

Insurance: The Omnibus Clause and Second Permitees

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It is submitted that any ultimate solution to this and similar problems must come from the legislature. Perhaps a rule similar to Federal Rule 57, which permits expeditious hearings in suits for declaratory relief upon motion of one party, should be enacted.³⁹ Commentators have suggested other, more comprehensive remedial procedures.⁴⁰ It is submitted that until such a fundamental legislative change occurs, the judiciary must balance the equities in the individual situations with which they are confronted. In so doing the courts should be cognizant of the potential for procedural abuse inherent in such situations and act within permissible limits to preclude improprieties.

Burt K. Carnahan

INSURANCE: THE OMNIBUS CLAUSE AND
SECOND PERMITTEES

Randy Carroll had an automobile which he bought and maintained with his own funds, but which was registered under the name of his stepfather and insured under his stepfather's policy. Randy let a friend borrow the car to go on a double date; the friend loaned the car to the boy with whom he was double dating, who wrecked the car through his own negligence. Randy and the second permittee did not know each other. When the owner and the collision insurer of the other vehicle involved in the accident sued the second permittee and his father, they pleaded the liability insurer of the car and their own liability insurer. The Supreme Court of Louisiana *held*, since the second permittee did not have the permission of the named insured, neither insurance company was liable.¹ *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 230 So.2d 253 (1969).

Czarniecki presents the problem of the application of the om-

39. FED. R. CIV. P. 57 provides in part: "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. . . ." This would not necessitate the furnishing of security as required by LA. CODE CIV. P. art. 3610.

40. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2401 (1958), in which the author advocates a speedy review system for administrative decisions.

1. Neither insurer was found liable for the collision itself; however, State Farm was held liable for attorney's fees because of its duty to defend. The issue of an insurer's duty to defend is not discussed in this casenote. Also, the court found Randy to be in the position of the named insured although his stepfather was the policyholder. The court spent little time on this point and so must have been satisfied that there was no fraud. The issue of who is the named insured is not discussed in this casenote.

nibus clause to the coverage of people whom the first permittee has allowed to drive.² When the named insured has given the first permittee express permission to let other specific people drive, no problem exists.³ The difficulty arises in determining when the named insured has given his implied permission to the first permittee to allow others to drive.⁴

The courts have utilized various theories in finding an implied permission. In some cases they found the named insured's granting general discretion and control to the first permittee included an implied permission to allow others to drive.⁵ In others, the fact that the car was being used for the benefit of the first permittee led to a finding of implied permission.⁶ Similarly, the fact that the first permittee was in the car and in control at the time of the accident was held to provide coverage.⁷ One

2. See Comment, 22 LA. L. REV. 626, 632 (1962) for a good discussion of this subject. The omnibus clause of the State Farm policy provides: "Persons insured. 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 other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other use thereof if within the scope of such permission, and . . ." American Home Assurance Co. v. Czarniecki, 255 La. 251, 260, 230 So.2d 253, 257 (1969). A reading of this clause plainly shows that the use of the automobile must be with the permission of the named insured for there to be coverage under the policy. The problem here is to determine if the named insured has given his permission for the first permittee to let others use the car.

3. Normand v. Hertz Corp., 254 La. 1075, 229 So.2d 104 (1969). In this case a man had rented a car from the defendant. The rental agreement listed several people whom the customer could allow to drive. However, there was no coverage because the man driving at the time of the wreck was not one of these people.

4. The courts can determine the existence of express permission by looking for some objective, positive wording. However, the question of implied permission involves a subjective examination of the facts. "Needless to say, neither Jesse Waters nor Randy Carroll gave Charley any express permission, and the law cannot, on the basis of this record, imply that Charley had permission . . ." American Home Assurance Co. v. Czarniecki, 255 La. 251, 266, 230 So.2d 253, 258 (1969).

5. Boston Ins. Co. v. Pendarvis, 195 So.2d 692 (La. App. 1st Cir. 1967); Peterson v. Armstrong, 176 So.2d 453 (La. App. 3d Cir. 1965); Buckelew v. Roy, 168 So.2d 831 (La. App. 2d Cir. 1964); Touchet v. Firemen's Ins. Co., 159 So.2d 753 (La. App. 3d Cir. 1964); Hurdle v. State Farm Mut. Auto Ins. Co., 135 So.2d 63 (La. App. 2d Cir. 1961); Garland v. Audubon Ins. Co., 119 So.2d 530 (La. App. 1st Cir. 1960); Brooks v. Delta Fire & Cas. Co., 82 So.2d 55 (La. App. 1st Cir. 1955); Boudreaux v. Cagle Motors, 70 So.2d 741 (La. App. 1st Cir. 1954); Perrodin v. Thibodeaux, 191 So. 148 (La. App. 1st Cir. 1939).

6. Thomas v. Peerless Ins. Co., 121 So.2d 593 (La. App. 2d Cir. 1960); Garland v. Audubon Ins. Co., 119 So.2d 530 (La. App. 1st Cir. 1960); Brooks v. Delta Fire & Cas. Co., 82 So.2d 55 (La. App. 1st Cir. 1955); Boudreaux v. Cagle Motors, 70 So.2d 741 (La. App. 1st Cir. 1954).

7. Travelers Ins. Co. v. Gulf Nat'l Bank, 307 F.2d 295 (5th Cir. 1962); Brooks v. Delta Fire & Cas. Co., 82 So.2d 55 (La. App. 1st Cir. 1955). How-

case held that the use of the vehicle for the purpose granted gave coverage to a third person accomplishing this purpose.⁸ Finally, implied permission was found where the named insured's prohibition against the first permittee's allowing others to drive had been knowingly violated in the past.⁹

In determining a lack of implied permission, the courts have most often found that specific instructions, written or verbal, were given to the first permittee not to allow anyone else to drive the car.¹⁰ Of course, as mentioned above, there might be a finding of implied permission if in the past these instructions had been knowingly violated.¹¹ In other cases the grant of permission for a specific purpose was held to negate implied permission to let others drive.¹²

*Rogillio v. Cazedessus*¹³ was the first case in which the Supreme Court of Louisiana ruled on the question of second permittees. In that case a boy borrowed his father's car for the night and left it at a friend's house while he accompanied the latter on a trip. As he and the friend left, the boy left the keys with the friend's younger brother so that the car could be moved out of the driveway if necessary. The friend's younger brother, not licensed to drive, took the car into town and wrecked it. The liability insurer of the car was held not liable because the friend's younger brother was driving without the permission of the named insured. The court stated that under the policy only the named insured or his spouse could grant permission. The named insured gave no express permission, and allowing

ever, the courts did not rely solely on the fact that the first permittee was in the car at the time of the wreck.

8. *Donovan v. Standard Oil Co.*, 197 So. 320 (La. App. 2d Cir. 1940).

9. *Krupp v. Pan Air Corp.*, 183 So.2d 403 (La. App. 4th Cir. 1966); *Thomas v. Peerless Ins. Co.*, 121 So.2d 593 (La. App. 2d Cir. 1960).

10. *Normand v. Hertz Corp.*, 254 La. 1075, 229 So.2d 104 (1969); *Colston v. Liberty Mut. Ins. Co.*, 210 So.2d 152 (La. App. 3d Cir. 1968); *Comeaux v. Miller*, 195 So.2d 168 (La. App. 1st Cir. 1967); *Taylor v. Liberty Mut. Ins. Co.*, 191 So.2d 786 (La. App. 2d Cir. 1966). *Smith v. Insurance Co.*, 161 So.2d 903 (La. App. 1st Cir. 1964); *Jones v. Indiana Lumbermen's Mut. Ins. Co.*, 161 So.2d 445 (La. App. 4th Cir. 1964); *Coco v. State Farm Mut. Auto. Ins. Co.*, 136 So.2d 288 (La. App. 3d Cir. 1961); *Clemons v. Metropolitan Cas. Ins. Co.*, 18 So.2d 228 (La. App. 2d Cir. 1944).

11. See cases cited note 9 *supra*.

12. *Raymond v. Indiana Lumbermen's Mut. Ins. Co.*, 295 F.2d 188 (5th Cir. 1961); *Scoggins v. Agricultural Ins. Co.*, 161 So.2d 438 (La. App. 4th Cir. 1964); *Anderson v. Adams*, 148 So.2d 347 (La. App. 1st Cir. 1962); *Parker v. Great Am. Indem. Co.*, 81 So.2d 79 (La. App. Ori. Cir. 1955); *Longwell v. Massachusetts Bonding & Ins. Co.*, 63 So.2d 440 (La. App. 1st Cir. 1953).

13. 241 La. 186, 127 So.2d 734 (1961).

the son to use the car did not include an implied permission to let others drive. There was testimony that the son had been instructed not to let other children drive the car, but the extent to which this consideration controlled the decision is not clear.

Two appellate court cases involving situations similar to the instant case are *Touchet v. Firemen's Insurance Co. of Newark, New Jersey*¹⁴ and *Buckelew v. Roy*.¹⁵ In *Touchet* the named insured gave his son permission to use his car for an evening of entertainment. A friend, who accompanied the son, was present when permission was given. Later in the night the son let his friend drive. When the friend wrecked the car, the court held that the initial permission to the son gave him such general discretion that it included the implied permission to let the friend drive.

In *Buckelew* the named insured gave his son permission to use the car for the night, knowing that two friends were triple dating with his son. The three went to pick up the son's date; since she was not ready, the son let the two friends go pick up their dates. While on this trip, one of the friends wrecked the car. In finding coverage, the court relied on the *Touchet* decision. The initial permission granted to the son gave him such general discretion that it included implied permission for the friends to drive.

In the instant case the court treated Randy as the named insured because of the unrestricted, broad authority he had to use the car. In determining whether the second permittee had Randy's implied permission, the court used the test of what was reasonably foreseeable to Randy. It found that Randy did not know the second permittee, had never allowed the first permittee to drive before, and had no reason to foresee that the first permittee would lend the car to someone Randy did not know. It also observed that the record did not establish that it was a custom of young people to lend their cars to one another when double dating. Based on these findings, the court decided that it was not reasonably foreseeable that the first permittee would lend the car to the second permittee. Since the latter was driv-

14. 159 So.2d 753 (La. App. 3d Cir. 1964).

15. 168 So.2d 831 (La. App. 2d Cir. 1964).

ing without the permission of the named insured, he could not be considered an omnibus insured.¹⁶

Upon first reading it might seem that this case departs from certain prior Louisiana appellate decisions. In *Touchet and Buckelew* the court, based on the absence of restriction and the general nature of the permission granted to the initial user, found that the named insured had given implied permission for others to drive. The court in the instant case found general permission from the named insured to the first permittee;¹⁷ it might thus appear that there should be coverage.

However, it is submitted that the case does not deviate from past jurisprudence, but rather presents a clearer and simpler test to determine the question of implied permission. First, the *Touchet* case is perhaps on the outer limits of the general permission theory.¹⁸ Of all cases its reasoning is the most consistent with Justice Sanders' concurring opinion in *Rogillio*.¹⁹ The thrust of Sanders' opinion is that where no restriction is imposed on the initial permittee he has implied permission to permit others to drive—i.e., a change in drivers is treated in the same manner as a deviation in route and coverage is not defeated.²⁰ But the majority opinion in *Rogillio* illustrates clearly that the supreme court was unwilling to go this far.²¹ While the use of the car in *Rogillio* was more restricted than in *Touchet*, the supreme court still evidenced its dis-

16. In *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 267, 230 So.2d 253, 258-59 (1969), the supreme court said that Aetna was not liable either, because Charley could not reasonably believe he was driving the car with the permission of the named insured. In *Rogillio v. Cazedessus*, 241 La. 186, 127 So.2d 734 (1961) the supreme court found the liability insurer of the boy who drove without permission of the named insured liable. The change in decisions reflects the change in the wording of the omnibus clause. The clause now extends coverage only if ". . . actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner. . . ." (Court's emphasis.) *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 267, 230 So.2d 253, 259 (1969).

17. *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 264, 230 So.2d 253, 257 (1969).

18. *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Insurance*, 25 LA. L. REV. 381, 382 (1965).

19. *Rogillio v. Cazedessus*, 241 La. 186, 200, 127 So.2d 734, 739 (1961). For discussion of this case, see text at note 13 *supra*.

20. *Id.*

21. *Id.* at 196, 127 So.2d at 737. "But counsel for said companies confidently declare that in other cases we have, either expressly or by denying writs to the Courts of Appeal, so extended the interpretation of 'permission of the named insured' that it applies to anyone who has been given legal control of the car. With this we cannot agree."

approval of a theory in which lawful possession by the second permittee would automatically mean permission of the named insured.²²

Secondly, the instant case can be distinguished factually from both *Touchet* and *Buckelew*. In both of these earlier cases the named insured knew the identity of the person who later drove. Here the named insured knew only that some unknown third person was double dating with the first permittee. In addition, the named insured had never before loaned his car to the first permittee. Thus, there was nothing to support a finding that the initial permittee had authority to lend the car to another, with the possible exception that the car was to be used on a double date.²³ The court was unwilling to go this far. It may be significant that the supreme court discussed neither *Touchet* nor *Buckelew*. Nonetheless, the fact that the owner did not even know the second permittee supports the belief that the owner did not anticipate that the car would be loaned to the second permittee by the omnibus insured or that the latter might assume authority to do so.

While this case is the first to utilize reasonable foreseeability as the test for determining the extent of the implied permission of the named insured, other cases have mentioned reasonable foreseeability as a factor.²⁴ It is submitted that this is the clearest and simplest test to apply. Items examined in the past by the courts to determine the scope of the implied permission—such as, the nature of the permission, the restriction, the presence of first permittees, the benefit of first permittees, and others—are actually only elements of what is reasonably foreseeable. Other factors such as past use and deviation should be examined. By combining these elements, the test of reasonable foreseeability provides a single and a most sensible test. If the named insured could have reasonably foreseen the possibility of the first permittee allowing another to drive and yet said

22. *Id.*

23. It is interesting to note that Justice Sanders in his dissent stated he felt the car's being used on a double date was enough to support a finding that the use by the second permittee was reasonably foreseeable. "Since Randy had full knowledge that the car was to be used on a *double* date, at least until midnight, it was entirely foreseeable that the other boy with Hans might drive the car." (Court's emphasis.) *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 272, 230 So.2d 253, 260 (1969).

24. *Rogillio v. Cazedessus*, 241 La. 186, 197, 127 So.2d 734, 738 (1961); *Brooks v. Delta Fire & Cas. Co.*, 82 So.2d 55, 58 (La. App. 1st Cir. 1955).

nothing, he has certainly given his implied permission for the other to drive. However, if the named insured could not reasonably foresee this action by the first permittee, it certainly is a fiction to say he gave his implied permission to let another drive.

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