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Insurance - Exclusionary Clauses in Automobile Liability Policies

Raleigh Newman

A particular problem is that the availability of obscene materials will have an unhealthy effect on the undisciplined and undiscriminating minds of young people. But adequate measures other than universal censorship exist for coping with this threat. The "clear and present danger" test is more tenable in this limited area, and would support legislation. The parental duty to provide for the health and welfare of the child provides added protection. It is submitted that a less strained interpretation of the first amendment would lead, not to moral chaos, but to a heretofore unknown spirit of sexual tolerance in the United States.

"I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field."[50]

Gerard A. Rault

INSURANCE — EXCLUSIONARY CLAUSES IN AUTOMOBILE LIABILITY POLICIES

Insured had driven his automobile to a service station to have it washed and serviced while he was at work. The service station manager sent an employe, Dronet, to accompany the insured to his place of employment then return the car to the station. While driving back, Dronet was involved in an intersectional collision with a car driven by plaintiff, who sued Dronet, the service station owner, and insured's liability carrier for personal injuries sustained in the collision. The insurance policy contained a clause excluding coverage with respect "to an owned automobile while used in the automobile business." The trial court sustained defendant insurer's motion for summary judgment denying coverage. The Third Circuit Court of Appeal reversed. *Held,* the exclusionary clause is susceptible of at least two meanings and is to be construed against the insurer; thus, the vehicle being driven with permission of the insured to the service station by an employe of the station to be washed and serviced was not being "used in the automobile business" within the exclusionary clause. *Wilks v. Allstate Ins. Co.*, 177 So. 2d 790 (La. App. 3d Cir. 1965), *writs refused,* 248 La. 424, 179 So. 2d 18 (1965).

50. Roth v. United States, 354 U.S. 476, 514 (1957) (dissenting opinion of Douglas, J.).

An insurance policy is a contract between the insurance company and the insured to which rules established for the construction of written instruments apply.[1] The courts are bound to give effect to contracts according to the true intent of the parties, such intent to be determined by the words of the contract when these are clear, explicit, and lead to no absurd consequences.[2] When a clause is susceptible of two interpretations, the one that allows coverage must be adhered to rather than the one that would deny coverage,[3] for the reason that ambiguities should be construed against the drafter. Thus, an exclusionary clause in an insurance policy should be strictly construed.

Two liability policies affording coverage to private automobile owners are in general use today, the Family Combination Automobile Liability Policy and the Standard Automobile Liability Policy. These are similar, but the Family Policy is designed to give broader coverage than the Standard Policy.[4] Under both the Standard and the Family Policy, one other than the named or a designated insured may be covered by the omnibus clause while driving the vehicle if he had permission from the named insured to use the vehicle and permission had not been withdrawn prior to the accident.[5] However, both these policies contain clauses which exclude coverage under certain circumstances.

In the instant case the policy contained an exclusionary clause

1. LA. CIVIL CODE art. 1901 (1870); Hemel v. State Farm Mut. Auto. Ins. Co., 211 La. 95, 29 So. 2d 483 (1947); Parks v. Hall, 189 La. 849, 181 So. 191 (1938).

2. *Id.* art. 1945.

3. *Id.* art. 1951.

4. The Family Policy provides that any resident of the named insured's household is an insured with respect to the owned automobile. Permission to use is no longer a prerequisite to coverage while the owned automobile is being used by a resident of the named insured's household. Coverage is also extended to the named insured for the use of *any* non-owned automobile, whereas the Standard Policy does not afford coverage when the non-owned automobile is furnished for the *regular* use of the named insured. In addition, any relative who is a resident of the named insured's household is covered while driving any non-owned private passenger automobile or trailer not furnished for the regular use of that relative.

The Family Policy also affords protection up to $100.00 for personal property damaged or totally destroyed by fire or lightning to the named insured, his spouse, or relative who is a resident of his household. This does not apply to articles stolen from the owned automobile, however, Also, tires damaged by malicious mischief are now covered. See Parcher, *The New Family Automobile Policy*, 24 INS. COUNSEL J. 13 (1957) and Note, 18 LA. L. REV. 206 (1958).

5. Dominguez v. American Cas. Co., 217 La. 487, 46 So. 2d 744 (1950); Waits v. Indemnity Ins. Co. of North America, 215 La. 349, 40 So. 2d 746 (1949). See Comment, 22 LA. L. REV. 626 (1962).

reading, "This policy does not apply to an owned automobile while *used* in the automobile business." (Emphasis added.) The policy defined the term "automobile business" as the business or occupation of selling, repairing, servicing, storing, or parking automobiles. As the service station employe was driving the car with the named insured's permission at the time of the accident, he was an omnibus insured; however, the defendant insurer contended, and the trial court held, that as he was driving the car in the course of his employment, the vehicle was being used in the automobile business and the exclusionary clause applied. The defendant contended that *Nyman v. Monteleone-Iberville Garage, Inc.*,[6] was controlling. However, as the court observed, the wording of the exclusionary clause in *Nyman* is different from the clause in the instant case, thus *Nyman* is inapplicable. In *Nyman*, the policy provided that coverage did not extend, other than to the named insured, "(c) *to any person or organization, or to any agent or employee thereof,* operating an auto repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident *arising out of* the operation thereof" (Emphasis added.) In construing this language, the Louisiana Supreme Court, like the courts of most other states,[7] placed emphasis on the identity or occupation of the driver at the time of the accident. If the driver operating the car when the accident occurs is an agent or employe of someone in the automobile business, as defined in the policy, then the accident is held to arise out of the operation of such business and there is no coverage.[8]

6. 211 La. 375, 30 So. 2d 123 (1947). In this case, Weaver, upon arrival at the Monteleone Hotel in New Orleans, where he intended to stay, notified the Monteleone-Iberville Garage, Inc., that he wanted his car stored. Lewis, employee of the garage, negligently killed the plaintiff's husband while driving the insured automobile to the garage from the hotel. Plaintiff sued Weaver's insurer, who defended on the ground that coverage was not extended since the accident arose out of the operation of the automobile business. The Supreme Court sustained the insurer's position and denied recovery to the plaintiff.

7. See 47 A.L.R.2d 556 (1956).

8. In 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4372 (1962), it is stated that this exclusionary clause does not mean that the named insured is not protected if liability should be imposed upon him while the vehicle is being used by someone in the automobile business; but it prevents the insurer from being liable by reason of any judgment recovered against the one engaged in the automobile business.

Where the automobile is being used for pleasure by a friend of the insured with the insured's permission, it would be of no consequence that such a friend happened to be an employee of a garage or other establishment in the automobile business. Coverage would still be afforded under the omnibus clause. See Commercial Standard Ins. Co. v. Sanders, 326 S.W.2d 298 (Tex. Civ. App. 1959); Bany v. Sill, 253 N.W. 14 (Minn. 1934).

The clause in the instant case employs the words "used in the automobile business," the word "used" being the key. Interpretation of this clause is *res nova* in Louisiana, but other jurisdictions have distinguished it from the clause in *Nyman*, and on facts similar to those in the instant case have construed the language in favor of coverage.[9] Most of these courts have concluded that the words "used in the automobile business" require more than mere possession or control by one in the automobile business. They are held to refer to an automobile employed for some purpose of the business, as a tow truck, an automobile used as a demonstrator, or one used to deliver equipment and supplies. In the instant case the court found the exclusionary clause ambiguous and construed it against the insurer. Although the court was under the impression that the clause in question had replaced "the old clause interpreted in the *Nyman* case,"[10] the two policies actually were of different types. In the instant case the insured was protected under a Family Policy, while a Standard Policy was involved in the *Nyman* case. The wording of the exclusionary clause in the Standard Policy has not been changed; it is the same today as it was when *Nyman* was decided.

The exclusionary clause exemplified in the instant case has been replaced in all Family Policies, however, effective January 1, 1963. The National Bureau of Casualty Underwriters stated that the clause had been changed to obviate decisions like that in the instant case "which have construed the exclusion contrary to intent."[11] The new clause, presently in effect, provides that subject to stated exceptions the policy does not apply "to an owned automobile while used by any person while such person

9. See 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4372 (Pocket Part 1965). See, *e.g.*, Goforth v. Allstate Ins. Co., 220 F. Supp. 616 (W.D.N.C. 1963), which held that an automobile being driven to the garage by a mechanic with the insurer's permission for further repairs was not being used in the automobile business. Northwestern Mut. Ins. Co. v. Great American Ins. Co., 404 P.2d 995 (Wash. 1965) held that a service station employee delivering a customer's car to his home after servicing it did not constitute a use in the automobile business. LeFelt v. Nasarow, 71 N.J. Super. 538, 177 A.2d 315 (1962) held that a mechanic who was test driving the insured vehicle to ascertain if the repairs had been properly made was not using the automobile in the automobile business. *But see* Universal Underwriters Ins. Co. v. Strohkorb, 205 Va. 472, 135 S.E.2d 913 (1964) and Trolio v. McLendon, 4 Ohio App. 2d 30, 211 N.E.2d 65 (1965), in which the court denied recovery under circumstances similar to the instant case.

10. 177 So. 2d 790, 792 (La. App. 3d Cir. 1965).

11. This is stated in correspondence from the National Bureau of Casualty Underwriters to the Louisiana Insurance Rating Commission, dated September 4, 1962, explaining the reasons for the amendatory endorsements for the Family Policy.

is employed or otherwise engaged in the automobile business." It would appear that under the facts of the instant case this new clause would exclude coverage since a service station attendant is a person employed in the automobile business. However, the recent case of *Dumas v. Hartford Acc. & Indem. Co.*,[12] concerned with a situation similar to that of the instant case, held that the exclusion of the new clause did not apply because the accident had occurred while the car was being returned to the owner. The court emphasized that the service station owner had *completed* work on the car; that the accident occurred *after* the car had been serviced and not *while* the service station owner was employed or otherwise engaged in the automobile business. The court stated further: "[O]ut of an abundance of precaution we further observe that, in any event, the exclusionary clause under consideration in the instant case is at least ambiguous.... [A]ny ambiguity must be construed against the insurer."[13]

It is submitted that the holding of the instant case is consistent with the public policy of this state to construe insurance policies liberally in favor of coverage and resolve ambiguities against the insurer.[14] This is in accord with notions of public policy in most states.[15] California, for example, considers all exclusionary clauses such as the ones considered in this Note a violation of public policy and prohibits them.[16] Most states, Louisiana included, recognize that the chances of a collision while

12. 181 So. 2d 841 (La. App.2d Cir. 1965). It appears that the language of the *Dumas* clause is closer to the language of the *Nyman* clause than to the *Wilks* clause. *Nyman* refers to an automobile while being driven by any *person, agent, or employee* of someone in the automobile business with respect to the operation thereof. *Dumas* refers to the automobile while being used by *any person employed or otherwise engaged* in the automobile business. Thus, since the courts exclude coverage under the *Nyman* clause, coverage would also be excluded under the *Dumas* clause. However, the same argument may be made with respect to the *Dumas* clause as was made in the *Wilks* case, that the insured automobile must be actually engaged in the automobile business and not just being driven by an employee thereof as an incident to the automobile business.

13. 181 So. 2d 841, 843 (1965).

14. LA. R.S. 22:655 (1950), as amended and re-enacted La. Acts 1962, No. 471, § 1, reads in part: "[A]ll liability policies within their terms and limits are executed for the benefit of all injured persons . . . to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy."

15. See 44 C.J.S. *Insurance* § 297 (1945).

16. In Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 39, 307 P.2d 359, 364 (1957), the California Supreme Court stated: "We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the Vehicle Code."

a car is being used in the automobile business are increased, and have permitted the insurer to limit the risk it desires to assume. It should be observed that the exclusion forces the claimant to rely on the service station's policy of insurance.

The construction of the clause "used in the automobile business" by the court in the instant case appears sound. A service station attendant or a mechanic driving a customer's automobile to or from the customer is not using it in the sense in which a demonstrator, tow truck, or parts-delivery vehicle is used. However, since the wording of the clause in question has been changed in an attempt to avoid the result of the instant case, some uncertainty will remain until the Louisiana Supreme Court is presented with the problem of *Dumas*. As the decision in *Dumas* was based on the fact that the work had been completed and the car was being returned, the question whether there will be coverage under the new Family Policy if an accident occurs while the attendant is driving the vehicle to the service station and before work is begun remains unanswered. The court in *Dumas* indicated that the exclusionary clause applies only while the car is actually being serviced.[17] Therefore, since a vehicle being taken to the station is not actually being serviced, the policy will probably afford coverage. The exclusionary clause interpreted in the *Nyman* case has not been changed, and the courts will probably follow *Nyman* when dealing with a Standard Policy. If the Supreme Court adopts the *Dumas* rule, an owned automobile would be covered by a Family Policy but not by a Standard Policy under the facts of the instant case. Such a result would be anomalous, since the intention of the parties under both policies is undoubtedly the same.

Raleigh Newman

INSURANCE — "OTHER INSURANCE" CLAUSES — CONFLICT BETWEEN ESCAPE CLAUSES AND EXCESS CLAUSES

An automobile liability insurance policy issued by State Farm to Grigsby provided that coverage "with respect to a temporary substitute auto or nonowned auto shall be excess insurance over

17. 181 So. 2d 841, 843 (1965): "We think it is abundantly clear under the facts of the instant case that the exclusionary clause of the policy would have applied to Waldrop service station manager who was driving the automobile at the time of the accident] only while he was actually engaged in servicing the Brady automobile."