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Automobile Liability Insurance--Omnibus Coverage for Second Permittees

Charles F. James

Recent Cases

AUTOMOBILE LIABILITY INSURANCE–OMNIBUS COVERAGE FOR SECOND PERMITTEES

United States Fidelity & Guaranty Co. v. SAFECO Insurance Co. of America[1]

When Jane Kloepper first began to drive her mother's car at age sixteen, she was told not to permit anyone else to drive it. A year and a half later, accompanied by a friend, Jane used the car to go bowling. Later in the evening they met two boys, Chapman and Alonzo. At Jane's request Chapman drove the car while she rode in the rear. Chapman subsequently drove the car off the road into a tree, causing injuries to the other two passengers. They recovered judgments against Chapman for their injuries totaling $132,500, and Alonzo's father recovered a judgment for $18,500 against Chapman for the loss of his son's services. Prior to the accident, United States Fidelity & Guaranty Co. had issued an automobile liability policy containing an omnibus clause to Mrs. Kloepper as named insured.[2] SAFECO Insurance Co. of America had issued its policy containing a non-owned automobile clause to Chapman's father.[3] The insurers brought a declaratory judgment action to determine their liability, if any, on these policies. The trial court held that both companies were liable and the Missouri Supreme Court affirmed.[4]

The question whether a second permittee–*i.e.*, one who drives the car with the permission of another who himself was given permission to

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1. 522 S.W.2d 809 (Mo. En Banc 1975).

2. Statutes commonly require that automobile liability insurance policies contain a so-called omnibus clause providing that the term "insured" includes the named insured as well as anyone using the automobile with his permission. R. ANDERSON, 12 COUCH ON INSURANCE 2D 45:291 (2d ed. 1964). Section 303.190.2, RSMo 1969, requires that a motor vehicle liability policy "insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured. . . ." The purpose of the omnibus clause in an automobile liability insurance policy is to protect the public, the named insured, and the persons within the omnibus clause from negligent drivers. R. ANDERSON, 12 COUCH ON INSURANCE 2D 45:293 (2d ed. 1964).

> The omnibus clause contained in the policy issued to Mrs. Kloepper read: The following are Insured under Part I: (a) with respect to the owned automobile, (1) the Named Insured and any resident of the same household. (2) any person using such automobile with the permission of the Named Insured, providing his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission. . . .

522 S.W.2d at 811.

3. The issue of coverage by the non-owned automobile clause in Mr. Chapman's policy will not be discussed in this note.

4. In addition to holding that Chapman was covered by both policies, the court also held that an agreement entered into by Chapman's guardian *ad litem* pursuant to section 537.065, RSMo 1969, after SAFECO had persistently refused to defend Chapman was not a collusive agreement. 522 S.W.2d at 819-20.

use the car by the named insured—is covered by the omnibus clause in the named insured's policy has been frequently litigated.[5] Several different approaches have evolved in the cases. In *Odolecki v. Hartford Accident Insurance Co.*[6] the New Jersey Supreme Court held that the second permittee is covered in all cases. Most courts have not gone so far. The predominant view is that whether the first permittee had authority to permit another to drive is a factual question.[7] The first permittee's authority to permit another to drive can be found from the scope of the initial permission granted to the first permittee by the named insured[8] as well as by the named insured's and the first permittee's subsequent conduct.[9] Most of the cases agree that if the named insured gives his permittee unrestricted use of the car, the permittee is authorized to allow another to drive.[10]

Missouri courts have previously been reluctant to extend omnibus clause coverage to a second permittee. Before *SAFECO* only *Haynes v. Linder*[11] had held a second permittee to be covered by the omnibus clause, but the court there found that the named insured had expressly assented to the first permittee's allowing the second permittee to use the car.[12] *SAFECO's* holding that the named insured's permission for the first permittee to allow another to drive the car can be implied from the named insured's course of conduct represents an extension of omnibus clause coverage in Missouri.

The court found that by continually allowing Jane broad and unrestricted use of the car, Mrs. Kloepper indicated her willingness for Jane to permit others to drive the car.[13] In determining that Mrs. Kloepper had given Jane unrestricted use of the car, the court noted that Jane had her own set of keys and that she used the car 75 percent of the time to go shopping, to go to parties, and to visit friends. The court also looked carefully at the kind of arrangement which existed between Mrs. Kloepper and Jane with respect to the latter's use of the car. Characterizing the arrangement as an exceedingly loose one,[14] the court stated that a "parent needs to

5. *See* cases collected in 4 A.L.R.3d 10 (1965).

6. 55 N.J. 542, 264 A.2d 38 (1970). *Odolecki* said that the policies of minimizing litigation and of assuring that all persons who are wrongfully injured have financially responsible persons to look to for damages require that the second permittee be covered by the omnibus clause. *Id.* at 548-49, 264 A.2d at 41-42.

7. *See, e.g.*, National Grange Mut. Liab. Co. v. Metroka, 250 F.2d 933 (3d Cir. 1958); St. Paul Ins. Co. v. Carlyle, 428 S.W.2d 753 (Spr. Mo. App. 1968).

8. *See, e.g.*, United Services Auto. Ass'n v. Preferred Acc. Ins. Co., 190 F.2d 404 (10th Cir. 1951); Boyer v. Massachusetts Bonding & Ins. Co., 277 Mass. 359, 178 N.E. 523 (1931); Haynes v. Linder, 323 S.W.2d 505 (K.C. Mo. App. 1959).

9. *See, e.g.*, Haynes v. Linder, 323 S.W.2d 505 (K.C. Mo. App. 1959); Holthe v. Iskowitz, 31 Wash. 2d 533, 197 P.2d 999 (1948).

10. *See, e.g.*, Perrodin v. Thibodeaux, 191 So. 148 (La. App. 1939); Robinson v. Fidelity & Cas. Co., 190 Va. 368, 57 S.E.2d 93 (1950).

11. 323 S.W.2d 505 (K.C. Mo. App. 1959).

12. *Id.* at 512.

13. 522 S.W.2d at 816.

14. *Id.* at 814.

be more specific in restrictions about the automobile."[15] A mother of a teenaged daughter with a car, the court reasoned, should expect that the daughter would allow a boy to drive when she is with him on social outings.[16] Even though Mrs. Kloepper had previously forbidden Jane to allow anyone else to drive the car, the court apparently thought that her lack of control over Jane's use of the car in the period between the admonition and the accident amounted to her acquiesence in Jane's allowing others to drive, at least in reasonably foreseeable situations such as social outings with boys.

The *SAFECO* court could simply have followed other decisions by finding that Chapman could not have been driving with Mrs. Kloepper's implied permission because she had expressly withheld such permission.[17] The court, however, took a practical approach and acknowledged that parents who give their teenaged child the use of their car are aware that without strict controls the child will allow friends to drive in certain social situations.[18] Chapman reasonably believed that he was driving with proper permission, and Mrs. Kloepper was responsible for his belief because of the manner in which she permitted Jane to use the car. It would have been unfair to have denied him coverage because of a secret verbal restriction about which he could not reasonably be expected to know.[19] It seems equally unfair that a secret restriction should deprive the victims of the accident of an insurance fund from which to recover for their injuries.

SAFECO, however, appears to be only a limited extension of omnibus clause coverage for second permittees. The court expressly rejected the policy argument that second permittees should be covered in all cases.[20] It also declined to overrule previous Missouri cases holding that the first permittee was not authorized to permit another to drive.[21] The court dis-

15. *Id.*

16. *Id.* at 813.

17. *See, e.g.*, Hopson v. Shelby Mut. Cas. Co., 203 F.2d 434 (4th Cir. 1953); Norris v. Pacific Indem. Co., 39 Cal. 2d 420, 247 P.2d 1 (1952); Cocos v. American Auto. Ins. Co., 302 Ill. App. 442, 24 N.E.2d 75 (1939); Carlton v. State Farm Mut. Auto. Ins. Co., 309 P.2d 286 (Okla. 1957).

18. 522 S.W.2d at 813.

19. The Kansas Supreme Court supports this view:

> The insurance protection of the public, as well as of all persons operating motor vehicles, . . . requires that the matter of coverage not be determined after an accident and controlled by a named insured's verbal admonitions given before the accident.

Alliance Mut. Cas. Co. v. Hartford Acc. & Indem. Co., 210 Kan. 769, 774, 504 P.2d 161, 165 (1972).

20. Odolecki v. Hartford Acc. & Indem. Co., 55 N.J. 542, 264 A.2d 38 (1970) is the leading case in support of the policy argument. *See* notes 6-7 and accompanying text *supra*.

21. Farm Bureau Mut. Ins. Co. v. Dryden, 492 S.W.2d 392 (Mo. App., D. St. L. 1973); Government Employees Ins. Co. v. Lammert, 483 S.W.2d 652 (Mo. App., D. St. L. 1972); Allstate Ins. Co. v. Hartford Acc. & Indem. Co., 486 S.W.2d 38 (Mo. App., D. Spr. 1972); St. Paul Ins. Co. v. Carlyle, 428 S.W.2d 753 (Spr. Mo. App. 1968); Helmkamp v. American Family Mut. Ins. Co., 407 S.W.2d 559 (Spr. Mo. App. 1966); Nye v. James, 373 S.W.2d 655 (Spr. Mo. App. 1963); Mid-Am. Mut. Ins. Co. v. Alexander, 351 S.W.2d 171 (Spr. Mo. App. 1962), 1976 F.A.

tinguished the earlier decisions on their facts and emphasized that whether a second permittee is covered will continue to be decided on a case by case basis.[22] Moreover, *SAFECO* apparently does not extend coverage to a second permittee using the car for his own purposes. The court recognized the distinction between a second permittee driving the car for the first permittee's purposes and his using it for his own.[23] Chapman was driving the car for Jane's social purposes and not for any purpose of his own. The court discussed the scope of Jane's authority in terms of permitting another to drive.[24] In this context, the court's use of the term "drive" in its holding,[25] rather than the broader term "use," makes it clear that the decision was meant to apply only where the second permittee is driving the car for the first permittee's purposes.[26]

This limitation on omnibus clause coverage, however, is unduly narrow. If a second permittee using the car for his own purposes is not covered by the omnibus clause, one cannot safely borrow a friend's car without first investigating the extent of the friend's authority with respect to the car. Less diligence may result in such a borrower being an uninsured driver, even though he reasonably believed the friend owned the car.[27] This result

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Mut. Ins. Co. v. Lawson, 336 S.W.2d 123 (K.C. Mo. App. 1960); Varble v. Stanley, 306 S.W.2d 662 (Spr. Mo. App. 1957).

22. Quoting from Teague v. Tate, 213 Tenn. 269, 375 S.W.2d 840 (1964), the *SAFECO* court stated:

> [W]e do not "intend to lay down the rule that will license the first permittee to select a second permittee who will, in all cases, become an additional insured. Each case should be considered on the facts presented."

522 S.W.2d at 816.

23. The court said:

> Jane Kloepper was using the automobile (she was riding in it, which is a use of the automobile) and while she was not operating it, her actual use of the automobile . . . was well within the scope of the broad permission she had from her mother. . . .

522 S.W.2d at 813.

24. The court stated:

> . . . Mrs. Kloepper gave implied permission to Jane Kloepper to permit others to operate the vehicle when Jane was in the car and it was being used for purposes which *Jane* was authorized to make of it.

Id. at 816 (emphasis added).

25. "Permission . . . can be found . . . to permit the first permittee to authorize others to *drive*. . . ." *Id.* (emphasis added).

26. Allstate Ins. Co. v. Hartford Acc. & Indem. Co., 486 S.W.2d 38 (Mo. App., D. Spr. 1972), discussed "use" and "drive" as those terms are employed by the omnibus clause:

> [A]s employed in an omnibus clause "use" is a term of much broader scope and application than "operate" or "drive," and . . . the latter terms are of narrower and more restricted meaning. Although one who operates an automobile obviously uses it, one can use an automobile without operating it.

Id. at 43. In *SAFECO* Jane was still using the car, even though she had delegated the operation of it to Chapman. *See* note 23 *supra*.

27. An earlier appellate decision, however, refused to uphold the trial court's reasoning that the father of a teenaged boy who has free use of the car knows that the boy may on occasion permit a friend to use the car for an errand. The appellate court stated:

> Under the reasoning of the trial court if a father permitted his son to

is not consonant with general social expectations. People do not interrogate their friends as to their authority to lend the car before borrowing it. If the friend treats the car as his own, they assume that he either owns it or has authority to allow others to use it.

The *SAFECO* court took a realistic approach in determining that Jane was authorized to allow another to drive the car for her purposes. The court considered all of the surrounding circumstances and took into account what a mother should expect of her teenaged daughter in certain social situations.[28] By doing so, the court avoided a harsh result. The decision, however, is apparently limited to narrow factual situations like that presented in *SAFECO*. Missouri courts should take a more expansive approach and extend coverage to a second permittee using the car for his own purposes, at least where the named insured has given the first permittee broad and unrestricted use of the car.[29] If the first permittee's authorized use of the car is so unrestricted that the second permittee reasonably believes either that the first permittee owns the car or has authority to treat the car as his own, the second permittee ought to be covered by the omnibus clause in the named insured's policy. It is not reasonable to expect that members of the public will investigate a first permittee's actual authority to lend the car when from all appearances he has that authority. When the named insured has allowed these appearances to exist, it is fair that his insurance should provide the protection for the driver and the public.

CHARLES F. JAMES

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drive the car he would necessarily have knowledge that he would permit his friend to also drive it. We cannot agree with this reasoning.

M.F.A. Mut. Ins. Co. v. Alexander, 361 S.W.2d 171, 181 (Spr. Mo. App. 1962).

28. *See* text accompanying note 16 *supra.*

29. Other jurisdictions have taken this view. *See, e.g.,* Tisdale v. Nationwide Mut. Ins. Co., 269 N.E.2d 390, *rev'd sub nom. on other grounds,* Holcomb v. Miller, 269 N.E.2d 885 (Ind. App. 1971) (broad permission implied from the circumstances included authority for the first permittee to delegate permission for another to use the car for the other's own purposes); Cascade v. Glacier Gen. Ins. Co., 156 Mont. 236, 479 P.2d 259 (1971). The *Cascade* court said "[T]his insured clothed the first permittee with the ostensible authority . . . [to permit] a friend to use the automobile." *Id.* at 245, 479 P.2d at 263.