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Insurance -- Liability of Insurers under the Omnibus Clause to Protect Emergency Drivers -- The North Carolina Situation

James Lee Davis

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The only difference between the latter situations and the actual facts of the case is that the date of distribution occurred both after the husband's death and the executor's sale. *Brewster* held that the decree of distribution gives no new rights and should not be considered in determining basis. By concentrating on the status of the plaintiff as executor of the wife's estate at the time of sale and on the date of distribution, the majority in *Manufacturers Hanover Trust* put form before substance.²²

The result reached in *Manufacturers Hanover Trust* represents a trap for the unwary. A long period of administration is not unusual, and the conclusion reached by the majority would, *mutatis mutandis*, be equally applicable to a shorter period of administration. The use of a single corporate executor for successive estates is not an unusual practice. The likelihood of a corporate executor's serving successive estates has in fact, been greatly increased in North Carolina due to the significant and continuing expansion of the state's larger banks, which now offer trust services that were not available in the past. Executors should be aware when administering successive estates that utmost care should be taken in the choice of dates for the distribution and sale of estate property.

LANNY B. BRIDGERS

Insurance—Liability of Insurers under the Omnibus Clause to Protect Emergency Drivers—The North Carolina Situation

The general effect of an omnibus clause in an automobile liability insurance policy is that one using the automobile with the permission of the named insured becomes an additional insured under the policy.¹ Not only does coverage under the omnibus clause provide the driver with a right against the insurer for indemnification for liability arising out of his use of the vehicle,² but such coverage also guarantees at least minimal recovery to an innocent third party who suffers personal injury or prop-

²² The inequitable result reached by the majority is even more apparent upon consideration of the estate-tax consequences. The fair market value of the securities at the date of the husband's death was used to compute the estate tax on his estate.

¹ 7 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4354 (1962) [hereinafter cited as APPLEMAN]; 7 D. BLASHFIELD, *AUTOMOBILE LAW AND PRACTICE* §§ 315.5, .8 (3d ed. 1966) [hereinafter cited as BLASHFIELD].

² 7 APPLEMAN § 4354; 7 BLASHFIELD § 315.5. The liability of the insurer is still controlled by the limits of coverage of the policy. 7 APPLEMAN § 4371.

erty damage due to the driver's fault.³ The importance of protection for the injured third party is clearly evident when it is realized that the driver may be judgment-proof.

In *Whelchel v. Sommer*,⁴ the owner's wife took his car without his knowledge. While she was driving, the vehicle went into a skid. The wife, suffering from a heart condition, became hysterical and allegedly passed out. Unable to drive, she was transferred to another car to be taken home. At no time did she give anyone permission to drive the car. However, one of her passengers decided to return the car to the owner's home because it was feared that the vehicle would be stolen or vandalized if left unattended in the immediate vicinity. An accident ensued in which the driver was killed and the appellant in the case was injured. The appellant, after obtaining a judgment against the decedent's estate that was unsatisfied, brought an action against the owner's insurance company for garnishment under the omnibus clause. Judgment was rendered for the insurer by the federal trial court on the basis that the decedent did not have permission to drive the car, and this judgment was affirmed on appeal.

Traditionally, permission of the named insured has been the key in bringing the omnibus clause into effect, and litigation involving whether there is coverage under such a provision is generally "permission-oriented."⁵ A typical policy may read:

Persons Insured:

- (1) the named insured . . .
- (2) any other person using such automobile with the *permission* of the named insured. . . .⁶

There is general agreement today that permission may be expressed or implied,⁷ that is, when express permission cannot be found, the court

³ "[S]uit may . . . be brought against the insured by a third person, injured by the conduct of the automobile, by garnishment or otherwise." 7 APPLEMAN § 4371.

⁴ 413 F.2d 521 (8th Cir. 1969).

⁵ For a discussion of the major issues which "dominate the history of litigation . . . with reference to the omnibus provision," see Note, *The Omnibus Clause and Extension of Coverage by the Court*, 45 N.D.L. REV. 505 (1969).

⁶ McLendon, *Coverage Disputes: Basis of Defenses* in NORTH CAROLINA BAR ASSOCIATION FOUNDATION, INSTITUTE ON LIABILITY INSURANCE LITIGATION III-1, III-12 (1968) [hereinafter cited as McLendon] (emphasis added).

⁷ 7 APPLEMAN § 4365; 7 BLASHFIELD § 315.10. North Carolina makes this provision by statute. N.C. GEN. STAT. § 20-279.21(b) (2) (Supp. 1969).

may look to see if the insured had impliedly consented to the driver's use of the vehicle. In making this determination, the facts and circumstances of each case are considered.⁸ However, judicial decisions have developed certain rules regarding the particular facts and circumstances that will justify a finding of implied permission. Three factors are generally required to coexist: (1) a history of frequent past use by the permittee, (2) knowledge by the named insured of such use, and (3) acquiescence on the part of the named insured.⁹ If no permission is found, the court will generally stop its inquiry and hold that the driver is not an additional insured. On such a finding, the injured party may be without a satisfactory remedy since the insurer is absolved from liability.

In *Whelchel*, as permission in the traditional sense could not be established, the appellant argued that the court should extend "implied permission" to cover the decedent on the basis of emergency—*i.e.*, that the court should find a constructive consent in that operation of the vehicle was under such circumstances that the named insured under the policy would have granted his permission had he been in a position to do so. As to "[t]he question of whether an 'emergency' can create implied permission of the named insured to drive his insured automobile,"¹⁰ the Court of Appeals for the Eighth Circuit recognized that the issue was one of first impression under Missouri law¹¹ and that very few other courts had previously considered it.¹² Under the dictate of *Erie*,¹³ the court found that the closest analogy to the question before it was the approach taken by the Missouri courts in cases presenting the traditional issue of implied permission. Finding that Missouri had adopted a strict position

⁸ 7 BLASHFIELD § 315.10.

⁹ Note, *The Omnibus Clause and Extension of Coverage by the Court*, *supra* note 5, at 519. Implied permission may also arise from the relationship of the parties or from certain conduct on the part of the named insured, but such permission is not germane to this note. *Id.* at 518-21.

¹⁰ *Whelchel v. Sommer*, 413 F.2d 521, 526 (8th Cir. 1969).

¹¹ The case was in the federal courts on removal from a Missouri court on the basis of diversity of citizenship. The parties agreed that Missouri law was controlling. *Id.* at 524.

¹² Perhaps the most analogous case in which liability for the insurer has been found is *Coons v. Massachusetts Bonding & Ins. Co.*, 12 App. Div. 2d 701, 207 N.Y.S.2d 819 (1960), *aff'd*, 9 N.Y.2d 994, 176 N.E.2d 515, 218 N.Y.S.2d 66 (1961). In this case the insured stopped his automobile in the middle of a busy street and walked away. A passenger attempted to move the vehicle and had an accident. Though the court mentioned the foreseeable "emergency," the decision appears to be based on permission implied from the conduct of the insured. See note 9 *supra*.

¹³ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

in that regard, the court felt compelled to hold that state law would not have recognized implied permission based on emergency. However, the court added:

. . . [W]e cannot escape the conclusion that a beneficial purpose would have been served if the Missouri Supreme Court could have rendered a definitive decision on a question that deeply involves matters of local law and policy.¹⁴

This question of "local law and policy" suggests that *Whelchel*, though far removed from the local forum, calls for a searching inquiry as to what should constitute permission in North Carolina. For the sake of discussion, let us imagine a clear situation of emergency arising in this state.¹⁵ Insured, driving alone, stops to pick up a hitchhiker. While stopped, insured slumps over the wheel unconscious. As no help is immediately available, the hitchhiker takes the wheel to drive to the hospital. Is the hitchhiker an additional insured? Under North Carolina case law, the answer is no. Clearly there has been no express permission.

Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference.¹⁶

It also appears that there is no implied permission on these facts. Though not spelling out the elements mentioned earlier,¹⁷ North Carolina has followed the traditional approach.

. . . [I]mplied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying consent.¹⁸

¹⁴ 413 F.2d at 527.

¹⁵ As the court in *Whelchel* refused to accept appellant's argument regarding emergency, it was unnecessary for it to determine if the facts of the case actually constituted such an emergency that the omnibus clause would be brought into effect. A significant difficulty in expanding implied permission to cover the "emergency operator" is the determination of what circumstances in fact constitute an emergency. Inquiring of the trier of fact whether a reasonable man would have granted his permission if he had known of the circumstances and had been in a position to consent may provide a solution.

¹⁶ *Hawley v. Indemnity Ins. Co. of North America*, 257 N.C. 381, 384, 126 S.E.2d 161, 164 (1962).

¹⁷ See text preceding note 9 *supra*.

¹⁸ *Hawley v. Indemnity Ins. Co. of North America*, 257 N.C. 381, 384, 126 S.E.2d 161, 164-65 (1962).

Should an accident occur under circumstances similar to those in our hypothetical fact-situation, the result might be to leave injured third persons without redress. Is such an outcome warranted on the sole grounds that the insured was unable to expressly consent and that, since the parties were strangers, no "course of conduct" can be established? The expressed public policy of the state would decry such a result.

The primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway.¹⁹

Yet, for "claims or causes of action" arising before July 6, 1967,²⁰ it is apparent that there would be no liability for the insurer.

In 1967, North Carolina General Statutes, section 20-279.21 was amended to read:

(b) Such owner's policy of liability insurance:

....

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, *or any other persons in lawful possession. . . .*²¹

The addition of the italicized language would appear to provide coverage to the hitchhiker in our hypothetical situation as the use of the conjunction "or" seems to indicate that "lawful possession" is something different from "using . . . with . . . express or implied permission." However, this interpretation ultimately depends upon a similar construction of the words "lawful possession" by the North Carolina courts, and to this date no litigation involving the issue has been before the supreme court or the court of appeals.²²

¹⁹ Allstate Ins. Co. v. Hale, 270 N.C. 195, 200, 154 S.E.2d 79, 84 (1967).

²⁰ Ch. 1162, § 4, [1967] N.C. Sess. L. 1795 provides: "[N.C. GEN. STAT. § 20-279.21(b) (2) (amendment ratified July 6, 1967)] shall be in full force and effect from and after its ratification, but shall not affect any claims or causes of action arising before ratification."

²¹ N.C. GEN. STAT. § 20-279.21(b) (2) (Supp. 1969) (emphasis added). Since coverage under the omnibus clause of "persons in lawful possession" of the named insured's vehicle is based upon the public policy of providing minimum protection for third persons, the courts might well limit the insurer's liability under the clause to the statutory minimums in the absence of an express provision to the contrary in the insurance policy.

²² Though this language was included in an earlier statute (Ch. 1006, § 4(2) (b),

The preamble to the session law through which this statutory addition was enacted²³ also appears to support the conclusion that it was intended to expand the scope of the omnibus clause beyond the traditional coverage of drivers with the "permission" of the named insured.

. . . .

WHEREAS, many innocent and blameless citizens who are victims of serious personal injuries and property loss are unable to receive any compensation whatsoever because of difficulty of proof under the terms of liability insurance policies, and it is difficult and often impossible for injured parties and operators to prove that one lawfully in possession of a vehicle had the express or implied permission of the owner to drive on the very trip and occasion of the collision; and

WHEREAS, liability coverage under the laws of North Carolina is provided for an operator of a vehicle who has the "express or implied permission" of the titled owner but does not extend to persons *otherwise lawfully in possession of vehicles*²⁴

Section two of the same session law reads: "It shall be a defense to any action that the operator of a motor vehicle was not in lawful possession on the occasion complained of."²⁵ Mr. L. P. McLendon, Jr., a member of the Senate Insurance Committee when the law was considered and passed, has pointed out that the effect of the second section is to shift the burden of proof to the insurer to show that the operator was not in lawful possession.²⁶ *Quaere* whether the insurer can meet this burden by simply showing that the operator had neither the express nor the implied permission of the insured. If so, it would appear that the sole effect of the statutory addition is to ease the plaintiff's "difficulty of proof" by shifting the burden on the issue of permission and that, in fact, coverage under the omnibus clause is not extended beyond the operator's having permission.

Since such a construction is possible, it is necessary for us to consider where the "emergency operator" and the person that he injures stand if they must fall back upon actual permission, express or implied.

[1947] N.C. Sess. L. 1414 (repealed 1953)), the cases indicate that there has been no judicial determination of the meaning of "lawful possession."

²³ Ch. 1162, [1967] N.C. Sess. L. 1794.

²⁴ *Id.* at 1795 (emphasis added).

²⁵ *Id.*

²⁶ McLendon at III-13.

A consideration of the circumstances that gave rise to the 1967 amendment may be helpful to the litigant. Mr. McLendon has attributed the legislation to confusion existing from court decisions dealing with the omnibus clause.²⁷ This confusion arose in an attempt by the supreme court to settle on one of three approaches taken by other jurisdictions in interpreting such clauses. Relying on *Hawley v. Indemnity Insurance Co. of North America*,²⁸ Mr. McLendon has summarized the three approaches as follows:

(1) *Strict Rule*— . . . [A]ny deviation from the time, place or purpose specified by the person granting permission is sufficient to take the permittee outside the coverage of the omnibus clause.

(2) *Moderate Rule*— . . . [A] material deviation from the permission granted constitutes a use without permission, but a slight deviation is not sufficient to exclude the permittee from coverage.

(3) *Liberal Rule*— . . . [I]f the permittee has permission to use the auto in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties at the time of the bailment, is a permissive use within the terms of the clause.²⁹

In *Hawley*, the supreme court derived a legislative intention to confine construction of omnibus clauses at least to the moderate rule.³⁰ The rationale was that since the Motor Vehicle Safety and Responsibility Act of 1947³¹ had extended coverage to one "using or responsible for the use of the motor vehicle with the permission, expressed or implied, of the named insured, or any other person in lawful possession,"³² the deletion in 1953 of the italicized phrase³³ indicated a legislative desire to narrow the statute. Mr. McLendon has criticized this interpretation and has pointed out that the legislature modeled the language of the 1953 enactment³⁴ deleting the phrase in question on a provision in the Uniform Motor Vehicle Safety Responsibility Act of 1952,³⁵ which has been held

²⁷ *Id.*

²⁸ 257 N.C. 381, 126 S.E.2d 161 (1962), noted in Note, *Automobile Insurance—Permissive User Under the Omnibus Clause*, 41 N.C.L. REV. 232 (1963). Mr. McLendon also relied upon this case note.

²⁹ McLendon at III-14.

³⁰ 257 N.C. at 387, 126 S.E.2d at 167.

³¹ Ch. 1006, §§ 1-59, [1947] N.C. Sess. L. 1412-32 (repealed 1953).

³² *Id.* § 4(2) (b) at 1414 (emphasis added).

³³ Ch. 1300, § 21(b) (2), [1953] N.C. Sess. L. 1271.

³⁴ N.C. GEN. STAT. § 20-279.21(b) (2) (1965), as amended, N.C. GEN. STAT. § 20-279.21(b) (2) (Supp. 1969).

³⁵ The pertinent provision in uniform legislation today can be found in NATIONAL

to encompass the liberal rule in other jurisdictions.³⁶ "Importantly," he has stated, "the Court noted that the omnibus clause as contained in the [1947 act] was broad enough to embrace the liberal rule."³⁷ Though Mr. McLendon did not say that the purpose of reinsertion of the phrase "in lawful possession" by the 1967 General Assembly was to enact the liberal rule, the quotation above would indicate his opinion that there was intent by the legislature to allow the courts to adopt it.

Significant in this legislative history is that the rules in question as well as the supreme court's opinion in *Hawley* are not concerned with what *constitutes* initial permission. Rather the focus is on the *scope of such permission* and the consequences for deviation from it.³⁸ Therefore, any attempt to determine specific legislative intent to either expand or restrict what constitutes initial permission would be futile, for it is implicit that this question was not considered by the legislature. However, continuing to be aware that "[a] compulsory motor vehicle insurance act is a remedial statute and will be liberally construed so that the beneficial purpose intended by its enactment . . . may be accomplished,"³⁹ the courts should realize that the specific attempt to liberalize the applicability of the statute in those cases involving a permissive user is some indication of the feeling of the legislature about application of the statute generally. As the 1967 amendment clearly provides the opportunity for adoption of the liberal rule in North Carolina as to the scope of permission once granted, it appears permissible for the courts to similarly liberalize the view of what constitutes initial permission so that the emergency operator will be covered by insurance and persons or property injured by his driving will be afforded some protection.⁴⁰ Even under the traditional interpretation of implied permission, the supreme court has recognized that "the purpose of the use . . . [has] bearing on

COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE & MODEL TRAFFIC ORDINANCE § 7-324(b) (2) (rev. ed. 1968).

³⁶ McLendon at III-13.

³⁷ *Id.*

³⁸ For a discussion of problems regarding the scope of permission in North Carolina see Note, *Automobile Insurance—Permissive User Under the Omnibus Clause*, 41 N.C.L. REV. 232 (1963).

³⁹ *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967).

⁴⁰ It is difficult for this writer to comprehend why the emergency operator (who is perhaps performing a service for the insured and who may possibly have the insured in the automobile at the time of the accident) should not be provided coverage if coverage is provided to one who has initial permission regardless of the extent of his later deviation. *Liberal Rule* in text at note 29 *supra*.

the critical question of the owner's implied permission for the actual use."⁴¹

Whether the courts interpret "lawful possession" to cover the emergency operator or whether he is found to have "permission" because of the existing emergency, it is evident that coverage must be provided under the statute if more than lip service is paid to the public policy underlying compulsory liability insurance in North Carolina. Arguably, the more desirable approach is to give "lawful possession" a meaning independent of permission, for the former appears to describe the emergency situation more accurately. Indeed, "lawful possession" can even be extended beyond the emergency situation so that anyone other than a thief becomes an insured. Such a far-reaching interpretation would still fall short of the ultimate remedial goal of providing partial redress to *every* innocent victim of a negligent driver.⁴²

JAMES LEE DAVIS

Labor Law—Duty to Bargain in Good Faith—Boulwarism Within the Totality-of-Circumstances Rule

In 1947, following a series of setbacks in negotiations with the three major unions representing its employees,¹ General Electric introduced a new approach into its technique of collective bargaining. This approach, labelled "Boulwarism" after its supposed progenitor,² was designed to instill in the employees of GE the idea that the company, without prodding by the representatives of the employees, would do what was "right" and would give each employee the benefits to which he was entitled, but no more.³ The implementation of Boulwarism was two-pronged. First, by means of extensive investigation into the various economic factors in-

⁴¹ *Bailey v. General Ins. Co. of America*, 265 N.C. 675, 678, 144 S.E.2d 898, 900 (1965).

⁴² See text preceding notes 19 & 24 *supra*.

¹ Note, *Labor Law: General Electric's "Overall Approach" to Bargaining Held a Violation of Good Faith*, 1965 DUKE L.J. 661 n.1. See Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653, 662-63 & n.35 (1966).

² Lemuel R. Boulware, then vice-president of GE, designed the new technique in the late 1940's. R. SMYTH, L. MERRIFIELD, & T. ST. ANTOINE, *LABOR RELATIONS LAW* 718 (4th ed. 1968). The most detailed history of Boulwarism is contained in H. NORTHRUP, *BOULWARISM* (1964).

³ Note, *Labor Law—Collective Bargaining—General Electric's Firm Offer Approach Held Bad Faith*, 40 N.Y.U.L. REV. 798 (1965). GE developed an almost paternalistic attitude toward its employees. See Cooper, *supra* note 1, at 660.