William & Mary Law Review

Volume 3 (1961-1962)
Issue 2

Article 20

March 1962

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INSURANCE

Omnibus Clause—Unauthorized Driver Covered Where Car Used for Permitted Purpose

The insured allowed her car to be used to transport customers on a sales promotion trip to and from a brewery, but expressly forbade any but her employee to drive. On the return trip a customer negligently drove the automobile and caused an accident resulting in his and the employee's death. The insurance policy provided coverage for any person, provided the actual use was with the named insured's permission. The Supreme Court affirmed the Superior Court decision holding that although a driver has been expressly prohibited by the owner from *operating* a car, he is still covered if he was *using* the car for the permitted purpose.[1]

The language of the standard omnibus clause in an automobile liability policy is construed broadly in favor of the insured and injured in order to effectuate a strong legislative policy of assuring financial protection for innocent victims of automobile accidents.[2] The clause does not enlarge the insurance coverage as defined in the policy, nor allow coverage inconsistent with declared or specified uses or purposes.[3]

Permission to use the vehicle must be either "express" or "implied" in order to bind the insurer. To be "express" it must be of an affirmative character, not left to inferences. To be "implied," such permission must arise from a course of conduct or relation among the parties in which there is a mutual accord or lack of objection derived from the circumstances.[4]

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[1] Indemnity Insurance Company of North America v. Metropolitan Casualty Company of New York, 33 N.J. 507, 166 A.2d 355 (N.J. Sup. Ct. 1960).

[2] N.J.S.A. 39:6-62; Matits v. Nationwide Mutual Insurance Company, 33 N.J. 488, 166 A.2d 345 (1960); Jordan v. Shelby Mutual Plate Glass & Casualty Co., 142 F.2d 52 (4th Cir. 1944); VA. CODE ANN. 38.1-381 (1950); American Automobile Insurance Company v. Fulcher, 201 F.2d 751 (4th Cir. 1953).

[3] Farm Bureau Mutual Automobile Insurance Company v. Daniel, 104 F.2d 477 (4th Cir. 1939).

[4] Aetna Casualty & Surety Company v. Czoka, 200 Va. 385, 105 S.E.2d 869 (1958); 45 VA. L. REV. 1277 (1959).

Most courts agree that if the insured specifically instructs his permittee not to allow another to drive, the permittee has no right to extend permission so as to have the policy cover a second permittee.[5] Even a liberal interpretation of the policy provisions will not justify disregard of its plain limitations.[6]

Thus where the insured forbids his permittee from allowing another to drive, the overwhelming majority of jurisdictions hold that such third party does not become an additional insured under the omnibus clause.[7] "No case has been found where permission could be implied where the evidence is that it was forbidden."[8] The principal case is an exception to this general rule.

Under the policy, the omnibus clause defined the word *Insured* as follows:

> With respect to the insurance for bodily injury liability and for property damage liability the unqualified word *Insured* includes the Named Insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or with his permission.

The New Jersey Supreme Court in the present case, and in *Matits* v. *Nationwide Mutual Insurance Company*,[9] in interpreting the policy in question, carefully distinguished between permitted *use* and permitted *operation*. *Use* and *operation* are not synonymous. The actual *use* of the automobile denotes the purpose for which it is employed, while the *operation* denotes the manipulation of the vehicle. *Use* is broader than *operation*.[10]

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[5] Young v. State Farm Mutual Automobile Insurance Company, 244 F.2d 333 (4th Cir. 1957).

[6] American Automobile Insurance Company v. Fulcher, 201 F.2d 751 (4th Cir. 1953); VA. CODE ANN. § 38.1-381 (1950).

[7] Baesler v. Globe Indemnity Company, 33 N.J. 148, 162 A.2d 854 (1960).

[8] *Coverage Arising from the Questions of Permissive Use or Agency*, 26 INS. COUNSEL J. 263 (1959).

[9] 59 N.J. 373, 146 A.2d 853, affirmed in 166 A.2d 345 (1960).

[10] Brown v. Kennedy, 141 Ohio St. 457, 48 N.E.2d 857 (Sup. Ct. 1943); Maryland Casualty Company v. Marshbank, 226 F.2d 637 (3rd Cir. 1955).

The omnibus clause only requires that the use of the automobile be with the insured's permission. Thus one permitted to use the car is still using it with permission, although he allows another to drive against the instructions of the named insured.[11] The thing forbidden related to the operation of the car, not what use was made of it.[12] Thus, where the actual use of the car is for the purpose intended, the operation is immaterial.[13]

This decision has been vigorously criticized by underwriters, for they claim this will preclude effective underwriting by an insurer. When the insurer underwrites, he underwrites the risk on the basis of whom the named insured is and those to whom he may grant permission to drive. Who a second permittee may be is not from an underwriting viewpoint predictable.[14]

The decision in the principal case promotes the idea of enhancing public protection under the omnibus clause and therefore it is a salutary addition to the case law on this subject.

R.S.C.

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[11] Glens Falls Indemnity Company v. Zurn, 87 F.2d 988 (7th Cir. 1937); Brooks v. Delta Fire & Casualty Company, 82 So.2d 55 (La. Ct. App. 1955).

[12] Arcara v. Moresse, 258 N.Y. 211, 179 N.E. 389 (Ct. App. 1932).

[13] Indemnity Insurance Company of North America v. Metropolitan Casualty Insurance Company of New York, 59 N.J. Super. 547, 158 A.2d 425 (1960).

[14] June M. Austin, *Permissive Use Under The Omnibus Clause of the Automobile Liability Policy,* 29 INS. COUNSEL J. 49, 63 (1962).