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The Automobile and the Omnibus Clause

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THE AUTOMOBILE AND THE OMNIBUS CLAUSE

Automobile liability policies commonly insure a named person and a specified automobile that he drives. The comprehensive policy also contains a clause which extends coverage to "any person or persons while riding in or legally operating any automobile insured hereunder, and any person, firm or corporation legally responsible for the operation thereof, with the permission of the named assured."[1] This clause is known as the "omnibus" clause,[2] and its purpose is to permit the named insured to extend his insurance coverage to anyone whom he allows to drive the vehicle specified in his policy.[3]

More specifically stated, the omnibus clause accomplishes three things. A. It gives an injured party the ability to recover from the insurer even though the named insured, or a person for whom he was legally responsible, was not operating the car. B. It provides the omnibus insured with insurance coverage without his having procured a policy. C. The clause may free the named insured from the threat of suit.[4]

Litigation concerning the application and construction of the omnibus clause has been voluminous, thus making it impossible to cover fully in this article even this small area of automobile liability insurance. Therefore, the discussion is limited to a survey of the cases as they construe the scope of permission granted and the application of such permission by the courts.

To establish liability under an omnibus clause it must first be established that the use is with the permission, either express or implied, of the named insured.[5] Once this has been established, the courts must determine what they consider to be the scope of the permission given. It is at this point the authorities divide. The theories which seem to reflect the actual holdings of the courts most accurately divide the cases into three basic approaches.

The first approach involves what is called the "strict" or "conversion" rule, and restricts the omnibus application to only the specific use granted by the permission given. That is, the consent given must have included specifically the use being made of the automobile at the time to which the coverage is to be applied. At the other extreme is the so-called "initial permission" or "hell-or-high-water" approach[6] where the courts determine that when the initial permission is given, the coverage applies regardless of the use to which the car is being put at the time of the accident. Falling

1. Odden v. Union Indemnity Co., 156 Wash. 10, 286 Pac. 59, 72 A.L.R. 1363 (1930).
2. As to the validity, construction and effect of the omnibus clause in general, see annotation in 72 A.L.R. 1375, supplemented in 106 A.L.R. 1251 and 126 A.L.R. 544.
3. See Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 Atl. 866, 41 A.L.R. 500 (1924) for a discussion of the purpose of the omnibus clause.
4. See Couch on Insurance 2d, § 45:293.
5. State Farm Mutual Auto Insurance Co. v. Cook, 186 Va. 658, 43 S.E.2d 863, 5 A.L.R.2d 594, (1947).
6. United States Fidelity and Guaranty Co. v. Smith, 279 F.2d 678 (C.A. 9 Ariz. 1960).

between these two extremes is what seems to be the more common approach today, the "minor-deviation" rule, which holds that a slight or immaterial deviation does not preclude coverage under the omnibus clause.

In considering the application of the omnibus clause to a particular set of facts, a minority of the courts apply the "strict," "conversion" or "specific purpose" rule. This rule has received additional support from the courts which feel the "actual use" utilization is intended to make this rule applicable to a given situation (as discussed infra). Under this view it is not sufficient that permission was gained to make some use of the car. It must be shown that the use being made of the automobile at the time of the accident was within the contemplation of the original permission given. This includes the showing that the time of the permissive bailment has not expired, the particular place where the automobile is being used is within the contemplation of the parties, and the specific use at the time must be within that same contemplation.[7]

The majority of cases which are said to apply the "strict" approach involve instances where the car has been given for a particular use and the granted the use of an automobile for furthering the purpose of his employer granted the use of an automobile for furthering the purpos of his employer is not an additional insured under this view when he uses the car for his own purposes.[8]

In a recent South Carolina case, *Eagle Fire Company of New York* v. *Mullins*,[9] the court accepted the "conversion" rule, although recognizing the liberal view, and they said the better reasoned cases hold, "consent should be considered as limited to the purpose for which it was given."[10]

More and more, courts have taken an intermediate view of the "minor deviation" rule. In applying this rule the courts adopt the same basic permission test as the strict rule, but modify it in allowing the application of "additional insured" status to the permittee if there is not a gross violation of the terms of permission given. Under this rule the courts must determine in each instance, by looking at the deviation as to time, distance, and use, whether such deviation is material or immaterial. If immaterial, then the coverage is allowed.[11] In the case of *Collins* v. *New York Gas Co.*,[12] the court felt that omnibus coverage is designed not only to protect those given the use of the automobile, but the public in general, and should therefore be applied liberally. However, the court says of the

7. 7 Am. Jur. 2d Automobile Insurance, § 120.
8. Johnson v. American Automobile Insurance Co., 131 Mo. 288, 161 Atl. 496 (1932); Williams v. Travelers Insurance Co. (Ca. 4 N.C. 1959) 265 F.2d 531.
9. 238 S.C. 272, 120 S.E.2d 1 (1961).
10. Id. at 5.
11. Lloyds of America v. Tinkelpaugh, 184 Okla. 413, 88 P.2d 356, (1939); Collins v. New York Casualty Co., 140 W.Va. 1, 82 S.E.2d 288 (1954); Dickman v. Maryland Casualty Co., 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924); Rickowski v. Fidelity and Casualty Co., 116 N.J.L. 503, 185 A. 473 (1936); Speidel v. Kellum, 340 S.W.2d 200 (Mo. 1960).
12. 140 W.Va. 1, 82 S.E.2d 288, 295 (1954).

"liberal" rule, "such a rule, if applied within its full scope, would have in numerous cases in the future baneful results not contemplated by either the insurer or the insured."[13] Therefore, says the court, the slight deviation rule most nearly effectuates the intent of the parties. The court then went on to find the deviation material.

The minor deviation rule has been criticized for its built-in uncertainty of application. In *Stovall* v. *New York Indemnity Co.*,[14] the leading case advocating the "initial permission" rule, it was said:

> If the application of the contract to a particular injury is made to depend upon the extent to which the driver of an automobile deviated from the permissive use authorized by the owner, the test of liability will be necessarily variable and uncertain. There is surely room for difference of opinion as to whether the deviation shown in *Dickinson* v. *Maryland Casualty Co.*, supra, was "slight" and unimportant, or substantial and material, when it included visits to two saloons in each of which the driver of the automobile has "some drinks."

The purpose for which the permission is granted is often the most significant factor in determining the extent of a particular deviation. Where the original permission granted is for social purposes, the borrower being a relative or acquaintance of the named insured, a much greater scope is assumed than in cases where the permission was given to a person occupying the position of an employee or agent.[15]

Another basis for determining the extent of a particular deviation is the belief that the omnibus clause should not be effective where the deviation is one which was not contemplated by the named insured in the beginning, and one to which, in the first instance, the insured would be presumed not to have assented.[16] Thus, the courts adopting this rationale feel they are effectuating the intention of all parties concerned. The named insured did not anticipate such a use and presumably would not have allowed such a use, the insurer contemplated coverage only within the intended permission of the named insured, and finally, the borrower or prospective insured who is no longer covered should have known the extent of his permission. This leaves only one person to suffer, the victim who was injured and who had the right to assume the person driving had the permission to do so.[17]

This leaves but one rule to discuss, and the "liberal" view is certainly the most controversial and most worthy of discussion. Under the liberal rule, the bailee need only receive permission to use the car in the first instance, and any use following the initial consent is considered to be

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13. Id. at 299.
14. 157 Tenn. 301, 8 S.W.2d 473 (1928).
15. Jordan v. Shelley Mutual Plate Glass and Casualty Co., 142 F.2d 52, (C.A.4th 1944).
16. Collins v. New York Casualty Co., supra note 8 at 299.
17. For a discussion of the risks insured, etc., see Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 Yale L.J. 554 (1961).

within the coverage of the omnibus clause, even though such use may not have been contemplated when the car was loaned. Therefore, the only qualification is that permission be given in the first instance.[18] Following this line of authority, there can be no such thing as an unauthorized use, and some say once the permission has been given it requires the equivalent of "theft or the like" to remove the driver from coverage within the clause.[19]

There are many policy considerations behind the adoption of the "liberal" rule and it is upon these various considerations that most courts base their decisions. The first rationale is that the language should be given a broad construction and interpreted liberally, and further, if there is any ambiguity in the policy provision it should be construed against the insurance company.[20]

A second rationale is that the liability policies themselves are as much for the benefit of the public as for the "insureds" under the policy. This view was illustrated in the dissenting opinion of *Konrad* v. *Hartford Accident and Indemnity Co.*[21] where the judge said: ". . . the rule is based on the theory that the insurance contract is as much for the benefit of the public as for the insured, and that it is undesirable to permit litigation as to the details of the permission and use; . . ."

The final justification upon which the "liberal" rule has been based is illustrative of the great changes which have been evident in the field of automobile insurance in recent years. State legislatures in many instances have drafted exhaustive legislation to assure that persons causing automobile accidents are financially responsible and capable of responding monetarily to innocent victims. Many of the cases adopting the "liberal" rule feel such construction most nearly effectuates the intention of the legislature as evidenced by the financial responsibility legislation. One court, although refusing to adopt the "liberal" rule because of lack of a financial responsibility act, stated the reasoning of the rule in this way:[22]

> This construction of the policy is in accord with the purpose of the various statutes adopted by several states requiring owners of automobiles to carry indemnity or liability insurance. These

18. Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S.W.2d 473 (1928); Carter v. Southern Farm Bureau Casualty Insurance Co. (La. App.) 135 So. 2d 316; Farmer v. Fidelity and Casualty Co. of New York, 249 F.2d 185 (C.A. 4th 1957); Foley v. Tennessee Odin Insurance Co., 245 S.W.2d 202 (Tenn. 1951); Hanover Insurance Co. v. Fanke, 75 N.Y. Super, 68, 182 A.2d 164 (1962); Parks v. Hall, 189 La. 849, 181 So. 191 (1938).

19. Hanover supra at 167.

20. Chatfield v. Farm Bureau Mutual Automobile Insurance Co., 208 F.2d 250 (C.A. 4th 1953); Stovall v. New York Indemnity Co., supra note 20.

21. 11 Ill. App.2d 503, 137 N.E.2d 855 (1956).

22. Hodges v. Ocean Accident and Guarantee Corporation, 66 Ga. App. 431, 18 S.E.2d 28, 31 (1941) citing the following cases: Guzenfield v. Liberty Mutual Insurance Co., 286 Mass. 133, 190 N.E.23 (1934); Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924); Stovall v. New York Indemnity Co., note 18 supra; Brower v. Employed's L.A. Co., 318 Pa. 440, 177 Atl. 826 (1935).

> statutes are enacted to protect the public using the streets and highways as a matter of public policy. The intent of the legislature is to protect those injured by automobiles, no matter who may be driving the car or where it is driven, provided the owner has voluntarily entrusted possession of the car to the driver for some purpose, and regardless of whether the person in possession of the car observes or breaks the contract of bailment.

Courts in other states where the statute specifically requires the inclusion of an omnibus clause in a liability policy say the legislation, being remedial in nature, should be interpreted to subserve the clear public policy, reflected in the statute, to broaden coverage.[23]

In their quest to standardize automobile insurance policies, insurance companies have made a subtle though only moderately successful attempt to restrict their liability under the omnibus clause. The omnibus clause as it appears in many of the modern policies, extends coverage to "any person using the automobile with the permission of the named insured, provided his *actual* operation or (if he is not operating) this other *actual* use thereof is within the scope of such permission." [emphasis supplied][24] The insertion of the word "actual" in the policies would appear to be an attempt by the companies to force upon the courts the "strict" or at the most the "minor deviation" rules. As illustrated by the cases, this attempt has met with mixed success. Some hold the insertion of "actual use" is intended to refer to the use at the time of the accident and that particular use must be with the permission of the named insured, thus adopting the "strict" conversion rule.[25] It appears that just as many courts have determined that the insertion "does not add or detract from the insurer's liability."[26] Cases following the latter view were cited with approval in a recent Wyoming case.[27] It would seem that the wording of the Wyoming statute covering the requirements of an insurance policy for purposes of financial responsibility, W.S. § 31-306(b) 2 (1957), resembles the old type omnibus clauses omitting the reference to actual use. It is doubtful that a policy could deviate from, or restrict, the construction of the statute. Therefore it would seem that in Wyoming the words "actual use" would not add or detract from the liability imposed on the insurer.

This leads us to investigate the position which the Wyoming courts might take if confronted with a difficult and border-line scope of permission question. The Supreme Court did consider an omnibus question in

23. Jordan v. Shelby Mutual Plate Glass and Casualty Co., 142 F.2d 52, (C.C.A. 4th Va., 1944).
24. 1963 Revision of the Standard Family Automobile Liability Policy.
25. Johnson v. Maryland Casualty Co. (D.C. Wisc., 1940) 34 F. Supp. 870; Gulla v. Reynolds, 82 Ohio App. 243, 81 N.E.2d 406 (1948); Hartford Accident and Indemnity Co. v. Peach, 193 Va. 260, 68 S.E.2d 520 (1952); Folden v. Wolf (Ohio App.) 67 Ohio 85, 119 N.E.2d 90 (1951).
26. Waits v. Indemnity Insurance Co. of N.A., 215 La. 349, 40 So. 2d 746 (1949); Sun Underwriters Insurance Co. v. Standard Accident Insurance Co. (La. App.) 47 So. 2d 133 (1950); Collins v. New York Casualty Co., 82 S.E.2d 288 (W.Va. 1954); Hauser v. Aetna Casualty and Surety Co. (La. App.) 185 So. 493 (1939).
27. Phoenix Assurance Company of New York v. Latta, 373 P.2d 146 (Wyo. 1962).

Phoenix Assurance Co. of New York v. *Latta*,[28] but the nature of the case permitted the court to put aside determination of the rule to be applied. In that case a drilling superintendent had sole use of a company car, supposedly to be used only for purposes of the business. At the time of the accident the employee was traveling with a female passenger to have dinner. The court found him to be within the coverage of the omnibus clause at the time, holding the determination to be for the trial judge and giving much weight to the fact that the employee had continuous permission to use the automobile with no other contemplated means of transportation. In so finding, the court may have created some precedent for assertion of the "initial permission" rule, in saying:[29]

> Some of the authorities hold that initial permission of an owner for the use of an automobile by another is all that is required to bring use of the vehicle within an omnibus clause of a policy. (citing cases) We do not consider it necessary for us to adopt this liberal view, and we do not pretend to say that initial permission in all cases will be sufficient to bring the use of an automobile within an omnibus clause of a liability policy.

The facts and the result of this case would seem to support the liberal rule were it not for the lack of any other transportation for the employee and the language of the court.

It should be noted for purposes of prophecying a potential decision, that Wyoming has enacted a Safety Responsibility Act.[30] In order to show proof of financial responsibility under the act, if circumstances require a driver to do so, an automobile liability policy must include an omnibus clause.[31] Therefore, it would seem that the Wyoming legislature has expressed an intent to protect innocent traffic victims. Since an omnibus clause is part of this scheme, it may follow that a court would construe such a clause liberally to effectuate the intention of the legislature and might very well adopt the "liberal" or "initial permission" view in application of the omnibus clause.

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28. Ibid.
29. Id. at 150.
30. Wyo. Stat. §§ 31-277 to—315 (1957).
31. Wyo. Stat. § 31-306 (1957).