

the cash value. *Newton v. Theresa V. M. F. Ins. Co.* 125 W 289, 104 NW 107.

Sec. 1943a, Stats. 1898, applies only to cases in which the insurer attempts by stipulation in the policy or with the policy without consent of the insured and without reduction of premium to limit its liability thereon below the amount or face of the policy, upon which or for which the insured has paid full premium and where the value of the goods destroyed is within the amount of such insurance carried on the property. This does not conflict with the standard policy law nor prohibit permission for additional insurance nor restriction of the amount of such additional insurance nor waiver of the invalidity of the additional insurance in whole or in part. A rider on the policy stated to be at the option of the insured and in consideration of a reduced rate of premium which gave permission for insurance up to 75% of the cash value of the policy, and providing that if the total insurance exceeded 75% the policy should be paid only in the proportion of such excess to the total insurance, held to be valid. *Bloch v. American Ins. Co.* 132 W 150, 112 NW 45.

An insurance contract under which the amount of coverage and the premium varies according to monthly inventory reports by the insured does not violate 203.22, Stats. 1953. *Albert v. Home Fire & Marine Ins. Co.* 275 W 280, 81 NW (2d) 549.

Where an insured did not receive the benefit of a monthly reporting form of fire insurance policy because of the insurance company's method of handling the reporting form by indorsing the policy each month and reducing what would be a provisional limit to a maximum limit of the amount of insurance for one month, such procedure violated 203.22, providing that no insurance company shall issue any fire policy containing any provision limiting the amount to be paid in case of loss below the actual cash value of the property if within the amount for which the premium is paid. *Ben-Hur Mfg. Co. v. Firemen's Ins. Co. of N. J.* 18 W (2d) 259, 118 NW (2d) 159.

A coinsurance clause in a policy is valid if consented to by the insured. 1904 Atty. Gen. 145.

A "three-fourths value limitation clause" on fire insurance policies is not prohibited by this section. 2 Atty. Gen. 435.

This section and 201.20, Stats. 1931, are independent of each other, 201.20 providing for carrying of a portion of the risk by the insured and this section for sharing of loss, and are not in conflict. 20 Atty. Gen. 605.

**203.24 History:** 1913 c. 316; Stats. 1913 s. 1943m; 1915 c. 29; 1919 c. 425 s. 15, 16; 1923 c. 291 s. 3; Stats. 1923 s. 203.24; 1933 c. 236 s. 2; 1933 c. 487 s. 102; 1933 c. 489 s. 9; 1937 c. 235; 1961 c. 562; 1969 c. 337 ss. 50, 88.

In pursuing the business of adjuster of losses when employed by an insurance company, a layman may investigate the facts of any loss, either himself or through his employes, may obtain written statements and photographs, and may appraise a loss or damages; and if authorized by his employer he may obtain reports or estimates of damage to property or the extent of personal injuries from

experts, and he may report all facts so obtained to his employer, and may comment on the facts found; but he may not advise his employer as to its liability or render advice as to legal rights to a claimant without thereby engaging in the "practice of law." *State ex rel. Junior Asso. of Milwaukee Bar v. Rice.* 236 W 38, 294 NW 550.

Sec. 1943m (9), Stats. 1913, does not prohibit a fixed fee of more than 5% to be paid to an insurance adjuster. The provisions apply only to a contingent fee. 4 Atty. Gen. 247.

**203.28 History:** 1933 c. 487 s. 103; Stats. 1933 s. 203.28; 1951 c. 573.

**203.29 History:** 1933 c. 487 s. 104; Stats. 1933 s. 203.29.

**203.30 History:** 1933 c. 487 s. 105; Stats. 1933 s. 203.30.

**203.31 History:** 1933 c. 487 s. 106; Stats. 1933 s. 203.31.

#### CHAPTER 204.

##### Insurance—Surety, Credit, Casualty.

**204.01 History:** 1933 c. 487 s. 131; Stats. 1933 s. 204.01.

**Revisor's Note, 1933:** Chapter 655, Laws 1919, created 14 sections numbered 1966—33a to 1966—33n, which dealt with fidelity insurance. At that time there were in existence statutory provisions created by chapter 277, Laws 1897, and covering this same subject, which provisions had been revised and made 1966—33 to 1966—39, Stats. 1898. See Revisers' note to 1966—25, Stats. 1898. The 14 sections created in 1919 were forced in between 1966—33 and 1966—34. Nothing was done to reconcile or harmonize the conflicting provisions in these 2 enactments. Although there was no express repeal, there certainly was some implied repeal; so far as there is conflict the act of 1919 is the law. There is conflict between 204.01 and 204.02; 204.09 and 204.19; 204.07 and 204.16; 204.11 and 204.18 and 204.20. Furthermore, the provisions of chapter 204 are not logically arranged and contain many repetitions of provisions elsewhere found in the statutes. These facts necessitate a thorough rearrangement, revision and renumbering of the provisions of the chapter. Section 204.01 is chiefly from the last sentence of old 204.02; 204.02 (1) is from 204.07 (1); (2) is from 204.14, created by ch. 655, Laws 1919 (1966—33m), which was approved on July 25, 1919; (3) is from (2) and (3) of 204.07; (4) is from 204.16; 204.03 and 204.04 are from 204.16. Subsection (4) of 204.07 deals with revocation of licenses and court reviews. Provisions for revocation of licenses are contained in 200.04, 200.14 and 201.40 (new 201.34). Rehearings and court review of the orders of the commission are covered by 200.11. [Bill 50-S s. 131]

**204.02 History:** 1933 c. 487 s. 131; Stats. 1933 s. 204.02.

An undertaking for costs on appeal executed by a surety company must have an attached certificate of the commissioner of insurance in order to make the appeal effective; but where no such certificate was attached,

leave was granted on payment of motion costs, to perfect the undertaking by attaching the same thereto. Johnston v. Northwestern L. S. Ins. Co. 107 W 337, 83 NW 641.

**204.03 History:** 1933 c. 487 s. 131; Stats. 1933 s. 204.03.

**204.04 History:** 1933 c. 487 s. 131; Stats. 1933 s. 204.04; 1961 c. 562; 1969 c. 337 s. 88.

**204.041 History:** 1933 c. 487 s. 132a; Stats. 1933 s. 204.041.

See note to 201.11, citing 30 Atty. Gen. 65.

**204.05 History:** 1919 c. 655 s. 1; Stats. 1919 s. 1966—33d; 1923 c. 291 s. 3; Stats. 1923 s. 204.05; 1933 c. 487 s. 133.

**Revisor's Note, 1933:** The duty of the commissioner upon service of process is covered by new 201.43. His appointment as attorney to admit service of process and summons and his duty are covered by 201.38, renumbered 201.32. See 204.06. [Bill 50-S, s. 133]

**204.06 History:** 1919 c. 655 s. 1; Stats. 1966—33e; 1923 c. 291 s. 3; Stats. 1923 s. 204.06; 1933 c. 487 s. 134; 1947 c. 100; 1969 c. 337 s. 88.

**204.07 History:** 1897 c. 277; Stats. 1898 s. 1966—33; 1923 c. 291 s. 3; Stats. 1923 s. 204.01; 1933 c. 487 s. 135; Stats. 1933 s. 204.07; 1969 c. 255.

**204.075 History:** 1957 c. 254; Stats. 1957 s. 204.075.

**204.08 History:** 1919 c. 655 s. 1; Stats. 1919 s. 1966—33a; 1923 c. 291 s. 3; Stats. 1923 s. 204.02; 1933 c. 487 s. 136; Stats. 1933 s. 204.08; 1935 c. 203.

**Revisor's Note, 1933:** The law is not changed. The attempt to enumerate all the kinds of documents which financial institutions may handle is sure to fail and if it were successful new kinds of documents would come into use or new names would be used, thus making the statute incomplete or somewhat obsolete. Reinsurance is authorized by 204.10. The definition of terms is transferred to new 204.01. [Bill 50-S, s. 136]

The rule of strict construction against the insurer cannot be invoked to modify the terms of the policy. A provision in an indemnity policy that the insurer shall not be liable "for loss sustained during the term of the policy and not discovered within 18 months after the occurrence of loss" relates wholly to liability, and not to the time in which liability may be enforced. City Bank of Portage v. Bankers L. M. C. Co. 206 W 1, 238 NW 819.

Where an employee embezzles funds of his employer during the term of one surety bond and later replaces the same by further misappropriations during the term of a subsequent bond, liability for loss rests on sureties on the bond during the term of which the first misappropriation occurred. 28 Atty. Gen. 100.

**204.09 History:** 1919 c. 655 s. 1; Stats. 1919 s. 1966—33h; 1923 c. 291 s. 3; Stats. 1923 s. 204.09; 1933 c. 487 s. 137.

**204.10 History:** 1919 c. 655 s. 1; Stats. 1919 s. 1966—33i; 1923 c. 291 s. 3; Stats. 1923 s. 204.10; 1933 c. 487 s. 138.

**204.11 History:** 1897 c. 277; Stats. 1898 s. 1966—38; 1903 c. 436; 1905 c. 205; Supl. 1906 s. 1966—38; 1911 c. 329; 1913 c. 760 s. 6; 1919 c. 655 s. 1; Stats. 1919 s. 1966—33j, 1966—38; 1923 c. 60; 1923 c. 291 s. 3; Stats. 1923 s. 204.11, 204.20; 1927 c. 364; 1933 c. 487 s. 139, 140; Stats. 1933 s. 204.11; 1935 c. 275.

See note to 271.04, citing Skelly Oil Co. v. Peterson, 257 W 300, 43 NW (2d) 449.

See note to 271.04, citing Confidential Loan & Mortgage Co. v. Hargrove, 259 W 346, 48 NW (2d) 466.

See note to 251.23, citing Giemza v. Allied Am. Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

**204.12 History:** 1919 c. 655 s. 1; Stats. 1919 s. 1966—33k; 1923 c. 291 s. 3; Stats. 1923 s. 204.12; 1933 c. 487 s. 141; 1951 c. 33.

**204.14 History:** 1897 c. 277; Stats. 1898 s. 1966—39; 1923 c. 291 s. 3; Stats. 1923 s. 204.21; 1933 c. 487 s. 144; Stats. 1933 s. 204.14.

**204.22 History:** 1897 c. 277; Stats. 1898 s. 1966—40; 1923 c. 291 s. 3; Stats. 1923 s. 204.22; 1933 c. 487 s. 149.

**Revisor's Note, 1933:** "Capital stock" evidently means the capital or property or assets of the company; see section 16, chapter 277, Laws 1897. Insurance of wages is not mentioned in 201.04. [Bill 50-S, s. 149]

**204.23 History:** 1897 c. 277; Stats. 1898 s. 1966—42; 1923 c. 291 s. 3; Stats. 1923 s. 204.23; 1933 c. 487 s. 150.

**204.24 History:** 1897 c. 277; Stats. 1898 s. 1966—44; 1923 c. 291 s. 3; Stats. 1923 s. 204.24; 1933 c. 487 s. 151.

**Revisor's Note, 1933:** "Any such" in line 1 means and includes all the kinds of insurance mentioned in (4) to (11), (13) and (15), 201.04. See 1966—25 to 1966—44, Stats. 1898. See section 19, chapter 277, Laws 1897. Dividends can only be paid out of profits, 182.19. Surety companies are required to maintain a surplus of \$125,000 by 204.04 and other insurance stock corporations of 25 per cent of the capital by 201.11 (2). This section seems practically worthless in view of other provisions which control corporations, and which were enacted later. Section 204.24 (1966—44) was created by chapter 277, Laws 1897, and never expressly amended. 204.04 was created by chapter 655, Laws 1919, and 201.11 was created by chapter 460, Laws 1909, and amended in 1911, 1915 and 1917. [Bill 50-S, s. 151]

**204.25 History:** 1897 c. 277; Stats. 1898 s. 1966—45; 1923 c. 291 s. 3; Stats. 1923 s. 204.25; 1933 c. 487 s. 152.

**Revisor's Note, 1933:** The "preceding section" speaks for itself and the reference is mistaken. It originated in section 2, chapter 166, Laws 1899, and there referred to section 1 of that act which section became 1906a, Supl. of 1906, and was repealed in 1913. Increase of authorized capital is provided for by 180.07, 180.10, 201.02, 201.28, 201.29. This provision for increase of capital is a duplicate of 201.29, created by chapter 166, Laws 1899, and never amended, and superseded 204.25, created by chapter 277, Laws 1897. At any rate, 201.29 is

the most complete as to procedure, and is sufficient. [Bill 50-S, s. 152]

**204.28 History:** 1917 c. 160; Stats. 1917 s. 1966—47a; 1923 c. 291 s. 3; Stats. 1923 s. 204.28; 1933 c. 487 s. 155; 1937 c. 219; 1969 c. 337.

**204.29 History:** 1901 c. 235 s. 1, 2; Supl. 1906 s. 1966—49a; 1923 c. 291 s. 3; Stats. 1923 s. 204.29; 1933 c. 487 s. 156; 1951 c. 614.

**Revisor's Note, 1933:** Section 204.29 extends to liability insurance. Corwin v. Salter, 194 W 333, 216 NW 653. It does not apply to policies issued under 204.31 which is a later enactment. In fact, a careful reading of 204.29 will lead to the conclusion that it was intended to cover only accident policies and was superseded by 204.31. [Bill 50-S, s. 156]

Ch. 235, Laws 1901, does not refer to a death claim made by a beneficiary, but to a claim which the assured is himself enforcing. Cady v. Fidelity & C. Co. 134 W 322, 113 NW 967.

A provision in an automobile liability policy requiring notice of an accident to be given to the insurer within 5 days is void. Corwin v. Salter, 194 W 333, 216 NW 653.

Where the insured was prevented from giving the required notice by wrongful acts of the insurer's agents, the insurer could not defeat recovery on the ground the required notice was not given. Witt v. Employers' L. A. Corp. 198 W 561, 225 NW 174.

Where the indemnity policy requires the insured to give written notice as soon as practicable after an accident, he is not required to give notice within 20 days after the accident, because of the statutory provision. But after the expiration of that 20-day period the insured is required to give the notice as soon as practicable and failure to give the notice raises the presumption that the insurer was prejudiced by such failure. Parrish v. Phillips, 229 W 439, 282 NW 551.

Under an automobile liability policy providing that notice of an accident shall be "given" as soon as practicable, but carrying on the face of the policy in large letters a direction to "send" all notices of accident to the insurer's Madison address without prescribing the manner of sending, and in view of the rule that provisions which tend to limit the liability of the insurer or which are ambiguous should be construed most strongly against the insurer, and in view of 204.29 (3), it is not necessary that the notice actually be received by the insurer, but it is sufficient if the notice is sent as directed on the face of the policy, in the ordinary mail and within the time limited by the policy or the statute. Heimbecher v. Johnson, 258 W 200, 45 NW (2d) 610.

The requirement of notice "as soon as practicable" in an automobile liability policy is modified by 204.34 (3) and 204.29 (1), Stats. 1963, the first prescribing the limitation in a policy of the giving of notice of an accident to a period less than that prescribed in the second section, which sets the limitation of 20 days. Since the statutory provisions put a limit of 20 days upon the contract terms, the standard "as soon as practicable" becomes effective and applies from the insured's viewpoint after the expiration of 20 days after the accident although practicable. Allen v. Ross, 38 W (2d) 209, 156 NW (2d) 434.

**204.295 History:** 1963 c. 176; Stats. 1963 s. 204.295.

**204.30 History:** 1925 c. 341; 1925 c. 372 s. 2; Stats. 1925 s. 85.25, 204.30; 1929 c. 454 s. 2; 1929 c. 467; Stats. 1929 s. 86.93, 204.30; 1933 c. 487 s. 157; 1943 c. 275 s. 52; 1955 c. 349; 1957 c. 260 s. 18; 1957 c. 672; Stats. 1957 s. 204.30; 1965 c. 486, 568, 598; 1967 c. 14, 174, 176, 292, 337; 1969 c. 114, 178, 312.

**Legislative Council Note, 1969:** Sub. (3) presently exempts "garagemen" from the requirements of the "omnibus clause," which generally requires the owner's liability policy to follow the car and its drivers. This amendment removes the "garagemen's" complete exemption and substitutes language which insures that an injured party has recourse to at least minimum statutory insurance coverage. Under this amendment, policies issued to "garagemen" must provide at least secondary coverage if no other insurance coverage is available when the car is driven by a person other than a garageman or his employee. Where a policy is issued to anyone other than a "garageman," it may provide that when the automobile is operated by a garageman, the policy affords minimum secondary coverage when no other insurance coverage is available. Removal of the "garagemen's" exemption was suggested in Ruby v. Ohio Casualty Ins. Co. (1967), 37 Wis. 2d 352. [Bill 35-A]

**Editor's Note:** The following decisions had to do with legal problems related to the garageman exclusion provisions of the statutes in effect prior to the amendatory legislation of 1969: Paine v. Finkler Motor Car Co. 220 W 9, 264 NW 477; Ederer v. Milwaukee Auto. Ins. Co. 220 W 635, 265 NW 694; Tolsma v. Miller, 243 W 19, 9 NW (2d) 111; Culver v. Webb, 244 W 478, 12 NW (2d) 731; Universal Underwriters v. Rogan, 6 W (2d) 623, 95 NW (2d) 921; Bendykowski v. Hall Chevrolet Co. 10 W (2d) 579, 103 NW (2d) 516; Lubow v. Morrissey, 13 W (2d) 114, 108 NW (2d) 156; and Albers v. Shapiro, 22 W (2d) 144, 125 NW (2d) 321.

1. Insolvency of insured.
2. Notice to agent.
3. Extended indemnity.
  - a. General.
  - b. Permission.
  - c. Employe exclusions.
  - d. Other exclusions.
4. Liability of insurer.

#### 1. Insolvency of Insured.

The provisions of 204.30, Stats. 1925, about insolvency are not in conflict with 85.25 and do not work an implied repeal of that section. It was passed to meet an unusual situation, and does not apply to cases where the insurer is a party to the negligence action. Ducommun v. Strong, 193 W 179, 212 NW 289.

Plaintiff, injured through the insured's negligent operation of an automobile, having recovered judgment on which execution had been returned unsatisfied after the insured's bankruptcy, could maintain an action directly against the insurer. Stone v. Inter-State Exchange, 200 W 585, 229 NW 25.

#### 2. Notice to Agent.

On notice of injury see notes to 204.29.

*3. Extended Indemnity.*

a. General.

In view of 204.30 (3) it was error to permit the plaintiff to show or insinuate that a greater premium than necessary was paid for the policy in order to protect the car owner for injuries while others were driving the car. Christiansen v. Aetna C. & S. Co. 204 W 323, 236 NW 109.

While the extended insurance clause excludes the insured from recovery for the death of a minor son killed by the wrongful act of another minor son while driving the automobile, still the wife of the insured was entitled to recover from the insurer one-half the sum allowed as pecuniary loss resulting from the death of the child and one-half of the compensation allowed, for loss of society and companionship. Munsert v. Farmers Mut. Automobile Ins. Co. 229 W 581, 281 NW 671.

The wrongful taking possession of personal property either by force or fraud generally amounts to a conversion. Under an automobile liability policy issued to a company engaged in the business of a public automobile garage and sales agency, extending coverage to any "customer" of the company against liability for injury to third persons, an unknown person who obtained a car from the company by false pretenses and who while making off with the car collided with another car, then immediately disappeared and could not be found, was not a "customer" of the company, and hence the insurer was not subject to liability under the policy for injuries sustained by the driver of the other car in the collision. Potts v. Farmers M. A. Ins. Co. 233 W 313, 289 NW 606.

With respect to personal injury sustained by him, an unemancipated minor may not bring an action against his parent's automobile insurer grounded on the parent's negligence, since the fact that the parent is insured does not give rise to a cause of action based on the parent's negligence where no cause of action exists against the parent if not insured. Lasecki v. Kabara, 235 W 645, 294 NW 33.

Where a garage policy assumed to insure the named insured against liability arising out of the operation of any of his cars for pleasure, the policy, to the extent of such obligation, was in the nature of a privately owned car policy, required by operation of 204.30 (3), to furnish omnibus coverage, so that a person involved in a collision, while permissively driving a car of the named insured on a trip unrelated to the garage business, was entitled to the coverage of the policy as an additional insured. Culver v. Webb, 244 W 478, 12 NW (2d) 731.

Except as otherwise permitted by 204.30 (3), the extension of the insurer's obligation for indemnity to a person driving the automobile with the permission of the named insured must be as great as the insurer's obligation for indemnity to the named insured. A provision in an automobile liability policy, that "the insurance with respect to any person other than the named insured does not apply to injury to or death of any person who is a named insured," is void as in violation of 204.30 (3),

and, specifically, is inoperative to relieve the insurer of obligation for indemnity to a person driving the automobile with the permission of the named insured and operating the automobile in such negligent manner as to result in injury to the named insured, riding therein. Schenke v. State Farm Mut. Auto. Ins. Co. 246 W 301, 16 NW (2d) 817.

A general exclusion clause in an automobile liability policy, which is a part of the general coverage provisions and provides that the policy does not apply to bodily injury to or death of any person who is a named insured, is not discriminatory as giving to an additional insured less protection than that given to the named insured, and is not void as repugnant to the omnibus coverage clause required by 204.30 (3); and under such general exclusion clause a named insured, who was riding in his own automobile driven by another with his permission, cannot recover against his insurance company for the negligence of his permittee. (Schenke v. State Farm Mut. Auto. Ins. Co. 246 W 301, distinguished.) Frye v. Theige, 253 W 596, 34 NW (2d) 793.

Under an automobile policy providing for a continuation of the coverage thereunder in case of the death of the named insured, for a period of not more than 60 days after the death, if notice of the death was given to the insurer within 60 days after the death, the insurer was not subject to liability as to a collision which occurred 94 days after the death of the named insured and without such notice having been given to the insurer, in the absence of conduct by the insurer creating an estoppel against asserting such defense of nonliability or amounting to a waiver of such defense. Whirry v. State Farm Mut. Auto. Ins. Co. 263 W 322, 57 NW (2d) 330.

A provision in an automobile liability policy that the insured will reimburse the insurer for any loss suffered by the insurer arising out of the negligent operation of the car by a person under the age of 25 years, as applied to the operation of the car by a member of the insured's household under 25 but of an age authorized by law to drive a car, is void as violating 204.34 (1), providing that no such policy shall exclude from its coverage persons driving a motor vehicle who are of an age authorized by law so to do, and 204.30 (3), prescribing the extended coverage which such a policy shall provide. Olander v. Klaprote, 263 W 463, 57 NW (2d) 734.

A provision in the omnibus coverage clause, providing that the insurance with respect to any person "other than the named insured" does not apply to any employee with respect to injury to another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer, is void as being repugnant to 204.30 (3) in providing for an exception applicable solely to an additional insured, whereas 204.30 (3) requires that an omnibus coverage clause afford coverage to an additional insured to the same extent as is afforded to the named insured. (Schneider v. Depies, 266 W 43, distinguished.) Shanahan v. Midland Coach Lines, 268 W 233, 67 NW (2d) 297.

A provision in a policy that the coverage should comply with the Financial Responsibility Law did not enlarge the liability in a case where the insured was not required to comply with that law, which applies after an accident. *Havlik v. Bittner*, 272 W 71, 74 NW (2d) 798.

"The intention of the legislature, in requiring automobile liability policies to contain the omnibus coverage provision, was to promote the interests of the public as well as the additional parties to the contract. \* \* \* \* Promotion of the interests of the public is the protection of third parties to whom the insurer was not previously liable when the car was driven by someone other than the insured, unless the driver was within the rule of agency to the insured. Since the enactment of the statute requiring 'omnibus' coverage the benefits of an automobile liability insurance policy are extended directly to third parties when the negligence and resulting liability of the driver are established." *Schaal v. Great Lake Mut. F. & M. Ins. Co.* 6 W (2d) 350, 354, 94 NW (2d) 646, 648.

An accident arose out of the "use" of a motor sweeper, even though the county employee-operator stopped it in an intersection while he signalled another driver to proceed, and 2 cars collided. *Kanios v. Frederick*, 10 W (2d) 358, 103 NW (2d) 114.

The provision in 204.30 (3), that the indemnity provided by an automobile liability policy shall extend also to any person "legally responsible for the operation of such automobile," includes the liability imposed by 343.15 (2) on a person who sponsors an application for a minor's driving license. *Groth v. Farmers Mut. Auto. Ins. Co.* 21 W (2d) 655, 124 NW (2d) 606.

The omnibus insurance protection required by 204.30 (3) follows the vehicle insured, while the extended or additional insurance afforded by the family coverage of the use of nonowned automobiles, permitted but not required by statute, follows the driver insured. *Foryan v. Firemen's Fund Ins. Co.* 27 W (2d) 133, 133 NW (2d) 724.

204.30 (3) applies to a comprehensive liability policy as well as to one insuring only motor vehicles; if the vehicle is covered it is a "vehicle described" even though not specifically described; 204.30 (3) is not limited to accidents occurring on a public highway. *Nelson v. Ohio Cas. Ins. Co.* 29 W (2d) 315, 139 NW (2d) 33.

The word "operating" in 204.30 (3), Stats. 1965, must be construed with the "use" of the automobile for the purposes described in the insurance policy and for which permission is granted by the named insured; thus "operating" in connection with loading and unloading coverage means participating in the loading and unloading activity. *Lukaszewicz v. Concrete Research, Inc.* 43 W (2d) 335, 168 NW (2d) 581.

Where the coverage of an insurance policy was in excess of that required by 204.30 (5), the principle that coverages omitted from an insurance contract may be compelled and enforced as though a part thereof, if the inclusion of such coverage was required by a properly enacted statute, was inapplicable. Amid-

*zich v. Charter Oak Fire Ins. Co.* 44 W (2d) 45, 170 NW (2d) 813.

See note to 893.19, on any other contract, citing *Sahloff v. Western Cas. & Surety Co.* 45 W (2d) 60, 171 NW (2d) 914.

Neither an indorsement on a garage liability policy, nor statutes relating to operation of an automobile by consent of the insured, which in effect added an omnibus clause, could extend the policy coverage to automobiles not therein included. *Hardware Mut. Cas. Co. v. Wendlinger*, 146 F (2d) 984.

The omnibus coverage provision applies to accidents occurring on private property as well as to those on public streets or highways. Such clause provides neither more nor less insurance coverage than that extended to the named insured as a general rule. *Travelers Ins. Co. v. American Fidelity & Cas. Co.* 164 F Supp. 393.

A transporter's driver was injured by the negligence of a consignee's employee while unloading freight delivered to the consignee. The unloading was construed to be a "use" of the vehicle in contemplation of the applicable insurance coverage. The driver's judgment for damages against the consignee and its employee was paid by the consignee's comprehensive liability insurer, which was entitled to recover the amount paid from transporter's auto liability insurer since the omnibus coverage clause makes the consignee and its employee additional insured and the latter insurer was not entitled in turn to recover from the consignee or its employee. *Travelers Ins. Co. v. American Fidelity & Cas. Co.* 164 F Supp. 393.

An indorsement on an automobile insurance policy for liability and property damage to the effect that it is "named driver policy," thereby limiting protection to cases when a car is being driven by a person named in the policy and excluding protection when it is driven by some person other than one named in the policy, is in violation of 204.30 (3). 19 Atty. Gen. 309.

#### b. Permission.

The law imputes to an automobile liability policy the provision extending coverage to others than the named insured. The words of such provision limiting coverage to the insured or persons operating the automobile with "permission of the named assured" are construed as intended to cover persons using the insured automobile with the insured's consent in the first instance, regardless of use thereafter. The coverage afforded by the statute and the equivalent policy provision, existing only when the use is for purposes described in the policy, is not greater when the automobile is used with the insured's permission than when used by the insured himself. *Drewek v. Milwaukee A. Ins. Co.* 207 W 445, 240 NW 881.

In actions arising out of a collision of automobiles, one of which, covered by a liability policy, was being driven at the time of the accident by a friend of a son of the insured owner, evidence that to the knowledge of the insured her son and his friend had at times exchanged places as driver of the car, that on 2 other occasions the insured had given ex-

press permission to the friend to drive the car, and that on the night of the accident the insured had returned home early so that her son and his friend could use the car and had cautioned them to be careful, supports the jury's finding that the car was being driven by the friend with the permission of the insured, so as to render the insurer liable on the policy. *Bushman v. Tomek*, 222 W 562, 269 NW 289.

In order to render an insurer liable under an automobile liability policy containing an omnibus clause covering anyone using the automobile with the permission of the insured or an adult member of his household, express permission need not be proved; it is sufficient if the facts adduced reasonably tend to show that the automobile was being used with the implied permission of the insured; but in order to support an inference that one has the implied permission to use an automobile belonging to another for his own pleasure and purposes, there must be evidence tending to show a course of conduct or practice known to the owner and acquiesced in by him, or by someone having authority to give permission. Evidence that the insured's chauffeur, who was also a handy man at the insured's summer home and who had charge of the insured's several automobiles and in the performance of his duties made frequent trips to a near-by village for oil, gasoline, groceries, and supplies, was often seen in the village in the evening driving one of the insured's automobiles, and was several times late at night seen in a tavern and on such occasions was driving one of the insured's automobiles, standing alone and in the absence of proof of other circumstances tending to show knowledge on the part of the insured that the chauffeur was using the automobiles for his own pleasure and purposes, was insufficient to support a finding that the chauffeur was using the insured's automobile with the implied permission of the insured at the time of the collision, which occurred between one and 2 o'clock in the morning while the chauffeur was out on a trip of his own. *Brochu v. Taylor*, 223 W 90, 269 NW 711.

A driver to whom an automobile had been intrusted by one who had permission to use it directly from the assured is not an "additional assured" under the omnibus coverage clause of an automobile liability policy. *Locke v. General A. F. & L. Assur. Corp.* 227 W 489, 279 NW 55.

A policy provision that "insured" includes "not only the named insured but also any person while using the automobile" provided "the actual use is with the permission of the named insured" is broader than that required by 204.30 (3). The named insured (father) knew that his son was using the car and that a classmate often drove. Under these circumstances there was a consent to the use and an implied consent to the operation by the classmate. *Schimke v. Mutual Auto. Ins. Co.* 266 W 517, 64 NW (2d) 195.

Where the insured owner allowed her son to drive on a trip, but specifically stated only he was to do so, the car was not being "used" with her permission when driven by another boy at the time of the accident. The omnibus coverage did not extend to the driver. *Prisuda v. General Cas. Co.* 272 W 41, 74 NW (2d) 777.

One who was driving an automobile with the actual permission of the owner and named insured, was driving with the "permission" of the named insured within the meaning of that word as used in the omnibus coverage clause of the named insured's automobile liability policy, so as to be covered under the policy as an additional insured, although his driver's license had been revoked at the time of the accident and he was, therefore, driving in violation of law and could not have been legally granted permission to drive. (*Quin v. Hoffmann*, 265 W 636, overruled.) *Pavelski v. Roginski*, 1 W (2d) 345, 84 NW (2d) 84.

The term "household," according to common and approved usage, means those who dwell under the same roof and compose a family. *Lontkowski v. Ignarski*, 6 W (2d) 561, 95 NW (2d) 230.

An employe was not driving a truck with his employer's permission at the time of an accident, where the employer had restricted operation of the truck to a particular use, and the accident occurred while the employe was on a personal errand at a place outside his designated limits. *Boehringer v. Continental Cas. Co.* 7 W (2d) 201, 96 NW (2d) 353.

The owner of a car has a right to grant a restricted use thereof to another, and permission may be restricted as to location or purpose. A person granting permission for the use of his car to another need not expressly state all the limitations thereon and, in the absence of express permission, the scope of the permission must be determined by the circumstances. Under the initial-permission rule as applied in Wisconsin, the implied authority to delegate permission to the use of the car by another is restricted to the same use for which the initial permission was given. *Harper v. Hartford Accident & Indemnity Co.* 14 W (2d) 500, 111 NW (2d) 480.

Evidence as to whether permission to drive was given or implied is discussed in *Dahlke v. Roeder*, 14 W (2d) 582, 111 NW (2d) 487.

Where the owner let his emancipated minor son take a car to another city and keep it several months, and the son lent it to someone else for a private trip, the owner will be held to have consented to the use in the absence of an express prohibition by the owner against letting others use the car. *Krebsbach v. Miller*, 22 W (2d) 171, 125 NW (2d) 408.

Where for all practical purposes the first permittee of an insured is the real owner of the car but title has been taken in the name of the named insured for reasons of convenience, the general control and custody of the first permittee is such that, when he grants permission to operate the insured vehicle to a third person, such operation is held to be with the implied permission of the named insured, and the third person is deemed an additional insured under the policy. *Foote v. Douglas County*, 29 W (2d) 602, 139 NW (2d) 628.

No agency relationship between the insured owner of an automobile and the permittee driver of the vehicle is necessary to call into effect extended coverage under a liability policy containing the mandatory omnibus coverage clause. *O'Leary v. Porter*, 42 W (2d) 491, 167 NW (2d) 193.

Uniform coverage of named and additional

assureds under omnibus coverage requirement. 38 MLR 290.

The case for a liberal initial permission rule under the omnibus coverage statute. Broll, 1966 WLR 191.

c. Employe Exclusions.

A liability policy did not cover the death of an employe of named assured from an automobile accident for which dependents were entitled to the benefits of the workmen's compensation law. *Bernard v. Wisconsin A. Ins. Co.* 210 W 133, 245 NW 200.

An automobile indemnity policy insuring B (a trucker) "and/or" S as the "named assured", and excluding from coverage accidents to employees of "assured" arising out of and in usual course of business of "assured," covers indemnification of B for injury to an employe of S from operation of a truck while the same was being operated by B in his own business, as against the contention that the word "assured" in the exclusion clause referred to both parties named in the coverage clause and to employes of both, and that the exclusion clause excluded accidents causing injury to employes of both or either regardless of which of the parties named in the coverage clause was operating the truck. *Employers Mut. Liability Ins. Co. v. Tollefson*, 219 W 434, 263 NW 376.

A public liability policy protecting the insured against liability for accidental injuries caused by employes of the insured in the line of their employment was "other insurance" within a provision in a policy excluding from the coverage of the policy the operation of loading and unloading trucks during the period covered by "other insurance" insuring against loss arising from such operation. Such excluding provisions are not prohibited by the standard policy regulations. *Fitzgerald v. Milwaukee A. Ins. Co.* 226 W 520, 277 NW 183.

The coverage afforded by an automobile liability policy when a claim for damages is against a party who, although not the named insured, is one to whom the insurer's obligation to indemnify is extended by virtue of 204.30 (3), is no greater than nor different from the coverage thereunder when the claim is against the named insured. A provision in an automobile liability policy that the extended indemnity did not apply "to any employe of an insured [other than the named insured] with respect to any action brought against said employe because of bodily injury to or death of another employe of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured," was void as in violation of the extended coverage requirements prescribed by 204.30 (3). The driver insured and the injured plaintiff both worked for the state which is not liable for the negligence of its employes while engaged in governmental functions. Hence, the state was not, under the policy "legally responsible for the use of" the car and hence was not an insured so as to bring into effect the policy exclusion of employes of the insured while engaged in business of the insured. *Narloch v. Church*, 234 W 155, 290 NW 595.

A general exclusion clause in an automobile liability policy, which excludes coverage for liability for injury to an "employe of the insured while engaged in the business \* \* \* of the insured," is valid and effectively excludes coverage in an action by an employe of the named insured, against a coemployee as an additional insured, for injury sustained in a collision while riding in a truck of the named insured, which was being driven by such coemployee on business of the named insured. The extension, by 204.30 (3), of the insurance or indemnity coverage under an automobile liability policy to persons other than the named assured "in the same manner and under the same provisions as it is applicable to the named assured," means that if, under certain conditions or circumstances, the policy does not afford coverage to the named assured, then under the same conditions no coverage is afforded to an additional insured under the omnibus coverage clause. Whatever coverage an automobile owner buys under a liability policy applies to the additional insureds by force of 204.30 (3), but the legislature has not yet interfered with the named insured's right to make exclusions applicable to both himself and others, and it has not provided that the statutory omnibus clause shall give greater coverage to an additional insured than the policy extends to the named insured, although it has prevented additional or greater restrictions in the omnibus clause. *Ainsworth v. Berg*, 253 W 438, 34 NW (2d) 790.

An exclusion clause in an automobile liability policy covering the operation of the insured's car, excluding coverage for liability for injury to an "employe of the insured while engaged in the employment \* \* \* of the insured," does not exclude the named insured from coverage for liability for the death of one who was not his employe but was a fellow employe riding in the named insured's car while the named insured was operating it in the business of the common employer. *Vick v. Brown*, 255 W 147, 38 NW (2d) 716.

Under an automobile liability policy defining "insured" as including the named insured, and any person while using the car, and any person or organization legally responsible for the use thereof, and excluding from the coverage bodily injury to or death of any employe of the insured while engaged in the employment of the insured or in the operation of the car, and the omnibus coverage of 204.30 (3) incorporated in the policy by law, the indemnity which the named insured has is extended to apply in the same manner and under the same provisions as it is applicable to the named insured to those who operate the car with the named insured's consent, and also to those who are legally responsible for its operation, provided such operation is with the consent of the named insured, so that the named insured has no insurance protection if the claim is by his own employe but is protected against the claims of all others, and likewise an additional insured has no protection when the claim is by his employe but is protected against the claims of persons not so related to him, no matter who else may be the employer of the claimant. Accordingly, under such a policy, the named insured had insurance pro-

tection where he was driving the car at the time of an accident and his companion, injured in the accident, was not his employee, although the named insured and his companion, the claimant, were employees of a common employer and were in the course of their employment. (*Brandt v. Employers' Liability Assur. Corp.*, 228 W 328, overruled.) *Sandstrom v. Estate of Clausen*, 258 W 534, 46 NW (2d) 831.

Under an automobile policy defining "insured" as including the named insured, and any person while using the car with the permission of the named insured, and any person or organization legally responsible for the use thereof, and the omnibus coverage of 204.30 (3), incorporated in the policy by law—an exclusion clause excluding from the coverage bodily injury to or death of any employee of the insured while engaged in the employment of the insured or in the operation of the car, and excluding any obligation for which the insured might be held liable under the workmen's compensation law, did not exclude a person who was driving the car at the time of an accident and was an additional insured, from coverage for liability for the death of a person riding with him who was not his employee nor the employee of the named insured, but was the employee of a third person who sustained no tort liability and was not an additional insured in relation to this accident. *Buck v. Home Mut. Cas. Co.* 258 W 538, 46 NW (2d) 749.

Under an automobile liability policy covering a truck, defining "insured," as including the named insured and any person while using the vehicle with the permission of the named insured—an exclusion clause, excluding from the coverage bodily injury to or death of any employee of the insured while engaged in the employment of the insured or in the operation of the vehicle, did not exclude a person, who was an additional insured operating the truck on the farm of the named insured when it struck and injured a third person, from coverage for liability to such third person, where there was no employer-employee relationship between such operator-additional insured and such injured person. *McMann v. Faulstich*, 259 W 7, 47 NW (2d) 317.

Where an employee, while a passenger in his employer's truck driven by a coemployee, was injured in a collision with another vehicle, and the 2 employees were in the course of their employment at the time, the employee-driver of the truck was an additional insured within the statutory omnibus coverage clause of the employer's automobile liability policy, so as to be entitled to the benefits of the policy, and the insurer was subject to liability for the injuries of the employee-occupant, although the policy contained an exclusion clause providing that its insurance coverage did not apply to "bodily injury to . . . any employee of the insured while engaged in the employment of the insured, or to any obligation for which the insured . . . may be held liable under any workmen's compensation law," and the insured-employer and his employees were subject to the workmen's compensation act. (*Sandstrom v. Estate of Clausen*, 258 W 534, applied.) *Zippel v. Country Gardens, Inc.* 262 W 567, 55 NW (2d) 903.

A general exclusion clause, providing that the policy does not apply "to any employee with respect to injury to . . . or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer," operated to exclude an employee of the named insured from coverage as an additional insured in a situation where such employee was operating the insured truck with permission and backed it into a fellow employee, and both employees were performing service for their common employer at the time of the accident, such exclusion clause being plain and unambiguous, and not being repugnant to 204.30 (3) nor violative of public policy. (*Buck v. Home Mut. Cas. Co.* 258 W 538, and other cases distinguished.) *Schneider v. Depies*, 266 W 43, 62 NW (2d) 431.

A general exclusion clause, providing that the policy does not apply to bodily injury to any employee of the insured while engaged in the employment of the insured, does not operate to exclude additional insureds where such additional insureds were not employers of the injured employee. 204.30 (3) is not meant to give additional insureds greater coverage than that given the named insured; but if a policy does in fact grant to additional insureds more protection than is afforded to the named insured, it is a matter of contract and is not inconsistent with the provisions of such statute. *Shanahan v. Midland Coach Lines*, 268 W 233, 67 NW (2d) 297.

See note to 102.29 (1), citing *Severin v. Luchinske*, 271 W 378, 73 NW (2d) 477.

A general exclusion clause in an automobile liability policy, providing that the policy does not apply to "liability to" any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer, did not prevent the policy's applying to liability "of" an employee of the named insured as an additional insured. (*Schneider v. Depies*, 266 W 43, distinguished.) *Matteson v. Johnson*, 275 W 615, 82 NW (2d) 881.

The fact that a named insured, under the terms of an automobile liability policy, had no protection against a claim of an employee, did not operate to exclude coverage to a third person for a claim by the injured employee. *Travelers Ins. Co. v. American Fidelity & Cas. Co.* 164 F Supp. 393.

#### d. Other Exclusions.

An infant's legal relation to an employer of the infant's brother, a truck driver, who, contrary to instructions, permitted the infant to ride in the truck, was that of a "trespasser." *Hartman v. Badger T. Co.* 210 W 519, 246 NW 577.

#### 4. Liability of Insurer.

The provision in 85.25, Stats. 1925, was not intended to deprive insurance companies of the right to limit their coverage or to issue such contracts of insurance or indemnity as they may choose. It is remedial in character, its purpose being to permit persons who sustain injuries in automobile accidents to join as

a defendant the insurance company which has issued the policy. *Fanslau v. Federal M. A. Ins. Co.* 194 W 8, 215 NW 589.

A clause in an automobile casualty policy that no action shall lie against the insurer until the amount of damage is determined by final judgment or agreement is not in conflict with 85.25, Stats. 1925. *Morgan v. Hunt*, 196 W 298, 220 NW 224.

Where an insurance company is sued with the operator of an automobile in a collision case as carrying a policy covering the liability of the operator, it is too late for the insurer to be heard on such an objection on appeal, although the defense was set out in its answer. *Tofte v. Crolius*, 196 W 608, 220 NW 225.

An insurer, made defendant in an action against an insured arising from an automobile accident, could not be held liable where the action against the insured was dismissed. The law permitting an insurer to be made a party defendant does not create a liability. *Stransky v. Kousek*, 199 W 59, 225 NW 401.

Provisions in an automobile insurance policy as to notice of accident, claim for damages, and cooperation in defense were conditions precedent, failure to perform which, in the absence of waiver or estoppel, constituted defenses to liability on the policy. 85.25 creates no liability where none exists by the terms of a policy, but only provides for direct liability and for joining insurer with insured in an action where there is ultimate liability on the insurer on its contract of insurance. Where the insured did not comply with provisions of an automobile liability policy requiring immediate notice of the accident and of the claim and requiring cooperation in defense of the action so that the insurer was not liable to the insured under the terms of the policy, the person injured by the insured's automobile could not recover from the insurer. *Bachhuber v. Boosalis*, 200 W 574, 229 NW 117.

In an action by an executrix for a testator's death in an accident alleged to involve an automobile owned by a policyholder of defendant companies, the executrix was not an "other person entitled to benefit hereunder," within a stipulation of the policy requiring a claim thereon to be liquidated by judgment or with consent of the company as a condition precedent to suit. In an action by executrix on policies alleged to have been issued to the owner of the automobile involved in the testator's death the meaning of the provision that the insured "or other person entitled to benefit hereunder" shall not sue the insurer, except on a definitely ascertained claim, is not changed by this section where such provision, construed with the remainder of the policy, was clearly not intended to affect a person situated like executrix, even though the statute was incorporated into policies renewed after its enactment. *Christiansen v. Schenkenberg*, 200 W 581, 229 NW 62.

Notwithstanding 85.93, Stats. 1929, a provision in a policy postponing the time for the commencement of action against the insurer until damages are ascertained against the insured is effective. *Bergstein v. Popkin*, 202 W 625, 233 NW 572.

The insurer under an automobile liability policy, which by the very provisions of the

statute must be considered as containing the conditions required, whether or not actually incorporated therein, was properly joined as defendant in an action against the insured, where the "no action" clause in the policy applied only to the insured. (*Morgan v. Hunt*, 196 W 298, 220 NW 224, and later cases distinguished.) *Heinzen v. Underwriters Cas. Co.* 208 W 512, 243 NW 448.

"Co-operation," within an automobile liability policy providing that it should be a condition precedent to the insurer's liability that the insured at all times render all "co-operation and assistance," requires that there shall be fair, frank and truthful disclosure of information reasonably demanded by the insurer for the purpose of enabling it to determine whether or not there is genuine defense. *Hunt v. Dollar*, 224 W 48, 271 NW 405.

The object of the contract of automobile liability insurance is to provide insurance against liability in tort. *Narloch v. Church*, 234 W 155, 290 NW 595.

The terms and conditions of 85.93, Stats. 1941, relating to the liability of the insurer in a policy covering liability to others by reason of the operation of a motor vehicle, are a part of the policy with like force and effect as though printed in the policy and whether the policy be considered an indemnity policy or a liability policy. *Kujawa v. Am. Indemnity Co.* 245 W 361, 14 NW (2d) 31.

85.93, Stats. 1943, making an automobile liability insurer directly liable to the injured person, does not make the insurer liable where there is no liability under the policy. *Fehr v. General Acc. F. & L. Assur. Corp.* 246 W 228, 16 NW (2d) 787.

The burden of pleading and proving policy limits was on the defendant liability insurer. *Dostal v. Saint Paul-Mercury Indemnity Co.* 4 W (2d) 1, 89 NW (2d) 545.

A policy of insurance which covers liability to others by reason of the operation of a motor vehicle and provides coverage to pay damages "caused by accident and arising out of the ownership, maintenance, or use" of an automobile is within 85.93, Stats. 1955, so that such policy covered a case where the plaintiff, while standing on the platform of an insured tractor-trailer in the act of loading baled hay onto it in a farmyard, was injured when his leg broke through the allegedly defective platform. *Wiedenhaupt v. Van Der Loop*, 5 W (2d) 311, 92 NW (2d) 815.

The law may treat gross negligence as equivalent to intentional wrongdoing for some purposes, but not for the purpose of excluding liability for gross negligence from the coverage of a liability insurance policy. *Peterson v. Western Casualty & Surety Co.* 5 W (2d) 535, 98 NW (2d) 433.

See note to 263.06, on misjoinder of causes of action, citing *Schwenkhoff v. Farmers Mut. Auto. Ins. Co.* 6 W (2d) 44, 93 NW (2d) 367.

Public policy requires that, where the rights of an injured third party have intervened subsequent to the issuance of the contract of insurance, the insurer should not be freed from liability to such third party, on the ground of non-co-operation of the insured in having made a false statement, unless the insurer has

been harmed thereby. *Kurz v. Collins*, 6 W (2d) 538, 95 NW (2d) 365.

The insurer is not relieved of liability by a breach of condition by the insured, which has occurred after the rights of an injured third person have intervened, in the absence of a showing by the insurer of any resulting prejudice or harm to the insurer. (*Heimlich v. Kees Appliance Co.*, 256 W 356, so far as inconsistent herewith, overruled, and *Kurz v. Collins*, 6 W (2d) 538, followed.) *Stippich v. Morrison*, 12 W (2d) 331, 107 NW (2d) 125.

See note to 260.11, citing *Smedley v. Milwaukee A. Ins. Co.* 12 W (2d) 460, 107 NW (2d) 625.

A farm liability policy covering operation of a tractor on the highway, although not actually describing the tractor, makes the insurer subject to direct liability despite a "no-action" clause. A tractor is a motor vehicle for purposes of 204.30 (4) and 260.11. *Snorek v. Boyle*, 18 W (2d) 202, 118 NW (2d) 132.

204.30 (4) and 260.11 (1), which subject a motor vehicle liability insurer to direct liability and make such an insurer a proper party defendant to an action by the person entitled to recover damages caused by the negligent operation, management or control of such a vehicle, do not apply to self-propelled land vehicles which are designed primarily for uses dissimilar to transporting or drawing persons or property upon a highway, unless such vehicle is operated upon the highway at the time of the accident. *Rice v. Gruetzmacher*, 27 W (2d) 46, 133 NW (2d) 401.

See note to 260.11, citing *Neumann v. Wisconsin Natural Gas Co.* 27 W (2d) 410, 134 NW (2d) 474.

While normally, where the non-co-operation defense is asserted, harm or prejudice cannot be determined until the trial of the issue of liability in respect to the negligence, harm may be apparent prior thereto where the false statements relating to the identity of the driver of the car are material as a matter of law because of the present certainty of prejudicial or disastrous effect on the fact-finding process, the integrity of which has been contaminated by inconsistent statements and incredibility of the insured as a witness. *Schauf v. Badger State Mut. Cas. Co.* 36 W (2d) 480, 153 NW (2d) 510.

Under sec. 85.25, Stats. 1927, making automobile liability insurers liable to persons entitled to recover for the death of a person or for injury to persons or property, caused by negligent operation, maintenance, use, or defective construction of motor vehicles, the construction of the words "liability" and "insurer" by the Wisconsin supreme court was binding upon a federal court. *Biller v. Meyer*, 33 F (2d) 440.

A provision in an insurance policy for indemnity against injuries in automobile accidents which excepts certain persons from its provisions is in violation of 85.25 and 204.30 (3). Stats. 1925. 16 Atty. Gen. 225.

Extraterritorial effect of direct liability statute. 30 MLR 300.

Direct action against liability insurance companies. *MacDonald*, 1957 WLR 612.

**204.31 History:** 1911 c. 84; Stats. 1911 s. 1960; 1913 c. 601; 1917 c. 106 s. 6; 1919 c. 536; 1923 c. 291 s. 3; Stats. 1923 s. 208.05; Stats. 1925 s. 206.50; Stats. 1927 s. 204.31; 1929 c. 233; 1933 c. 487 s. 158; 1937 c. 77; 1939 c. 44; 1941 c. 176; 1943 c. 119; 1945 c. 346, 351, 356, 586; 1947 c. 339, 422; 1949 c. 194, 207; 1951 c. 614 s. 2 to 4m; 1953 c. 61 s. 118; 1957 c. 321; 1959 c. 534; 1959 c. 641 s. 28; 1961 c. 33, 94, 624; 1963 c. 299; 1965 c. 249, 423; 1969 c. 303, 337.

On exercises of police power see notes to sec. 1, art. I; on legislative power generally and delegation of power see notes to sec. 1, art. IV; and on jurisdiction of the supreme court (control over corporations and non-judicial officers) see notes to sec. 3, art. VII.

The commissioner of insurance has power to determine whether a form of policy submitted for his approval complies with all statutory requirements, including its typography as well as its contents, and his decision that it does not so comply cannot be collaterally attacked in an action upon such policy by expert testimony to show that a certain provision was not printed in the size of type required by sec. 1960 (2), Stats. 1913. *Lundberg v. Interstate B. M. A. Asso.* 162 W 474, 156 NW 482.

Although lawful at common law, a parol contract for accident or health insurance is made unlawful by sec. 1960, Stats. 1921. *Schilbrch v. Inter-Ocean C. Co.* 180 W 120, 192 NW 456.

While ambiguous insurance policies are construed most strongly against the insurer, the language will not be wholly ignored. Sec. 1960 (2), Stats. 1921, relates to the form of the policy and such form is determined by the law of the place where made, not by the law of the forum. A policy issued in Iowa by an Iowa corporation to a resident of that state is not invalid here because it did not present exceptions with the same prominence as benefits and reductions of benefits with greater prominence, as required by this section. *Bowen v. Inter-State B. M. A. Asso.* 182 W 223, 196 NW 229.

A railroad passenger accident policy, contained on a coupon sold by a patented device and furnishing only meager information as to the contents of the policy, which could be seen only by calling for a copy filed with the railroad company, does not conform either to the letter or spirit of sec. 208.05. *State ex rel. United States F. & G. Co. v. Smith*, 184 W 309, 199 NW 954.

Where an accident policy provided that notice of claim be given "to the company at Green Bay, Wisconsin, or to any authorized agent of the company at Green Bay, Wisconsin," the notice could be given "to any authorized agent of the insurer" wherever found. The provision in such policy for less sick benefit for nonhouse confinement condition than for confinement to the house was valid, as was the requirement that the insured should be attended by a physician. *Isaacson v. Wisconsin C. Asso.* 187 W 25, 203 NW 918.

The standard provisions required in an accident policy are obligatory on the insured as well as on the insurer. A provision of an accident policy requiring payment of the renewal premium in advance, which was not one of the standard provisions required, may be changed or waived by the parties. *Jones v. Preferred Accident Ins. Co.* 226 W 423, 275 NW 897.

Exceptions which were evasively designated as conditions and which were printed in type smaller than the text of the policy constituted a violation of 204.31, Stats. 1927, notwithstanding the form of the policy had been approved by the insurance department. Mutual L. Ins. Co. v. Schenkat, 62 F (2d) 236.

Where an accident insurance policy contains option standard policy provisions, the insurance company cannot prorate its face policy liability because not notified of a prior life insurance policy with supplementary contract of double liability in case of death by accident. 13 Atty. Gen. 622.

The meaning of the word "period" in 204.31 (3) (a) is discussed in 53 Atty. Gen. 117.

Wording in accident and sickness policies which differs from statutory language may be approved by the commissioner of insurance if not less favorable to the insured or beneficiary. 56 Atty. Gen. 49.

**204.32 History:** 1961 c. 32, 94, 624; Stats. 1961 s. 204.32.

**204.321 History:** 1961 c. 94, 624; Stats. 1961 s. 204.321; 1963 c. 6; 1965 c. 249, 423; 1969 c. 337.

Under 204.32 (2) (b), Stats. 1949, authorizing group insurance policies, a certificate issued to an individual member of the group which states coverage and conditions differing from those of the policy estops the insurer from asserting the policy provisions. Riske v. National Cas. Co. 268 W 199, 67 NW (2d) 385.

Students at flight training schools are not employees or members of an association on whom group accident and health insurance may be written under 204.31 (13), Stats. 1947. 37 Atty. Gen. 472.

A proposed automobile driver's league constitutes an association eligible for group and accident insurance under 204.32 (2) (a), Stats. 1957, only if availability of such insurance is not a compulsive force to enrollment and maintenance of membership but is incidental to the package program involved. 47 Atty. Gen. 271.

**204.322 History:** 1961 c. 94; Stats. 1961 s. 204.322; 1965 c. 249, 423; 1969 c. 337.

**204.33 History:** 1951 c. 614; Stats. 1951 s. 204.33; 1961 c. 94.

**204.34 History:** 1931 c. 477; Stats. 1931 s. 204.33; 1933 c. 487 s. 160a; Stats. 1933 s. 204.34; 1961 c. 583; 1967 c. 292.

204.34 (2), Stats. 1933, providing that no policy of insurance or agreement of indemnity shall exclude from the coverage afforded or provisions as to benefits therein provided persons related by blood or marriage to assured, does not amplify a liability policy so as to entitle unemancipated minors, in an action against the insurer of their father, to recover damages for injuries sustained because of negligence of the father in operation of the automobile. Segall v. Ohio Cas. Co. 224 W 379, 272 NW 665.

In an action on an automobile indemnity policy for injuries received at night in a collision with an insured automobile driven by a minor licensed under statute to drive in the daytime but too young to secure permit to

drive at night, a provision of the policy excluding coverage if the automobile was driven in violation of law as to age was operative. Witzko v. Koenig, 224 W 674, 272 NW 864.

Failure of the insured to give timely notice of an accident creates a presumption that the insurer was thereby prejudiced or damaged. Parrish v. Phillips, 229 W 439, 282 NW 551.

The extended insurance clause under 204.30 (3), Stats. 1937, making a policy inure to one driving the automobile with the insured's consent but excluding any obligation to the insured, did not authorize the insured to recover for the killing of his minor son by the use of the automobile by another son. Munsert v. Farmers Mut. Auto. Ins. Co. 229 W 581, 281 NW 671.

The provision in 204.34 (3), Stats. 1947, that failure to give notice of accident to the insurer shall not bar liability under a policy if the insurer was not prejudiced by such failure, cannot be extended to apply to a failure to comply with a policy condition requiring the insured immediately to forward to the insurer every demand, notice, summons or other process received by the insured, particularly where notice of suit was not given to the insurer until 17 months after the accident. Heimlich v. Kees Appliance Co. 256 W 356, 41 NW (2d) 359. (But see Stippich v. Morrison, 12 W (2d) 331, 107 NW (2d) 125.)

204.34 (3) creates a presumption that an automobile liability insurer is prejudiced by a failure to give timely notice of accident and puts the burden of proof to rebut the presumption on the person claiming liability. In an action by a person injured against the insurer alone, the record fact that no notice was given to the insurer until 11 months after the accident required a determination, in the absence of any proof to the contrary, that the insurer was prejudiced by the delay. The insurer did not waive and was not estopped to assert the defense of untimeliness of a notice of accident given 11 months after the accident, and to disclaim liability on that ground, by reason of the fact that the insurer's subsequent investigation of the accident had disclosed full information that the insured had given a signed statement of the facts and talked to the insurer's representative, and was in court as a witness, and that the insurer had made no prior disclaimer of liability. Calhoun v. Western Cas. & Surety Co. 260 W 34, 49 NW (2d) 911.

See note to 204.30, on extended indemnity, citing Olander v. Klapprote, 263 W 463, 57 NW (2d) 734.

On a motion of a defendant liability insurer for summary judgment as to it, based on a policy provision requiring written notice by or on behalf of the insured as soon as practicable after an accident, and on an affidavit alleging that this accident occurred in 1948 but that no report was received at the office of the insurer until 1950, to the prejudice of the insurer, the plaintiffs' counteraffidavit, denying any knowledge or information as to when the insured made a report to the insurer, or whether it was a timely notice, was a sufficient denial so that summary judgment should not have been granted, lapse of time in giving the notice not being prejudicial as a

matter of law under 204.34 (3). *Vlasis v. Cheese Makers Mut. Cas. Co.* 268 W 389, 68 NW (2d) 23.

204.30 and 204.34 (1) (a) deal with and apply only to automobile liability policies; they do not apply to collision policies insuring the named insured's motor vehicle against damage from collision without regard to anyone's negligence and under which such insured is liable to no one; and hence they do not preclude the inclusion in such a policy of a provision excluding such coverage where the insured is being operated at the time of collision by a person not legally licensed to operate an auto. *Schaal v. Great Lakes Mut. F. & M. Ins. Co.* 6 W (2d) 350, 94 NW (2d) 646.

Where an insurer knew of and investigated an accident in which its insured was killed, but was not made a party to a subsequent action for damages which was later dismissed and was not notified of the claim against its insured until 13 months after service, it was prejudiced by the failure to give notice. *American Ins. Co. v. Rural Mut. Cas. Ins. Co.* 11 W (2d) 405, 105 NW (2d) 798.

204.34 (2) was not intended to prohibit the issuing company from extending greater coverage to one of the members of the family of the named insured than required under 204.30 (3), without extending such coverage to all members of the family. *Klatt v. Zera*, 11 W (2d) 415, 105 NW (2d) 776.

See note to 204.30, on liability of insurer, citing *Stippich v. Morrison*, 12 W (2d) 331, 107 NW (2d) 125.

Failure to give the notice of accident within the time prescribed by the policy does not relieve the insurer from liability on the policy unless it was prejudiced by such delay, and the statute thereby creates a presumption of prejudice which the person claiming liability is required to rebut. *Kohls v. Glassman*, 29 W (2d) 324, 139 NW (2d) 37.

An automobile insurance company cannot avoid liability under 209.06 because of false statements in the application, since this would circumvent legislative intent. *Zepczyk v. Nelson*, 35 W (2d) 140, 150 NW (2d) 413.

Although Wisconsin does not permit a family exclusion in an insurance contract written and issued in Wisconsin, it is not against state policy to recognize and enforce such a provision in a foreign contract. *Urhammer v. Olson*, 39 W (2d) 447, 159 NW (2d) 688.

So much of 204.34, Stats. 1967, as sets forth as a limitation on what can be excluded from coverage in an automobile insurance contract "the operation, manipulation or use of such motor vehicle for unlawful purposes", must be read in conjunction with 346.94 (2), which provides that it is unlawful to participate in any "race or speed or endurance contest upon any highway", and thus the statutory limitation on exclusions of coverage encompasses use of the insured vehicle for the purpose of transversing a length of public highway in a prearranged speed contest. *Krempl v. Noltze*, 41 W (2d) 454, 164 NW (2d) 227.

204.34, Stats. 1967, applies only to insurance contracts written in Wisconsin. *Ford v. Graf*, 279 F Supp. 692.

Notice of accident to automobile liability insurer. 33 MLR 247.

The requirements and effect of the notice condition in the liability insurance policy. Duffy, 51 MLR 366.

The cooperation clause in automobile liability insurance policies. Erdmann, 51 MLR 434.

The "temporary substitute automobile" an unowned-owned vehicle. Clancy, 52 MLR 146.

Liability insurance: effect of false statements on duty to cooperate. Schoone and Berzowski, 52 MLR 221.

Liability of excess and primary automobile insurance companies for defense costs. Anderson, 52 MLR 367.

Interest payments under the supplementary payments provision of the standard automobile liability policy. Anderson, 52 MLR 396.

**204.35 History:** Stats. 1931 s. 208.03 (4) to (6); 1933 c. 344 s. 22; Stats. 1933 s. 204.35; 1947 c. 100; 1951 c. 33.

**Revisor's Note, 1933:** Transferred to chapter 204 for better arrangement. The law which specifies the legal investments for domestic fraternal benefit societies is extended to foreign societies seeking a license. This makes the rule more certain and simple. The change probably adds to the kinds of investments which such foreign societies may make. Subsection (6) was 1955a—1, renumbered by chapter 639, Laws 1913, (7) was 1955b—5 created by chapter 158, Laws 1909; (8) was created by chapter 639, Laws 1913. The limitation on insurance companies (other than fraternal benefit societies) is in 201.16. [Bill 51-S, s. 22]

**204.36 History:** 1941 c. 240; Stats. 1941 s. 204.36.

## CHAPTER 205.

### Workmen's Compensation Insurance.

**205.01 History:** 1917 c. 637 s. 2; Stats. 1917 s. 1921—1; 1923 c. 291 s. 3; Stats. 1923 s. 205.01; 1933 c. 487 s. 162; 1933 c. 489 s. 10; 1937 c. 329; 1961 c. 354.

**Committee Note, 1961:** The transaction of workmen's compensation insurance is regulated by chapter 205. The last major revision of this chapter was in 1933, and many sections are more than 30 years old. There have been several relatively minor amendments or repeal of certain sections which has resulted in a numbering of the sections and a presentation of material that is frequently not in proper sequence in the existing statute. The current practices of the Wisconsin compensation rating bureau, the industrial commission and the insurance department are in several respects quite different from the procedures described by statute. There has been a considerable evolution in the approach to insurance regulation since the enactment of P.L. 79-15. There are important considerations on which the present statute is silent which have been incorporated in the proposed new chapter. The chapter as proposed is intended to update the law consistent with current practices without effecting any significant changes from the essential elements of the present statute. [Bill 190-A]

**205.03 History:** 1961 c. 354, 624; Stats. 1961 s. 205.03; 1969 c. 337 ss. 62, 88.