



# TO THE BAG

## COULD THE CAR REALLY GET ANY MORE AMBIGUOUS?

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I write to applaud Mark Cooney's lucid explanation of the three types of ambiguities found in the auto-insurance definition of "occupying" a vehicle. *Once Upon a Car: A Tale of Three Ambiguities*, 20 Green Bag 2d 143 (2017). I also propose to suggest a different take on the syntactic ambiguity he describes and to point out yet another ambiguity.

To refresh our memories, the definition in question is:

"Occupying" means in, upon, getting in, on, out or off.

Of the three ambiguities that Professor Cooney describes, the third is syntactic, which, as he explains, is ambiguity that arises from the arrangement of words, and which often relates to a modifier. *Id.* at 148. The definition is syntactically ambiguous in that *getting* could modify *in* alone or it could also modify *on*, *out*, and *off*. Professor Cooney concludes that *getting* modifies the series because otherwise "it would leave two nonsensical items suggesting occupancy when a person is *out* of the vehicle or *off* the vehicle." *Id.* at 149. He also finds syntactic ambiguity in the lack of punctuation to help the reader discern the main series in the phrase (*in*, *upon*, *getting*) from the series that stems from the word *getting* (*in*, *on*, *out* or *off*). *Id.* at 149-150.

Professor Cooney suggests (*id.* at 150) denoting the main series with semicolons and the subsidiary series with commas, thus:

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“Occupying” means in; [on]; {or} getting in, on, out, or off.

And that’s where I have a different take. In this quote, the brackets show where *on* has replaced *upon*, which the article earlier concludes was the drafter’s likely intent. But the curly brackets show where the conjunction *or* was added, without any indication at all. Check out the original definition again:

“Occupying” means in, upon, getting in, on, out or off.

There is no *or* between *upon* and *getting*. The spontaneous *or* – not the punctuation – does the real work to define two series by denoting that *getting* will be the last item in the first series. The original definition suggests a new series only contextually; *i.e.*, because *getting in* and *getting on* are both familiar vehicle-related concepts. The only item we can be sure is the last in a series is *off*, which precedes the conjunction *or*.

But it is possible to define two series in the definition by adding only punctuation, although it results in different series:

“Occupying” means in; [on]; getting in, on, out; or off.

Semicolons separate the items in the main series (including where at a minimum the original deserved an Oxford comma) and commas separate those in the inner series. *Off*, which must be the last item of some series, moves to the main series and *getting* therefore modifies only *in*, *on*, and *out*. If that were intended, you would be occupying a vehicle if:

You are *in* the vehicle  
You are [on] the vehicle;  
You are *getting in* the vehicle;  
You are *getting on* the vehicle;  
You are *getting out* {of} the vehicle; or  
You are *off* the vehicle.

This works syntactically but it brings back what the article describes as a nonsensical definition for “occupying”: being *off the vehicle*. *Id.* at 149. But is it so nonsensical? Being *off* a vehicle suggests that the person very recently was *on* the vehicle. If a car hits a bus just as someone is stepping off, for example, that person would be *getting out* of the bus – so taking *off* out of the *getting* series would do no harm. (Removing *off* from the *getting*

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series also prevents direct-or-indirect-object ambiguity in *getting off* the vehicle.) But a moment later, that person is *off* the bus. Why shouldn't such a person have just as much claim to recover as he did an instant before? While it's true that the person is still *off* that same bus an hour or a day later, and in fact we are all perpetually *off* every vehicle we've ever previously been on, it's unlikely a court would apply such a hypertechnical definition. Accordingly, there's no reason to reject out of hand the possibility that the definition of "occupying" includes *off* on its own and not as part of the *getting* series.

There is yet another ambiguity which arises from treating *getting* as defining a series. As the alert reader has undoubtedly noticed, curly brackets have reappeared above to show that the word *of* was inserted in the penultimate item. We have to add *of* if we think *out* is part of the *getting* series because otherwise "occupying" means "getting out a vehicle."

Getting *out of* a vehicle is a familiar concept and makes sense as a definition of occupying because it mirrors *getting in*, which clearly is part of the definition. *Getting out* a vehicle is not a familiar concept. You could *be* out a vehicle if, for, instance, one of your fleet of delivery trucks is in the shop, or maybe one of your several vehicles was lost somehow, as in: My garage caught fire and now I'm *out* one car. But neither of those concepts works with *getting* and neither makes sense as a definition of "occupying."

Sincerely,  
Jack Metzler  
Washington, DC

## HOWDY, COLUMBUS

To the *Bag*:

For the last seven years, the geographic center of the United States Supreme Court has bobbed upon the shimmering surface of Tappan Lake, Ohio. Measured by the average latitude and longitude of the places where the Justices worked at the time of their appointment to high federal office, a midpoint that pressed westward during most of American history had in recent decades reversed course toward the Northeast (following several nominations from the Acela corridor).<sup>1</sup>

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<sup>1</sup> See Benjamin C. Zuraw & Robert A. James, *The Supreme Court and the Westward Movement*,