To the Bag:

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:
“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
To the Bag

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).¹

¹ See Benjamin C. Zuraw & Robert A. James, The Supreme Court and the Westward Movement,