North Dakota Law Review

Volume 32 | Number 3 Article 6

1956

Insurance - Motor Vehicles - Scope of the Omnibus Clause

Lowell W. Lundberg

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation

Lundberg, Lowell W. (1956) "Insurance - Motor Vehicles - Scope of the Omnibus Clause," *North Dakota Law Review*: Vol. 32 : No. 3 , Article 6.
Available at: https://commons.und.edu/ndlr/vol32/iss3/6

This Note is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

An injunction should be granted upon proof of a violation and the plaintiff should not be required to prove damages.

LYLE E. BALL

INSURANCE—MOTOR VEHICLES—SCOPE OF THE OMNIBUS CLAUSE—The typical omnibus clause found in the modern automobile liability policy reads as follows:

> "With respect to the insurance for bodily injury and for property damage liability, the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, 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 such spouse or with the permission of either. . . "[1]

The omnibus clause is of comparatively recent origin, one authority having cited it as a creature of the late nineteen twenties.[2] Its existence has resulted from the twin factors of legislation and the fact its inclusion in the policy is regarded by the insurance industry as a "sales point."

Legislative action has developed the clause in two ways. Some states have enacted statutes which specifically require insurance policies to contain such clauses.[3] Other states have achieved the same result by the adoption of statutes imputing liability to the owner of the car for the negligence of the driver who had permission to drive it.[4] It has been held that where such a clause is required by statute, the policy will be treated as containing the required provision wheither it is actually present or not.[5]

The moving spirit behind the adoption of laws requiring inclusion of an omnibus clause is the desire to promote the interests of the public as well as the additional insureds.[6] Apparently this consideration of public policy has been the determining basis for construing the application of the clause in some jurisdictions.[7] Although courts have held that the omnibus clause is not am-

1. Taken from a speciment policy issued by the Association of Casualty and Surety Companies, 60 John Street, New York, New York (1954).
2. Appleman, Special Phases of the "Omnibus Clause" in Insurance Policies, 22 A.B.A.J. 613 (1936).
3. Ohio Rev. Code § 4509.01 (Baldwin 1953); Pa. Stat. Ann. tit. 75, § 1253 (Purdon 1953).
4. Cal. Code Vehicle Ann. § 402 (Deering 1948); Mich. Comp. Laws § 256.29 (1948).
5. Maxey v. American Cas. Co., 180 Va. 285, 23 S.E.2d 221 (1942); Employers Mut. Liability Ins. Co. v. Tollefsen, 219 Wis. 434, 263 N.W. 376 (1935).
6. Locke v. General Accident, Fire, and Life Assurance Corp., 227 Wis. 489, 279 N.W. 55, 58 (1938)(dictum).
7. Chatfield v. Farm Bureau Mut. Auto Ins. Co., 208 F.2d 250 (4th Cir. 1953).

biguous,[8] hence not entitled to the application of the maxim that ambiguities are construed in favor of the insured, the application of its provisions has resulted in much litigation.

Variations in the wording of the omnibus clause have been comparatively few and those which have occurred have resulted in fewer changes in application. "Consent" and "permission" as used in an omnibus clause are accorded no different meaning by the courts.[9] The clause now present in the standard policy uses the words "actual use" instead of "use" in the phrase, "provided the actual use is . . . with the permission of the named insured. ."[10] Appleman in his work states that the change was drafted to confine the coverage to situations where the employment made of the vehicle at the time of the accident was within the scope of the permission granted.[11] This theory has been completely rejected in a jurisdiction which takes a broad view of coverage[12] but it has been accepted in others.[13] It is stated that the weight of authority holds the change or little or no importance.[14]

Variation has also been present in the phrase ". . . word insured includes. . . any person while using the automobile. . ."[15] where the words "using" and "operating" have been used. The term "use" draws significance from the context in which it is used, and overlaps the word "operate".[16] A man may be using the vehicle and coverage may be present although he is not actually driving or operating the car[17] and although he is not present in the car.[18] He may also be operating the vehicle and coverage may be present even though the named insured is riding in the vehicle.[19]

The point on which coverage under an omnibus clause has most often been in dispute has been in connection with the requirement of permission. It is well settled that the permission necessary to bring a permittee under the protection of the omnibus clause may

8. Hawkeye Casualty Co. v. Western Underwriter's Assn., 53 F. Supp. 256 (S.D. Idaho 1944); Cronan v. Travelers Indemnity Company, 126 N.J. 56, 18 A.2d 13 (1941).
9. Hodges v. Ocean Accident & Guarantee Corp., 66 Ga. 431, 18 S.E.2d 28 (1941); See American Automobile Ins. Co. v. Jones, 163 Tenn. 605, 45 S.W.2d 52 (1932).
10. See note 1 *supra.*
11. 7 Appleman, Insurance Law and Practice 132 (1941).
12. Haisuer v. Aetna Casualty & Surety Co., 187 So. 684 (La. App. 1939).
13. Johnson v. Maryland Casualty Co., 34 F. Supp. 870 (W.D. Wis. 1940); Gulla v. Reynolds, 320 Ohio App. 243, 81 N.E.2d 406 (1948); LaRoche v. Farm Bureau Mut. Auto Ins. Co., 335 Pa. 478, 7 A.2d 361 (1939).
14. 10 Wash. & Lee L. Rev. 241 (1953).
15. See note 1 *supra.*
16. Cronan v. Travelers Indemnity Co., 126 N.J.L. 56, 18 A.2d 13, 14 (1941)(dictum).
17. Hardware Mutual Casualty Co. v. Mitnick, 180 Md. 604, 26 A.2d 393 (1942); Arcara v. Moressee, 258 N.Y. 211, 179 N.E. 389 (1932); Brown v. Kennedy, 141 Ohio St. 457, 49 N.E.2d 417 (1943).
18. See Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1943).
19. Bachman v. Independence Indemnity Co., 214 Cal. 529, 6 P.2d 943 (1931).

be express or implied, without regard to the specific language of the policy.[20] The permission may be implied from the relationship of the parties,[21] a course of conduct,[22] or by silence.[23]

Establishment of permission, either express or implied, does not insure coverage in all jurisdictions.[24] The courts have divided in applying the permission received to the use being made of the vehicle at the time of the accident.[25]

Some jurisdictions apply the "strict" or "conversion" rule, which provides that where the use made of the automobile exceeds or deviates from the authorized use to the extent that the bailee could be held liable for conversion, the use is not within the terms of the policy and coverage is not present.[26] This type of holding has been referred to as consisting of a small minority of jurisdictions.[27] A court under this rule will require a showing of consent to use the car at the time, place and under the circumstances of the accident.[28]

A contrary holding is illustrated by what has been termed the "hell and high water" rule,[29] and has been attributed to a feeling on the part of the states adopting it that the liability contract is as much for the protection of the public as for the named and additional insureds.[30] Under this rule, if the vehicle was properly turned over to the permittee in the first instance, any use which he makes of it is within the scope of the permission granted, regardless of any violation of the terms of the original bailment.[31]

Probably the best that can be said for either of these rules is that they are definite, and would be correspondingly easy to administer. The insurer no doubt favors the "strict" rule, for such a restriction of coverage will make easier the maintenance of low insurance rates. On the other hand, an injured and innocent stranger may, as a result of the same restriction, be left with a worthless

---

20. 7Appleman, Insurance Law and Practice 166 (1941).
21. See United Services Auto Assn. v. Preferred Accident Ins. Co., 190 F.2d 404 (10th Cir. 1951); Standard Accident Insurance Co. v. Gore, 99 N.H. 277, 109 A.2d 566 (1954).
22. See Hopson v. Shelby Mutual Cas. Co., 203 F.2d 434 (4th Cir. 1953); Hawkeye Cas. Co. v. Rose, 181 F.2d 157 (8th Cir. 1950); Hooper v. Maryland Cas. Co., 233 N.C. 154, 63 S.E.2d 128 (1951).
23. American Emp. Ins. Co. v. Cornell, 73 N.E.2d 70 (Ind. App. 1947); Schmike v. Mutual Auto Ins. Co., 266 Wis. 517, 64 N.W.2d 195 (1954).
24. See Johnson v. American Automobile Ins. Co., 131 Me. 288, 161 Atl. 496 (1932).
25. See Johnson v. American Automobile Ins. Co., *supra* note 24; Stovall v. New York Indemnity Company, 157 Tenn. 30, 8 S.W.2d 473 (1928).
26. 7 Appleman, Insurance Law and Practice 172 (1941).
27. 10 Wash. and Lee L. Rev. 242, 245 (1953).
28. See Johnson v. American Automobile Ins. Co., 131 Me. 288, 161 Atl. 496 (1932); Sauriolle v. O'Gorman, 86 N.H. 39, 163 Atl. 717 (1932).
29. 7 Appleman, Insurance Law and Practice 169 (1941).
30. Nyman v. Monteleone Iberville Garage, 211 La. 375, 30 So. 2d 123, 125 (1947) (dictum).
31. Stovall v. New York Indemnity Copany, 157 Tenn. 30, 8 S.W.2d 473 (1928).

judgment against a judgment proof permittee. This unfortunate situation could occur in jurisdiction where by statute liability is imputed because the language of the statute requires a showing of permission from the owner to the permittee as does the omnibus clause.[32] Thus if there is not enough permission to qualify the permittee under the insurance policy, there will not be liability under the imputation statute.

The third line of authority applies what is usually described as the rule of minor deviation. Under this rule the court will compare the use made with the permission granted and will extend coverage or deny it according to the degree of deviation.[33] The flexible basis which this rule establishes is at the same time its greatest virtue and greatest failing, for while it might afford coverage, and hence protection to the public, it also makes a definition of what is a minor and major deviation a difficult question for the court and jury.[34]

Other considerations have occupied the courts in determining the question of coverage under the omnibus clause where the vehicle is being used by a second permittee, whose use has been authorized only by the first permittee. Ordinarily, the first permittee has no authority to delegate to a second permittee the use of the automobile so as to bring the second permittee under the coverage of the policy, but an insured's conduct or the nature or scope of the permission granted by him may be such as to indicate that such authority is present.[35]

The basis for conflict in this situation is apparent. On one hand, permitting the insured to delegate a further choice of operator to the first permittee extends the coverage beyond the terms of the policy provisions which call for the additional insureds to be nominated by the named insured. Such an extension might clearly be to the detriment of the insurance company.[36] However, a refusal to permit such a delegation might well result in a failure of recovery by an injured party who should be protected.

The use of an automobile by a second permittee has been held

---

32. See note 4 *supra*.

33. *E.g.* Fredericksen v. Employers Liability Assurance Corp., 26 F.2d 76 (9th Cir. 1928).

34. Phoenix Indemnity Co. v. Anderson, 170 Va. 406, 196 S.E. 629, 633 (1933) (dictum).

35. See Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1943); Norris v. Pacific Indemnity Co., 39 Cal.2d 420, 247 P.2d 1 (1952); Boudreaux v. Cagle Motors, 70 So. 2d 741 (La. App. 1954).

36. Card v. Commercial Cas. Ins. Co., 20 Tenn. App. 132, 95 S.W.2d 1281, 1284 (1932)(dictum).

covered by omnibus clause provisions in a case where the named insured granted the use of the vehicle to her son knowing that he had on previous occasions permitted others to drive.[37] The first permittee was found authorized to extend the permission in another case where the named insured was such only for reasons of convenience and where the first permittee had "unlimited control and discretion in the use of the vehicle."[38] Coverage has also been held present where the second permittee was using the car to seek medical aid of the first permittee who had been granted the reasonable use of the car by the named insured.[39] Also covered was a second permittee who was authorized to drive by one who had possession of the car to "try it out' with a view toward possible purchase from the named insured.[40] In a case where the permitted use of the vehicle involved a joint enterprise, the circumstances implied authority from the named insured to permit others to operate the car.[41] Where the particular use to which the vehicle was to be put was such that the implication was clear that others than the named insured might drive, coverage was present.[42] Similarly, a Virginia court held that the second permittee was included in the omnibus clause coverage where the use of a truck by the first permittee was such that he had not been inhibited in its use for his own pleasure and purpose although the named insured was aware that the truck was being so used.[43] Coverage was held present by the Supreme Court of North Dakota in a case where the car was purchased for a salesman and he was given full authority over the operation and control of the car. The court held that the second permittee in aiding the salesman in the permitted use was covered.[44] A Georgia case,[45] on almost identical facts[46] held that the second permittee was not included in the policy coverge.

Coverage was also refused in a Pennsylvania case where the appeal court found that the nature of the use for which permission

---

37. Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1943).
38. United Services Auto Assn. v. Preferred Accident Ins. Co. of N.Y., 190 F.2d 404 (10th Cir. 1951).
39. Aetna Life Insurance Co., v. Chandler, 89 N.H. 95, 193 Atl. 233 (1937).
40. American Employers Insurance Co. v. Liberty Mutual Ins Co., 93 N.H. 101, 36 A.2d 284 (1944).
41. Glen Falls Ind. Co. v. Zurn, 87 F.2d 988 (7th Cir. 1937).
42. Drake v. General Accident Fire & Life Assurance Corp., 88 Ga. App. 408, 77 S.E.2d 71 (1953); Conrad v. Duffin, 158 Pa. Super. 305, 44 A.2d 770 (1945).
43. State Farm Mutual Ins. Co. v. Cook, 186 Va. 658, 43 S.E.2d 863 (1947).
44. Persellin v. State Automobile Ins. Assn., 75 N.D. 716, 32 N.W.2d 64 (1948).
45. American Gas. Co. v. Windham, 26 F.Supp. 261 (M.D. Ga. 1939).
46. The only apparent difference is that testimony was offered in the Georgia case indicating that the use granted to the salesman was somewhat restricted. However, the court did not accept this as true, and refused coverage on the basis that the salesman had no authority to act for the named insured in permitting another to drive the car.

was granted was not such as to indicate any implication of authority to delegate permission, and neither was there anything present in the conduct of the named insured to indicate such an authorization.[47] In a case involving extension to a third permittee, an Ohio court denied coverage.[48] The named insured in that case was a corporation owned in part by the husband who habitually used the company car. The car had been loaned by him to his wife, who in turn loaned it to a nephew. The court stated: "In the present case, there is not the remotest showing that the H.F. Harrison Development Co., the named insured, ever gave permission to McNammara to use the automobile in question or ever knew that he had driven it or would drive it. It is not likely that it was within the contemplation of the named insured that the permittee of its permittee would authorize the driving of the car by a person who was intoxicated, drank heavily at times, and had been in other accidents.[49]

CONCLUSION

Harsh as it may be to an insurer, it is quite clear that in most cases mere changes in the language of the policy will not be successful in restricting coverage where the legislature has established requirements or where the courts have established precedent. It is suggested that insurers might well acknowledge the fact that broad interpretation of omnibus provisions will result in high loss ratios and that adjustment will have to be made in other ways. This may be accomplished in the form of reduced rates to those who do not permit others to drive or in the more careful selection of policy holders with a view toward their activities in this regard.

One thing is certain; the possibility of a lessening of the broad interpretation of the clause is unlikely in view of the general trend of our time toward protection of the public from the cradle to the grave. Public policy is an ever stronger factor in connection with automobile injuries and insurance and it is not likely to change.

LOWELL W. LUNDBERG

47. Aetna Casualty & Surety Co. v. DeMaison, 213 F.2d 826 (3rd Cir. 1954).
48. West v. McNammara, 159 Ohio St. 187, 111 N.E. 2d 909 (1953).
49. *Id.* at 913.