily and automatically, without the payment of an additional premium, to the insured to protect him when he uses an automobile not specified in the policy in place of the specified vehicle he intended normally to use but did not because of its withdrawal from use for a reason stated in the policy.[3]

More often the courts prefer to comment on the definition in a negative sense: ". . . it indicates a purpose to avoid covering more than one automobile for a single premium."[4]

The real question, of course, is not what the insurance company intended to do when they included the clause, but what, in fact, they have accomplished. This paper will first determine when a vehicle qualifies as a "temporary substitute automobile" and then discuss the nature and extent of the insurance coverage thereunder.

II. WHEN IS A VEHICLE A TEMPORARY SUBSTITUTE AUTOMOBILE?

There is no single "temporary substitute" test that can be applied in every fact situation. "All cases on the subject of 'substitute automobile' sustain the doctrine fully that each case is determined by its own peculiar circumstances."[5] Therefore, the application of a given policy definition to a particular automobile at a definite time will ordinarily involve only questions of fact. A clause by clause analysis of the given

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[1] *See* Safeco Ins. Co. of Am. v. Banks, 152 So. 2d 666 (Ala. 1963).

[2] *See* RISJORD & AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES—STANDARD PROVISIONS 186 (1964).

[3] Lewis v. Bradley, 7 Wis. 2d 586, 97 N.W.2d 408 (1959); *see also* Harte v. Peerless Ins. Co., 123 Vt. 120, 183 A.2d 223 (1962).

[4] Farmers Ins. Exch. v. Wendler, 84 Idaho 114, 368 P.2d 933 (1962); *see also* Musso v. Am. Lumberman's Mut. Cas. Co., 14 Misc.2d 450, 178 N.Y.S.2d 377 (1958).

[5] Central Nat. Ins. Co. of Omaha v. Sisneros, 173 F. Supp. 757 (D. N.M. 1959).

policy definition will be of great help in resolving the questions which do arise.

A. Not Covered by the Named Insured

For the time being, it is necessary to assume that the "named insured" refers only to the person named in the declarations.[6] The general rule in this area is that the specified insured shall not actually own, in whole or in part, the automobile which he seeks to qualify as a temporary substitute.

In *Midden v. Allstate Insurance Company*[7] an auto was owned by the insured husband *and* his wife. Although the vehicle was ordinarily used only by the wife, who carried her own insurance on the car, it could not qualify as a temporary substitute for the husband because he owned it.[8]

Government Employees Insurance Company v. Thomas[9] provided a slightly different situation. The insured made a verbal agreement to sell his second, uninsured car to a friend. The insured later repossessed this second car because his friend failed to make the purchase payments. Then the insured's first car became disabled. The second auto did not become a temporary substitute automobile for the insured because he still owned it.

The rule was pushed to the limit in *Fleckenstein v. Citizen's Mutual Automobile Insurance Company*[10] where the insured assigned a certificate of title to the car in question to his son. The son did not obtain a new certificate of title, but title was held to have passed notwithstanding the noncompliance with state law. The auto became a temporary substitute for the father who borrowed it back and had an accident.[11]

In all these cases the courts have been quite insistent on finding *actual* ownership before denying coverage. This very element was missing in *St. Paul-Mercury Indemnity Company v. Heflin.*[12] A car titled to a partnership was used by an insured partner while his personal car was undergoing repairs. The court found that the vehicle qualified as a substitute auto because it was not owned by the insured but "was

[6] *But see* the text connected with footnotes 44 - 53 of this article for a complete discussion of the "named insured" problem. For purposes of clarity, this paper will refer to the insured named in the declarations as the "specified insured."

[7] 7 Ill. App. 2d 499, 129 N.E.2d 779 (1955).

[8] It is important to recognize that the coverage under the temporary substitute clause is always excess. The question of coverage on the husband's policy does not even come into play here until the wife's primary coverage (if it applies in the given fact situation) is exhausted. The nature and extent of the insurance coverage under the temporary substitute clause is covered in the text connected with footnotes 54 - 57 of this article.

[9] 357 S.W.2d 548 (Ky. 1962); *see also* Luckett v. Cowser, 39 Wis. 2d 224, 159 N.W.2d 94 (1968). In all these cases the reader must assume that an accident occurs while the insured is driving the car in question.

[10] 326 Mich. 59, 40 N.W.2d 733 (1950).

[11] *But see* Kahn v. Lockhart, 392 S.W.2d 30 (Mo. App. 1965).

[12] 137 F. Supp. 520 (W.D. Ark. 1956).

actually purchased and owned by the partnership." Although partnership assets ultimately belong to the partners, this is not the actual ownership which disqualifies an auto from becoming a temporary substitute.[13]

B. While Temporarily Used

The words "while temporarily used" imply, it would seem, a relatively short period. No doubt the phrase was originally included in the temporary substitute automobile definition to deny substitute coverage to a vehicle which the insured regularly used or which the insured regularly had at his disposal. If that was the idea which the drafters of the insurance contract had in mind, their choice of wording was unfortunate.[14]

Actually, there is no time limit on temporary use. The passage that formed the basis for the interpretation of these words is *McManus v. Home Insurance Company*.[15] In that case, the Wisconsin Supreme Court interpreting "temporary" as it was used in a fire insurance policy, said: "The word 'temporary' has no fixed meaning in the sense that it designates any fixed period of time. It is a word used in contradistinction to permanent. . . . If not permanent, it must have been temporary."

The *McManus* definition was cited with approval in *Fleckenstein v. Citizen's Mutual Automobile Insurance Company*,[16] one of the leading cases which construed a "temporary substitute automobile" clause. In that case the court affirmed a jury determination that the use of a substitute automobile for a six-month period was a temporary use.[17]

Even where the ownership of an insured vehicle has been terminated by selling it to a junkyard, a subsequent use of other non-owned vehicles

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[13] A slightly different fact situation brought about the same result in Farley v. American Auto. Ins. Co., 137 W. Va. 455, 72 S.E.2d 520 (1952). The insured business vehicle was covered by a policy issued to partners A *and* B. The vehicle was withdrawn from normal use and a truck owned by partner A was loaned to partner B for use in the partnership business. The vehicle became a temporary substitute automobile for the withdrawn vehicle because the substituted truck was not owned by the named insured (the named insured being partners A *and* B).

[14] The definition of "non-owned automobile" also includes language which prohibits use over an extended period of time. RISJORD & AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES—STANDARD PROVISIONS 186 (1964), set out the usual "non-owned automobile" definition: ". . . an automobile or trailer not owned by or furnished for the regular use of. . . ." An extended discussion of the "non-owned" provision is beyond the scope of this paper. However, the courts have quite literally applied the "not . . . furnished for the regular use of" provision. Le Mense v. Thiel, 25 Wis. 2d 364, 130 N.W.2d 875 (1964). *But see* Pacific Auto. Ins. Co. v. Lewis, 56 Cal. App. 2d 597, 132 P.2d 846 (1943). Contrast the application of that language to the "temporarily used" language of the definition under question in this article.

[15] 201 Wis. 164, 229 N.W. 537, 538 (1930).

[16] Fleckenstein v. Citizen's Mut. Ins. Co., 326 Mich. 59, 40 N.W.2d 733 (1950).

[17] *See* Little v. Safeguard Ins. Co., 137 So. 2d 415 (La. App. 1962); De Marco v. Lumbermen's Mut. Cas. Co., 153 So. 2d 594 (La. App. 1963); McKee v. Exch. Ins. Ass'n, 270 Ala. 518, 120 So. 2d 690 (1960).

qualifies them as temporary substitute automobiles.[18] The cases in this area indicate a desire to provide protection over the life of the policy even though the insured automobile doesn't last that long.[19] Since a policy is ordinarily written for a year's duration, any period of time up to that length could easily be determined as temporary.[20]

C. With the Permission of the Owner

This clause, absent in the 1958 Standard Family Automobile Liability Policy, was included in the next draft, in 1963.[21] The later draft should put an end to decisions like *Densmore v. Hartford Accident & Indemnity Company*[22] where the court found that an auto stolen by an insured after his vehicle became disabled qualified as a temporary substitute automobile.

Even prior to the change, some courts insisted that the permission of the owner was necessary.[23]

Once the specified insured has obtained the owner's permission to use the substitute vehicle, it appears that, under the proper circumstances, either the owner of the vehicle or the specified insured can give permission to other persons to use the borrowed car.[24] There are many

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[18] *See* Freeport Motor Cas. Co. v. Tharp, 338 Ill. App. 593, 88 N.E.2d 499 (1949); McKee v. Exch. Ins. Ass'n, 270 Ala. 518, 120 So. 2d 690 (1960).

[19] In Freeport Motor Cas. Co. v. Tharp, 338 Ill. App. 593, 88 N.E.2d 499 (1949), the court declared: "The policy was to cover a one-year term and was designed to cover the insured during that period of time, even if his automobile was withdrawn from normal use by reason of breakdown. It must be conceded . . . that the automobile which the insured sold for junk was withdrawn from normal use by reason of the breakdown. . . . To conclude that the insured was required to retain ownership of the automobile described in the policy before there would be any protection to the insured under its terms, we feel is not justified under the facts and the law."

[20] The case of Munson v. Speck, 76 S.D. 599, 83 N.W.2d 479 (1957), seems to indicate that once an insured car is abandoned, no other automobile could qualify as a temporary substitute under that policy. The case can be factually distinguished from Freeport Motor Cas. Co. v. Tharp, 338 Ill. App. 593, 88 N.E.2d 499 (1949). In *Munson* the insured auto had a flat tire. The specified insured decided he didn't want it any more and notified the used car dealer who still held the title as security under a conditional sales contract. Before the specified insured was involved in an accident in the borrowed car, the flat tire on the insured auto had been fixed and the insured auto was being driven again. Therefore at the time of the loss in question the insured auto was not "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction." However, when, as in *Freeport*, the vehicle is junked, even though any ultimate ownership rights in the auto have terminated, the auto still fits the language of the policy.

[21] Compare RISJORD & AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES—STANDARD PROVISIONS 58 (1964) (Text of 1958 Standard Provisions) with 186 (Text of 1963 Standard Provisions).

[22] 221 F. Supp. 652 (W.D. Pa. 1963).

[23] *See* Davidson v. Fireman's Fund Indem. Co. 4. App. Div.2d 759, 165 N.Y.S.2d 598 (1957).

[24] This is a relatively general statement which must be further clarified to put it in its proper perspective. When the specified insured is driving the alleged temporary substitute automobile, the only "permission" question is whether he has the permission of the owner of the substitute vehicle.

The real permission problems arise when an additional insured suffers an accident. The additional insured becomes involved in a temporary substitute automobile problem in two basic ways. First, he uses the specified insured's

complicated fact situations which arise in conjunction with this "second" permission, but these problems are better put off until after an extended discussion of "named insured" later in this paper. At this point it is sufficient to say that the "owner's permission" requirement is quite clear on its face, and the courts insist on finding at least this initial permission before ruling that a borrowed vehicle is a temporary substitute.

D. As a Substitute for the Owned Automobile

"Owned automobile" in this sense is construed to be the vehicle specified in the declarations. The courts will not look to the definition of "owned automobile" within the policy because the definition includes a temporary substitute automobile.[25] Thus if "owned auto" was interpreted any other way than "the specified auto," this particular part of the "temporary substitute automobile" definition would be nonsense.

The important word in this phrase, therefore, is substitute. "It has been said that the word 'substituted' describes a replacement of one thing by another . . . and [it] implies the removal or elimination of the thing replaced. . . ."[26]

Substitution can be proven only by showing that, except for the breakdown, "the insured car would have been in use at the time and in tre circumstances involved."[27]

By way of example, the Norman Concrete Works owned a 1941 Ford which was used on a highway construction job. The evidence

auto with permission, but the vehicle does not operate properly. Therefore the additional insured borrows another automobile to continue the trip. This borrowed automobile will constitute a temporary substitute under the specified insured's policy if there was express or implied permission to the additional insured to make the substitution. United States Fidelity & Guaranty Co. v. Grundeen, 138 F. Supp. 498 (D. N.D. 19), *aff'd.* 238 F.2d 750 (8th Cir. 1956). If the additional insured is a resident of the same household as the specified insured, the permission is not even required. *See* Davidson v. Fireman's Fund Ind. Co., 4 A.D.2d 759, 165 N.Y.S.2d 598 (1957), and the comment to that case in 2 RISJORD & AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES 1554-5 (1965). Of course, in situations like this, the permission of the owner of the borrowed vehicle to the additional insured is indispensable.

The second way an additional insured can be involved in a temporary substitute automobile problem is by borrowing a car from the specified insured which has already become a temporary substitute for that party. In these situations coverage is determined as if the temporary substitute was actually the owned automobile of the specified insured. The specified insured necessarily must have had the permission of the owner to have borrowed the car originally. The additional insured will ordinarily need the permission of the specified insured to use the car, but this permission is not necessary when the additional insured is a resident of the same household. Harte v. Peerless Insurance Co., 123 Vt. 106, 183 A.2d 223 (1962).

[25] *See* RISJORD & AUSTIN note 2 *supra* at 185-6.

"'. . . owned automobile' means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,

(b) a trailer owned by the named insured,

(d) . . . a temporary substitute automobile. . . ."

[26] 83 C.J.S. *Substitute* § 766 (1953), cited with approval in Fullilove v. United States Cas. Co. of N.Y., 240 La. 859, 125 So. 2d 389 (1961).

[27] Little v. Safeguard Insurance Co., 137 So. 2d 415 (La. App. 1962). *Accord,* Bivins v. Ace Wrecking & Excavating Co., 409 S.W.2d 97 (Mo. 1966).

tended to show that, because of the vehicle's deteriorated condition, it was never used on the highway. One of the partners was using his own Oldsmobile during working hours and was involved in a collision on the highway. He pointed out that the 1941 Ford was in for repairs, that he otherwise would have used it for the trip in question, and that he therefore qualified under the temporary substitute automobile clause of the Ford's insurance policy. The court said: "we consider controlling the absence of any evidence which can be said to establish that the Oldsmobile was, for tre trip in question, used as a substitute for the Ford. . . . [T]he breakdown of the Ford was only coincidental."[28] Since the Ford was never used on the highway, the use of the Oldsmobile on the highway foreclosed its qualifying as a substitute.

E. When Withdrawn From Normal Use

Under this phrase, the law is far from settled. The majority position is that before a vehicle can qualify as a temporary substitute automobile, the vehicle specified in the declarations must be withdrawn from *all* normal use. The minority contends that an insured can substitute another vehicle if the auto named in the declarations is disabled from performing its *principal,* or nomal, use.

Service Mutual Insurance Company v. Chambers[29] provides a good illustration of the majority position. The insured truck was ordinarily used for house moving. On the day in question, however, the winch of the insured truck was broken, so the insured rented another truck. The rented truck did not qualify as a temporary substitute under the policy because the insured truck was still being used for some purpose. In fact, the insured truck was being driven in front of the rented truck to provide directions. Had the rented truck qualified as a substitute, the insurer would have been covering two trucks for the price of one premium.[30]

The leading case for the minority position is *Allstate Insurance Company v. Roberts.*[31] The insured's car had a faulty ignition system which caused it to kill at highway speeds, although it did operate properly at low speeds. The insured decided to take a friend home who lived in a nearby town and he borrowed a car for this purpose. The insured left his car keys with his wife so she would have transportation. The court held that the limited withdrawal of the insured car because of its disrepair was sufficient to make the borrowed car a temporary substitute automobile.[32]

[28] Western Cas. & Sur. Co. v. Norman, 197 F.2d 67 (5th Cir. 1952).
[29] 289 S.W.2d 949 (Tex. Ct. Civ. App. 1956).
[30] *See also* Erickson v. Genisot, 322 Mich. 303, 33 N.W.2d 803 (1948), where the borrowed auto was more comfortable, in better working condition, and more appropriate to the particular use. The borrowed auto was not a temporary substitute because the insured auto was still being driven.
[31] 156 Cal. App. 2d 755, 320 P.2d 90 (1958).
[32] It is interesting to note that in most ases under the majority position, the exposure of the insurance companies has been actual. That is, both the in-

A concise statement of the minority position appeared in *Mid-Continent Casualty Company v. West.*[33] The court said: "Under the reasonable and liberal interpretation that must be given the 'temporary substitute automobile' provision, its wording does not mean that the . . . 'described automobile' must be disabled from all use.[34]

F. Because of Its Breakdown, Repair, Servicing, Loss or Destruction

This particular part of the definition is almost inseparable from the "withdrawn from normal use" section. Consequently, the impact of the majority and minority views is felt in this area too. In those states that require a vehicle to be withdrawn from all normal use, a greater degree of breakdown, etc., is required before a substitute vehicle will be covered. Under the minority position where an insured vehicle need only be withdrawn from some normal use, a lesser degree of breakdown will be sufficient justification to borrow another car.

Under either standard, however, there must be a more concrete reason for not using the specified vehicle than the fact that it was not as suitable as another available car. In *Hartford Accident & Indemnity Company v. Western Fire Insurance Company*[35] the insured preferred to use an older truck rather than his insured auto to travel over rough roads. The truck did not constitute a temporary substitute auto. Likewise, where the insured borrowed a car because his was low on gas and had chains on the tires which were not necessary, the borrowed car did not qualify as a substitute.[36]

In a state which adopted the minority view, worn tires on the insured vehicle were sufficient to qualify the borrowed auto as a temporary substitute.[37] Under the majority rule, worn tires did not constitute a breakdown.[38]

In any jurisdiction, when a vehicle is *necessarily* withdrawn for any of the enumerated reasons, coverage is obtained. In *Brown v. Security Fire & Indemnity Company*[39] the insured auto had a flat tire. The truck that was borrowed to take the tire to be fixed was a temporary substitute automobile.

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sured vehicle and the borrowed vehicle were being driven at the same time. Conversely, where the courts favor the minority rule, both cars were not being driven at the time of the accident. It appears to this writer that the differing equities of the fact situations should not control the outcome. Even where, as in *Allstate Ins. Co. v. Roberts,* 156 Cal. App. 2d 755, 320 P.2d 90 (1958), there was no actual double exposure (since the wife did not actually drive the insured car at the same time that her husband was using the borrowed car), nonetheless the potential exposure was there, and the insurance company should not be required to bear this uncompensated burden.

[33] 351 P.2d 398, 400 (Okla. 1959).

[34] *See also* Canal Ins. Co. v. Paul, 51 Tenn. App. 446, 369 S.W.2d 393 (1962).

[35] 196 F. Supp. 419 (E.D. Ky.) 1961).

[36] Iowa Mut. Ins. Co. v. Addy, 132 Colo. 202, 286 P.2d 622 (1955).

[37] Mid-Continent Casualty Co. v. West, 351 P.2d 398 (Okla. 1959).

[38] Fullilove v. United States Cas. Co., 240 La. 859, 125 So. 2d 389 (1960). It is interesting to note that in this case, too, the insured's wife actually drove the vehicle while her husband was using the borrowed car. *See* note 32 *supra.*

[39] 244 F. Supp. 299 (W.D. Va. 1965).

In a closer decision, the insured vehicle was in the possession of a sign painter to have the name of a business painted thereon. The described vehicle was deemed withdrawn because of "servicing" and the borrowed vehicle became a temporary substitute.[40]

However, even where the vehicle is actually withdrawn, if the reason is not one of those specified in the policy, there will be no coverage. For example, in *Lincombe v. State Farm Mutual Automobile Insurance Company*[41] the insured traded in his insured auto but could not get immediate delivery on his new automobile. The dealer lent the insured a car but it did not qualify as a temporary substitute.

In another situation, the buyer defaulted in car payments on a conditional sales contract and his insured auto was repossessed. A subsequently borrowed car did not qualify as a temporary substitute automobile.[42]

G. Summary

When an insured is involved in an accident and he is driving a different car than the one specified in his policy declarations, he is only going to get coverage under the "temporary substitute" or "non-owned" provisions of his policy. The coverage is broader under the substitute provision.[43] An attempt should always be made to qualify under that section first. In addition, some automobiles that would not qualify as "non-owned," because they are provided for the regular use of the named insured or any relative, will still qualify as temporary substitutes.

The only way to determine whether the automobile qualifies as a substitute is to analyze the policy definition clause by clause. There will be very few policies, if any, which use more language than that which has been analyzed in this paper.

The first item to question is who actually owns the borrowed car. If the insured has any *actual* ownership, the auto simply has no chance of qualifying as a temporary substitute. If the insured is not the owner, the next thing to check is whether the insured had permission to use

[40] Sanz v. Reserve Ins. Co., 172 So. 2d 912 (Fla. App. 1965).

[41] 166 So. 2d 920 (La. App. 1964).

[42] Travelers Indem. Co. v. American Casualty Co., 226 F. Supp. 354 (S.D. W. Va. 1964). In considering the cases that deny coverage under the temporary substitute automobile cases. the reader should not lose sight of the entire coverage picture. The standard automobile insurance policy ordinarily provides coverage for the named insured when he is driving a "non-owned" automobile. However, fewer additional insureds are covered under the "non-owned" provision than are covered under the "temporary substitute" provision. Therefore insureds often try to qualify under the latter definition. Moreover, there is no coverage under the "non-owned" provision when the non-owned vehicle is furnished for the regular use of the insured. *See* Moutry v. American Mut. Liab. Ins. Co., 35 Wis. 2d 652, 151 N.W.2d 630 (1967). If a temporary substitute auto meets all the other requirements which were previously set out, the fact that it is regularly used does not defeat coverage. What the overall picture really boils down to is that the insurance company is willing to provide coverage in these areas as long as the exposure is limited to one car per premium.

[43] Note 42 *supra.*

the substitute vehicle. Once such permission is established, it is important to find out (1) what was wrong with the insured car, (2) where it was at the time of the eventual accident, and (3) why it was not being used. Where the auto was fully disabled for a reason specified in the policy, the borrowed auto will qualify as a temporary substitute without question. Where the "disabled" auto was actually being used by someone at the time the insured had the accident in the borrowed car, it is going to be extremely difficult to qualify the borrowed vehicle as a temporary substitute. Where the "disabled" auto was capable of being used for some purpose, but it was not actually being driven when the insured had the accident in a borrowed car, the courts differ on the coverage question. Although it would seem that the courts should not provide "temporary substitute" coverage in this situation, but should, rather, look for coverage under the "non-owned" section of the policy, some courts have determined that limited withdrawal and limited disability is a sufficient basis for temporary substitute automobile status.

The last point to check is whether the insured car would have been used had it not been withdrawn. When the insured auto is only coincidentally being repaired, there is no temporary substitute coverage. As previously pointed out, the length of time the borrowed auto is used will not defeat coverage if all the other conditions are satisfied.

III. The Dual Problem of the "Named Insured"

The words "named insured" are strewn throughout the Standard Family Automobile Liability Policy.[44] In connection with the temporary substitute automobile those two words have caused considerable confusion. Conceivably there should be no problem because the words are defined in the policy: " 'named insured' means the individual named in item 1 of the declarations and also includes his spouse, if a resident of the same household;"[45] The ultimate root of the problem is that the policy definition of "named insured" applies in some instances and not in others.

Assuming that the substitute vehicle meets the policy definition for a temporary substitute automobile, it is important to determine who is insured under the policy. This determination is quite simple to make. By definition the "owned automobile" includes a temporary substitute automobile. Therefore once a vehicle qualifies as a temporary substitute, it becomes, for all purposes, the vehicle named in the declarations. Any further interpretation of the policy should proceed as if the temporary auto was actually the owned automobile.

In determining which persons are insured while driving a temporary substitute, we need only to look at the policy statement of "persons insured with respect to the owned automobile." That definition is set out

[44] *See* Risjord & Austin, note 2 *supra.*
[45] *Id.* at 185.

below.[46] The most striking part of that definition, of course, is the now famous omnibus clause.[47] That clause has been the source of much discussion which is not pertinent to the topic being analyzed here. It is important, however, to note that when the words "named insured" are used within the "persons insured" definition, the policy definition of "named insured" applies.

Therefore, once a vehicle is qualified as a temporary substitute automobile, the analysis of the terms "persons insured" and "named insured" proceeds exactly as if the automobile named in the declarations was being driven instead of a borrowed car. The substitute car really *becomes* the owned-automobile.

However, in attempting to qualify a vehicle as a temporary substitute automobile, the words "named insured" appear again. " 'Temporary Substitute Automobile' means any automobile or trailer, not owned by the named insured. . . ."[48]

In this context, "named insured" is interpreted to be the insured named in the declarations. The policy definition of "named insured" does not apply here.

The end result of this construction is that an automobile owned by a specified insured's spouse can be a temporary substitute automobile for the other marriage partner. In *Caldwell v. Hartford Accident and Indemnity Company*[49] the insured's wife owned an automobile in her own name. The insured's car had a flat tire and he borrowed his wife's car. That car qualified as a temporary substitute. The court held that a wife's car is not owned by the named insured even though the policy definition of named insured includes the wife.[50]

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[46] The definition of "persons insured with respect to the owned automobile" is found in RISJORD & AUSTIN, note 2 *supra* at 184:
"Persons Insured
The following are insureds under Part 1:
(a) With respect to the owned automobile, 1() the named insured and any resident of the same household,
(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above. . . ."
Under WIS. STAT. § 204.30 (3) (1965), section (a) (2) of the "Persons Insured" definition is amended to read:
"(2) any other person using such automobile with the permission of the named insured or an adult member of his household other than a chauffeur or domestic servant, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and. . . ."

[47] *See* note 46 *supra* WIS. STAT. § 204.30 (3) (a) (2) (1965). An extended analysis of the omnibus clause can be found in Annot, 4 A.L.R.3rd 10 (1965).

[48] RISJORD & AUSTIN, note 2 *supra.*

[49] 248 Miss. 767, 160 So. 2d 209 (1964).

[50] *Accord,* where the substituted car was owned solely by the wife, Baxley v State Farm Mut. Auto. Liab. Ins. Co., 241 S.C. 332, 128 S.E.2d 165 (1962).

Cases that appear to b on all fours with *Caldwell,* but which have opposing results, can be factually distinguished on the basis of actual ownership.

The insured in *Farmers Insurance Exchange v. Wendler*[51] borrowed his wife's car as a substitute when his was disabled. The policy in that case defined "named insured" as including the wife. The title to the borrowed car was in the wife's name but the Idaho Supreme Court held that the borrowed car was owned by the named insured. However, it is important to remember that Idaho is a community property state. Because the car was purchased with community funds, the husband was considered the *actual* owner of the car along with the wife.

In *Casano v. Cook*[52] the insured bought a second car for his wife. The car was registered in both names but the wife took out a separate insurance policy for "her'" car. When the husband borrowed her car (his was disabled), it was held not to be a temporary substitute automobile because the second car was registered in his name and he was a part *actual* owner.

Therefore, in analyzing a "named insured" problem under a temporary substitute automobile situation, there is really a two-step process. First, see if the substituted automobile was actually owned in whole or in part by the insured named in the declarations. If it was, the auto will not qualify as a temporary substitute. Second, if the auto was not so owned, see if the driver qualifies as a "named insured" as the term is defined in the policy.[53] Any further problems that arise with the "named insured" provision relate to that definition and are beyond the scope of this paper. However, it is important to remember that from this point on, the substitute automobile has become an "owned automobile" for all policy interpretation purposes.

IV. The Nature and Extent of the Insurance Coverage

If a vehicle qualifies as a temporary substitute automobile, the coverage is specifically declared in the policy to be excess coverage.[54] Therefore when other insurance primarily covers the insured, the insurance covering the vehicle as a temporary substitute would apply on top of the other primary insurance.

For example, a student is working as a delivery boy for a flower

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[51] 368 P.2d 933 (Idaho 1962).

[52] 157 So. 2d 616 (La. App. 1963).

[53] In analyzing a "named insured" definition in an insurance policy, the reader can expect to encounter difficulties in determining when a person is a resident and what constitutes a household. Moreover "named insured" problems go hand-in-hand with scope of permission inquiries under the omnibus clause. It may be some help to consult Gouldin, *Who is the Insured?,* 31 N.Y. Bar Bull. 365 (1965).

[54] *See* Risjord & Austin, note 2 *supra* at 191 and 194-199. The insurance coverage under Part I—Liability, Part II—Expenses for Medical Services, and Part III—Physical Damage is stated as follows: ". . . the insurance with respect to

shop. Prior to leaving on a particularly rush delivery, he discovers that the delivery truck has a flat tire. The owner of the flower shop requests the student to use his own car for the particular delivery, and the student is involved in an accident. A judgment is subsequently entered against the student and the flower shop in excess of the student's $10,000 limits. In such a situation, the student's insurance is primary and it is applied up to the $10,000 limit. Thereafter, and up to its limits, the insurance on the flower shop delivery van comes into focus because the student's car was a temporary substitute[55] for the delivery van.

Until very recently, there was a question whether the owner of the substitute vehicle could be covered as an additional insured under the substitution provision of another's policy. This was the exact situation set out in the hypothetical above. The student was the actual owner of the substitute vehicle, but the vehicle qualified as a temporary substitute under the flower shop's insurance policy. In *Lumbermen's Mutual Casualty Company*[56] the defending insurance company claimed there was no coverage under that type of fact situation. There a father's car was insured, but it was broken down and withdrawn from all use. The father asked his son to run an errand in the son's car. A collision followed and the son claimed excess coverage under his father's insurance policy. The Court of Appeals decided in the son's favor.

An incredible variety of fact situations can develop when two or more insurance policies cover an automobile involved in a collision. Every policy has some type of "other insurance" clause wherein they try to limit their primary and excess coverage. Some recent articles do a particularly thorough job of analyzing these various problems.[57] The difficult problems arise when two or more companies have excess exposure and each of them declares that their insurance only applies after "all other valid and collectible insurance." Further discussion of this topic goes beyond the scope of this paper, but the cited articles will provide a thorough briefing of the problems involved.

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a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance."

[55] Recall the analysis set for at the end of part one of this article which will determine whether the borrowed vehicle qualifies as a temporary substitute. The vehicle is not owned by the 'name insured" (specified insured) because the flower shop's insurance policy is involved. The student is the actual owner of the vehicle in question. The flower shop had the permission of the vehicle's owner to use the vehicle. The specified evhicle was actually withdrawn for a reason specified in the policy, and the specified vehicle would have been used for the delivery in question except for the breakdown. The substitution was only temporary.

[56] 367 F.2d 250 (4th Cir. 1966).

[57] *See* Nole, *Concurrent Coverage in Automobile Liability Insurance,* 65 Colo. L. Rev. 319 (1965), and Snow, *Other Insurance Clauses—Multiple Coverage,* 40 Denver L. J. 259 (1963). *See also* Lencombe v. State Farm Mut. Auto. Ins. Co., 166 So. 2d 920 (La. App. 1964).