c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

**Summary**

Paragraph c. of the "who is an insured" provision extends the liability coverage to anyone who is liable for the conduct of an insured, e.g., the indirect legal responsibility of an employer for the acts of an employee or a principal for torts of an agent. The coverage is limited to the extent of that vicarious liability. For purposes of this paragraph, the definition of "insured" is described in paragraphs a. and b. of the "who is an insured" provision.

**Discussion**

The omnibus insured statutes of several states make the owner of the automobile vicariously liable for losses caused by the permissive user. This provision gives insured status to the owner for its vicarious liability imposed under one of these state laws.

"Peculiar Risks." In the construction context, Paragraph c. has been read to extend coverage for the vicarious liability of a project owner or contractor for an insured's failure to take precautions to redress a "peculiar risk" of physical harm to third parties that is inherent in the job site conditions.

In *American States Ins. Co. v. Progressive Cas. Ins. Co.*, 180 Cal. App. 4th 18, 102 Cal. Rptr. 3d 591 (Ct. App. 3d Dist. 2009), for example, the general contractor hired a grading contractor to perform site preparation work. The grading contractor hired a trucking company to send over a dump truck to haul away dirt from the site. The trucking company hired an independent owner/operator to supply a dump truck for that job. The only street access to the job site was very tight. To get in, the operator had to do a U-turn at an intersection, drive against traffic, encroach on two pedestrian crosswalks, jump a curb, and cross a sidewalk—all without the benefit of flagmen. While trying to enter the job site, the owner/operator negligently caused an accident in which a pedestrian was severely injured. She sued the owner/operator, the trucking company, and several construction defendants (the grading contractor, the general contractor, and the project owner). She
asserted that the construction defendants were negligent in failing to take necessary safety precautions at the project's intersection entrance.

At first, the grading contractor's BAP insurer accepted the defense of the construction defendants. Then it tendered the defense to the BAP insurers for the owner/operator and the trucking company. Those insurers refused to defend the construction defendants, arguing that they were not named as insureds or additional insureds on their policies, and they were not "using" the dump truck at the time of the accident.

The appellate court disagreed, holding that the BAP insurers for the owner/operator and the trucking company owed a defense to the construction defendants. The definition of "insured" in the owner/operator's BAP included:

Any other person or organization, but only with respect to the legal liability of that person or organization for acts or omissions of any person otherwise covered under this PART I—LIABILITY TO OTHERS while driving your insured auto.

The definition of "insured" in the trucking company's BAP included "Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability."

Under the facts of this case, there were at least two ways that the construction defendants could have been held liable to the injured pedestrian. Most obviously, they could have been held directly liable for their own negligence in failing to take reasonable safety precautions at the intersection entrance (in which case they would not be covered).

Less obviously, they could also have been held vicariously liable for the negligence of the owner/operator under Restatement of Torts, Section 416, which states:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

The appellate court explained that, in California, the upstream party's liability for the "failure of the contractor" to exercise reasonable care to
address a "peculiar risk" under Section 416 is interpreted to be, in essence, vicarious liability.

In this case, the construction defendants should have recognized that the conditions at the intersection entrance created a "peculiar risk" that pedestrians could get hurt unless special precautions were taken, and they could have been held vicariously liable for the negligence of the owner/operator (an "independent contractor" under Section 416). Because the construction defendants could have been liable for acts of their insureds, the BAP insurers for the owner/operator and the trucking company therefore owed them a duty to defend.

**Mistaken Allegations of Employment.** Another potential benefit of this provision is that it extends coverage (and thus a defense) to an entity that a claimant mistakenly believes is the employer of the insured's employee.

In *Atlanta Postal Credit Union v. International Indem. Co.*, 228 Ga. App. 887, 494 S.E.2d 348 (Ct. App. 1997), a credit union entered into a contract with a repossession company to repossess vehicles when a debtor defaulted on a car loan. Employees of the repossession company unsuccessfully tried to repossess an automobile parked at one debtor's father's residence. The father came out of the house and was yelling at the employees to get off his property. As they were pulling out of the father's driveway in their wrecker, the father followed along, beating on the window with a cell phone. Just then, the father had a heart attack and died. His estate brought a wrongful death claim against the credit union under the doctrine of *respondeat superior*. The complaint was technically incorrect, since the contract established an independent contractor relationship between the credit union and the repossession company, not an employment relationship.

Nevertheless, the court held that the BAP insurer who had issued a policy to the repossession company must provide a defense to the credit union. The "who is an insured" provision in the BAP issued to the repossession company extended liability coverage to "[a]nyone liable for the conduct of an insured." The *respondent superior* theory asserted in the complaint was an attempt by the estate to hold the credit union vicariously liable for the conduct of the employees in their use of the insured wrecker. Therefore the credit union was an "insured."

**Additional Insured Status Unnecessary.** Since this provision gives additional insured status for an entity that is liable for the conduct of an insured, it negates the need to specifically add an additional insured endorsement for that entity. Contracts should therefore not require an additional insured endorsement to afford vicarious liability. For example,
consider the owner and general contractor of a construction project. An auto accident occurs at the construction site. To the extent that the project owner is held to be vicariously liable for the conduct of the general contractor with regard to the accident, the project owner is an insured under the general contractor's BAP. Though it is unnecessary to name individuals or entities that have insured status by virtue of this policy provision, an optional designated insured (CA 20 48) endorsement was introduced in 1997 for the purpose of doing so.