Some Aspects of the Omnibus Clause

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COMMENT

SOME ASPECTS OF THE OMNIBUS CLAUSE

The presence of an omnibus clause in automobile insurance policies can be attributed to the highly competitive nature of the insurance industry. Basically, the omnibus clause is designed to give insurance coverage to an un-named person who is driving the policyholder's automobile with the latter's consent. A standard clause reads,

With respect to the insurance for bodily injury liability and for property damages liability the unqualified word "insured" includes the named insured and also includes any person while using the automobile and any organization legally responsible for the use thereof, provided the actual use is by the named insured or with his permission or the permission of an adult member of his household.

Coverage under the clause is broad as it includes (1) persons not named in the policy; (2) those who pay no consideration to the insurer; (3) those who are unaware of the clause and do not rely upon it; and (4) those to whom the insurer will not issue a policy.

The purpose of this Comment is to explore two problems presented by the omnibus clause. First, to obtain coverage under the clause, the named insured must grant permission to the permittee to use his car. The concept of permission has been particularly troublesome; indeed, there is little harmony among the courts as to its meaning and application. The writer proposes to analyze the approaches taken by the courts toward the concept of permission, with a special emphasis on the Washington cases. Second, an interesting and related problem posed by the recent case of Wood v. Kok has suggested a study of the situation in which the named insured allows another to use his car, and he in turn delegates operation of the automobile to a third person.

THE PERMISSION PROBLEM

The first prerequisite to coverage is that the person giving permission has the capacity under the omnibus clause to grant it. There is no question that the named insured has the necessary capacity, provided he has beneficial ownership of the car. Under the standard clause, an adult member of the named insured's household may also give permission. In Hinton v. Carmody, a minor of 20 years and 9 months owned a car which his father had insured. The policy contained a

\^1 58 Wn.2d 12, 360 P.2d 317 (1961).
\^2 186 Wash. 242, 57 P.2d 1240 (1936).
standard omnibus clause. The minor allowed a friend to use the car, and the court held that the driver drove without permission of the named insured or a member of his household; thus coverage was denied.

Permission is revocable, and like many agency relations, it terminates on the death of the grantor. In *Collins v. Northwest Cas. Co.*, the named insured gave her son permission to use her car. The son had an accident after the death of his mother and claimed that he was covered on the ground that death did not revoke the permission or that since he was a member of the named insured's household, he could drive with coverage. Rejecting both arguments, the court held (1) that to obtain coverage, the son should have received permission from the executor of his mother's estate; and (2) that since death of the head of the household terminates it, the son could not, as a member of a non-existent household, give himself the requisite permission. The underlying reason that permission ceases on the death of the named insured is that a casualty insurance policy is a personal contract, dependent upon the existence of the parties; thus it terminates on the death of the insured unless there is a provision to the contrary.

Unique problems of capacity arise when the person granting permission has given up possession of and title to the car but has not cancelled his policy covering the vehicle. The general rule seems to be that under such a circumstance, the policy holder has no authority to grant permission. The basis of the rule is that capacity to give permission terminates with the cessation of the grantor's beneficial interest in the automobile.

A second condition of coverage involves the scope of permission, a problem closely akin to an agent's scope of authority. Permission, by itself, encompasses both express and implied permission. In the landmark case of *Odden v. Union Indem. Co.*, the court found no express permission, but rather relied on the past conduct of the parties consisting of three months of continuous use of the automobile by the permittee and his friends, which was known to the named insured. One

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4 Permission by one who is mentally competent but subsequently becomes incompetent is not revoked by the later change in circumstances. Tooney v. Heney, 166 F. Supp. 85 (N.D. Ohio 1958).
6 156 Wash. 10, 286 Pac. 59 (1930).
of the friends had an accident with the vehicle, and the court held that he was covered by the omnibus clause.\textsuperscript{7} Implied permission may also be found from a relationship between the named insured and the permittee, or by finding acquiescence on the part of the named insured in allowing the permittee use of the automobile. The court was liberal in finding permission in the \textit{Odden} case. However, in \textit{McKee v. Garrison},\textsuperscript{8} the court recognized the above rules but applied them strictly so as to reach a very different result. In \textit{McKee}, \textit{R} gave his car to \textit{G}, a self-proclaimed auto mechanic, so \textit{G} could repair a noisy engine. \textit{R} asked \textit{G} to look at the brakes because they were grabbing. In holding that \textit{G} had no implied permission to use the vehicle, the court reasoned that since \textit{G} was a novice mechanic, unfamiliar with the manner in which automobiles were repaired, \textit{R} did not intend that he should do any driving. Normally, the only way in which one could test brakes would be to drive the car, and the relationship of repairman-patron should raise an inference of permission.

Express permission must be of an affirmative character; \textit{i.e.}, clear and direct.\textsuperscript{9} Whether there has been express permission or not is a question of fact for the jury.\textsuperscript{10}

A third prerequisite to coverage under an omnibus clause is also connected with the concept of permission. The problem can best be illustrated by several examples. Suppose the named insured asks \textit{P}, a permittee, to run a personal errand for him. \textit{P} completes the errand, but instead of returning the car immediately, proceeds on a trip of his own and has an accident. Or suppose that there are two roads, one twice as long as the other, which \textit{P} can use. \textit{P} takes the longer route and has an accident. Or, altering the hypothetical slightly, assume the named insured specifically says, "Bring my car straight back from the errand." \textit{P} finishes the errand and on the way to his girlfriend's house has an accident. Must the permittee be doing \textit{exactly} what he was authorized to do, or is he allowed a degree of latitude within the scope of his authority? The courts have divided three ways on what conduct will place a permittee within the ambit of the omnibus clause.

\textsuperscript{7} In \textit{Trotter v. Union Indem. Co.}, 33 F.2d 363, \textit{aff'd}, 35 F.2d 104 (9th Cir. 1929), the federal court heard the same case as presented in \textit{Odden v. Union Indem. Co.} and found that as between the named insured and the permittee, no permission, express or implied, to allow the permittee's friends to use the automobile existed; thus the friend was denied coverage under the omnibus clause.

\textsuperscript{8} 37 Wn.2d 37, 221 P.2d 514 (1950).


\textsuperscript{10} \textit{Holthe v. Iskowitz}, 31 Wn.2d 533, 197 P.2d 999 (1948); \textit{Odden v. Union Indem. Co.}
First, a minority of courts has adopted the "strict conversion" rule (so-called because any deviation from the intended use makes the user a converter), which the Washington court has defined in the following terms:

[F]or a driver's use to be with the permission of the named insured, that permission, express or implied, must have been by the named insured not only to the taking and use of the car in the first instance but also to the particular use being made of the car at the time in question.\(^{11}\)

The emphasis in the strict conversion rule is on the use at the moment of impact. If the permittee is not doing exactly what he was given permission to do, coverage is denied. The rationale for the rule is that coverage is co-extensive with the owner's actual permission, so that deviation from the permitted activity will terminate coverage.

In Cypert v. Roberts,\(^{12}\) the first case in which the Washington Supreme Court had an opportunity to construe an omnibus clause, the court seemingly adopted the strict conversion rule. The permittee was authorized to take the named insured's car for a certain length of time and then was directed to return it. Upon returning the car and being unable to locate the named insured, the permittee used it again. The court stated:

That she did not have such permission, express or implied, . . . at the time, and under the circumstances, or for the purposes existing at the time of the collision was clearly established, and must be so held . . . as a matter of law. (Emphasis added.)\(^{13}\)

Although Cypert might be distinguished on the ground that the permittee lacked permission originally because she returned the vehicle and thereby ended her rightful possession, such an interpretation is too narrow since it does not give full effect to the court's statement quoted above. Since Cypert, the Washington court has retreated from the strict conversion doctrine, and indeed has rejected it.\(^{14}\)

Second, a number of courts adhere to the "liberal" or "initial permission" rule.\(^{15}\) Under this theory, if the permittee receives permission to use the automobile in the first instance, any subsequent use is deemed to be with the permission of the named insured, even though the use

\(^{12}\) Id. at 38, 13 P.2d at 55.
\(^{13}\) Id., 156 Wash. 10, 286 Pac. 59 (1930).
\(^{14}\) Parks v. Hall, 189 La. 849, 849, 181 So. 191 (1938); Hodges v. Ocean Acc. & Guar.
may be for a purpose completely foreign to that originally contemplated, or at a time or place not intended by the named insured when he parted with possession. The initial permission rule was first adopted in Tennessee, but was subsequently restricted there. The rule is grounded on a pure public policy argument; i.e., automobile insurance is as much for the benefit of the public as for the insured, and when an automobile accident occurs, the issue of "permission" is immaterial. Little imagination is needed to see that once such reasoning is adopted, its application is limitless. In *Fulco v. City Ice Service, Inc.*, an employer allowed his truck to be left in an alley with the keys in the ignition. An unknown person took the truck. The truck later struck and injured the plaintiff. The court found that the truck was being used with implied permission from the named insured because he knew of the practice of his drivers and acquiesced in it. Evidently, in Louisiana, the carelessness of a named insured gives rise to implied permission, and this in conjunction with the initial permission rule makes coverage under an omnibus clause absolute. It seems safe to conclude that had the defendant insurance carrier known that its contract would be so interpreted, it would not have entered it.

That the Washington court has not yet accepted the initial permission rule is demonstrated in *Yurick v. McElroy* and *Wallin v. Knudtson*. In *Yurick*, the permittee was given permission to drive the named insured's car on New Year's Eve; however, the car broke down just after the permittee took possession of it. He was instructed to get the car running and return it on New Year's Day. Instead of returning the automobile directly to the named insured, the permittee drove it on several personal errands. On one of these, the plaintiff was negligently struck by the permittee. The court found that the permittee had limited permission only, and liability could be imposed only if he were operating the vehicle within the scope of permission. The court said,

The delivery of an automobile by the owner . . . to accomplish a particular mission for the owner, would not, ordinarily, without the

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*Corp., 66 Ga. App. 431, 18 S.E.2d 28 (1941), cert. denied, 316 U.S. 693 (1941). This rule has been aptly termed the "Hell or High Water Rule" in 7 *Appleman, Insurance Law & Practice* 308 (2d ed. 1962).
18 *53 So. 2d 488 (La. 1951), withdrawn by order of court, 53 So. 2d 389 (1951).
20 46 Wn.2d 80, 278 P.2d 344 (1955).
granting of further permission to use the car for the loanee's own purpose, be considered as an implied grant of such permission.\textsuperscript{21}

In the \textit{Wallin} case, the named insured gave permission to another to drive his car from Fort Lewis to nearby Tacoma. The permittee drove to Tacoma and then started on a forty-five mile trip to Seattle. When he was seventeen miles out of Tacoma, he negligently struck the plaintiff's decedent. The court rejected the initial permission rule, but it left the door open for its subsequent adoption, stating,

\begin{quote}
[W]e do not... desire to foreclose re-examination of [the initial permission rule] in the light of the changing conditions should occasion require it. The statutes of many states requiring owners of automobiles to carry indemnity or liability insurance making an insured of anyone who has possession of an automobile with the permission, express or implied, of the owner, are placing the stamp of approval on the rationale of those cases as a matter of public policy.\textsuperscript{22}
\end{quote}

The third approach to the problem is embodied in the "minor deviation" rule. Under this rule, a permittee is covered so long as he is either operating the car for the precise purpose which it was given to him, or, if he has made a slight deviation from that purpose, he is likewise protected. The leading case on the minor deviation rule is \textit{Dickinson v. Maryland Cas. Co.},\textsuperscript{23} in which the named insured loaned his car to the permittee so he could go to his home and change his clothes. The permittee started toward home, but stopped at a saloon where he met Dickinson and several others. The permittee agreed to take Dickinson to his home, which was in the general direction of his own. After driving more than a mile in a direction away from their homes to let the others off, the permittee and Dickinson stopped for several drinks. Finally, they started toward home. It was on this trip that the permittee collided with a tree, mortally injuring Dickinson. The court reasoned that had the insurance company wanted to protect itself fully, it could have provided that a permittee would be protected under the omnibus clause only if he were operating the vehicle for the exact purpose for which it was loaned. The court thought that the deviation described was too slight to annul the protection afforded by the policy.

The rationale for the minor deviation rule is twofold. First, upon the loan of the car, the named insured may specifically state the object of

\textsuperscript{21} Yurick v. McElroy, 32 Wn.2d 511, 518, 202 P.2d 464, 468 (1948).
\textsuperscript{22} Wallin v. Knudtson, 46 Wn.2d 80, 82, 278 P.2d 344, 345 (1955).
\textsuperscript{23} 101 Conn. 369, 125 Atl. 866 (1924).
the loan, but the manner of accomplishing it is usually within the discretion of the permittee; thus coverage should not be denied if the purpose is completed in a manner slightly different from that contemplated. This is analogous to the concept used in agency to ascertain whether an agent is acting within the scope of his employment. Second, the rule more nearly accords with the intention of the insurance company when it entered the contract than does, for example, the initial permission rule.

The Washington court in *Wallin v. Knudtson*24 adopted the minor deviation rule:

> As regards the breadth to be given the word 'permission' as used in the clause of the character herein considered—where one asks for and receives permission to use the car for a purpose indicated by him in his request, it will not be held that any deviation or departure from the purpose so indicated by him annuls the permission and puts him in the position of unlawfully using the car.25

There are several disadvantages to this rule, the most noteworthy of which is that each case presents a particular factual problem of whether the deviation was great enough to annul coverage. In *Wallin*, the court provides a guide:

> It seems to us that a much greater deviation, measured in terms of purpose, time, and distance, can be justified as permissible in such a case than in a situation where the named insured has delivered possession of the car to another person for a specific purpose indicated by the named insured.26

The formula given by the court stresses three factors—purpose, time, and distance. If the named insured restricts the purpose alone for which the car may be used, then any deviation from that purpose will be closely scrutinized, with the probability of denial of coverage under the omnibus clause. However, if the named insured imposes restrictions on time and/or distance or a combination of those two with purpose, then deviations from the named insured's original permission will be deemed minor so long as the car can be returned within the time limit.

> It is the opinion of this writer that the minor deviation rule most closely accords with the intent of the parties to the insurance contract.

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26 *Id.* at 87, 278 P.2d at 347.
Unlike the other two rules, the minor deviation rule strikes an even balance between denying effect to the omnibus clause and using it as a means of obtaining insurance for all automobile drivers, regardless of the conditions under which they were given the car. Recognizing that society has become more mobile, the rule allows a permittee a reasonable degree of latitude in use of the car, with a special emphasis on the time factor. Finally, the rule recognizes a fundamental division of labor between the judicial and legislative branches of government; i.e., whether or not a state should have compulsory insurance, or any aspect of it, is a matter for legislative determination, and is not a decision which the court should attempt by a distorted construction of the omnibus clause.

THE SUB-PERMISSION PROBLEM

The second problem to be discussed arises when a permittee of a named insured allows a second, or sub-permittee, to use the automobile. The point at issue is whether the omnibus clause will cover the sub-permittee when the named insured either did not expressly authorize the original permittee to delegate the use or operation of the car, or expressly forbade such a delegation.

The most common situation is that in which the named insured says nothing about sub-delegation. Should silence be a denial to the permittee of the authority to sub-delegate, or can silence create an inference of power to sub-delegate? This question has reached the courts on numerous occasions, and the answer still is not settled.

A springboard for discussion of the problem is the recent case of *Wood v. Kok.*27 In *Wood,* the named insured granted *K* permission to use her car for the purpose of testing it to see whether he would buy it. *K* allowed *M,* who was a minor of fourteen, unlicensed, and unknown to the named insured, to drive. While *M* was driving, she negligently struck the plaintiff. The omnibus clause in the named insured’s policy stated that the

unqualified word ‘insured’ includes . . . (2) with respect to the described automobile, any other person or organization legally responsible for its use, provided the actual use of the automobile is by the named insured or with his permission. . . .28

The court ignored any discussion of the fact that *K* was granted permission only to test the car; rather it decided that the term “use”

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28 Id. at 14, 360 P.2d at 577.
meant that so long as the named insured had granted K permission to drive the car, the clause would be operative if the vehicle was being used to benefit K. Four judges dissented on the ground that K was not given general permission to use the car, so that he lacked authority to delegate operation of it. The holding in the Wood case seems unwarranted for two reasons. First, Washington has not accepted the liberal rule on scope of permission, so that when K was given the car, he retained its use for a particular purpose; viz., to test drive it to determine whether he would buy it. This excludes, by implication, the power to delegate to an unlicensed and inexperienced driver. Indeed, the dissent points out, "The record is explicit that there was no request for an unlimited use, nor was permission for an unlimited use ever granted." Under the minor deviation rule, a permittee should not be entitled to relinquish possession of the automobile to another since the named insured entrusted it to him, and such a change in drivers would be a deviation of greater consequence than the rule allows. Second, the intent of the insurance carrier when it issued its policy to the named insured cannot be ignored. The insurance company, by including the omnibus clause, relied upon the discretion of the particular named insured to delegate the use of the vehicle. It did not intend to insure the risk created when the permittee of the named insured delegated its use to a sub-permittee. The statement of Judge Chambliss in American Auto. Ins. Co. v. Jones makes this point clearly and convincingly,

The element of risk underlies all forms of insurance. The insurer has a right to assume that the risk he undertakes shall not be enlarged. The extent of the risk is the basis of all tabulated premium charges. And this is one of the forms of insurance, of which fire policies are an illustration, wherein there is a recognized personal element resting on standards of character, responsibility, and competence. In this class of cases, theoretically, ... the insurer looks first to the standing and reputation of the named assured and trusts him to select and delegate to responsible employees, only the "use" or operation—controlling, guiding, driving—of its cars covered, and on this theory agrees to cover such "additional assureds." No power passes, in contemplation of the parties, to such an agent to delegate in turn this responsibility. Such a diversion of use can hardly be said to be impliedly with the consent of the named assured, or within the contemplation of the insurer. It is a

29 Id. at 17, 360 P.2d at 579.
80 163 Tenn. 605, 45 S.W.2d 52, 53 (1932).
departure too radical and foreign, and involves an unjustifiable extension of the risk covered by the contract.

Although these two reasons seem persuasive, a majority of courts have circumvented them and have imposed liability on insurance carriers when a sub-permittee has been driving. First, in *Odden v. Union Indem. Co.*, the court found that a course of conduct of loans by the permittee, known to the insured but unobjected to, constituted implied permission to allow delegation. The doctrine of implied permission has been extended so far that in at least one jurisdiction mere transfer of possession of the vehicle to a permittee raises an implication that he can sub-delegate its use. Such a result is incompatible with Washington’s minor deviation rule.

A second manner in which the problem of sub-delegation can be avoided turns on the meaning and distinction between “use” and “operation.” Where the omnibus clause employs the word “use,” it is deemed to have a broader meaning than “operate.” “Operate” refers to actual manual direction of the car, while “use” refers to employment for an object or purpose of the user. Thus, in order to be using a car, one does not have to be operating it. Most omnibus clauses require that the named insured has given permission for use of the automobile. If a permittee allows a sub-permittee to drive, and he is within the scope of permission which the named insured gave, then there is coverage as he is using the car for its intended purpose. Under such reasoning, it is immaterial who is operating the car.

Another group of cases in which the distinction between “use” and “operate” creates liability for the insurance carrier arises when the permittee is riding with the sub-permittee. The reasoning is that the permittee is deriving benefit from the car even though he is not driving it. The concept of physical presence and benefit has been carried to such an extreme that it covers the situation where the permittee is sleeping while the sub-permittee is driving. A third theory for omnibus clause coverage is based solely on the

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31 156 Wash. 10, 286 Pac. 59 (1930).
33 Trotter v. Union Indem. Co., 33 F.2d 363 (W.D. Wash. 1929), aff’d, 35 F.2d 104 (9th Cir. 1930).
34 Indemnity Ins. Co. of North America v. Metropolitan Cas. Ins. of New York, 33 N.J. 507, 166 A.2d 355 (1960) (driver expressly forbidden to drive.)
36 American Cas. Co. v. Windham, 107 F.2d 88 (5th Cir. 1939), cert. denied, 309 U.S. 674 (1940).
benefit concept; viz., so long as the car is being driven for the benefit of the permittee, the sub-permittee is protected. The courts which advocate this theory do not require a permittee to be physically present when a sub-permittee is driving. Under the benefit doctrine, the sub-permittee would be covered even though the permittee was forbidden to delegate operation of the car. The apparent rationale for this doctrine is that original permission includes by inference the authority to delegate.

The case of Wood v. Kok presents the most difficult situation for omnibus clause coverage because the sub-permittee is unlicensed. Even assuming the strongest case, i.e., that initial permission by the named insured includes by implication authority to delegate use to a sub-permittee, can such an inference also encompass the power to allow an unlicensed person to drive? Even in the strongest case, such an implication is unwarranted as being totally unreasonable. In such a situation, an analysis of coverage should originate with the insurance contract to determine the rights and duties of the parties. The risk of delegation to an unlicensed driver by a permittee was not within the contemplation of the parties when the original insurance policy was issued, since it is highly unlikely that the insurance carrier would have issued a policy covering a risk so extreme in its inception unless an extra premium were charged.

In conclusion, the result reached in the Wood case creates serious doubts as to whether Washington will continue to follow the minor deviation rule in the future. In Wallin v. Knudtson, the court left the way open for adoption of the liberal or initial permission rule. In Wood, the court did not discuss either rule but seemingly gave sanction to the liberal rule. The writer urges that the minor deviation rule be retained and followed because it more closely accords with the intent of the named insured and the insurance carrier when the particular policy was issued, and because it leaves to legislative determination Washington’s position on any form of compulsory insurance.

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37 Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1943).
38 Glens Falls Indem. Co. v. Zurn, 87 F.2d 988 (7th Cir. 1937).
41 46 Wn.2d 80, 278 P.2d 344 (1955).