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INSURANCE

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PERMISSIVE USE—SECOND PERMITEE

Coverage under automobile liability policies is generally extended not only to the named insured, but also to other persons using the vehicle with the permission of the named insured.¹ Permission is a frequently litigated issue in cases where the operator involved in the accident obtained possession of the automobile from a permissive user rather than directly from the named insured.² The Louisiana Supreme Court first considered coverage for a second permittee in *Rogillo v. Cazedessus*.³ The court recognized that under the policy language the permission necessary to effectuate coverage must flow from the named insured to the operator. Permission from the first permittee is not sufficient unless the first permittee has express or implied authority from the named insured to allow others to drive. In *Rogillo*, the named insured's son gave the keys to the unlicensed operator who was involved in the accident. The court held

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1. For example, a family automobile policy usually provides that an insured with respect to the owned automobile includes "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 actual use thereof is within the scope of such permission."

2. Permission can also be an issue where the operator received or took possession of the auto from the named insured. Under policy language which did not expressly limit the coverage to use within the scope of the permission granted by the named insured, our courts adopted the "initial permission rule." See, e.g., *Waits v. Indemnity Ins. Co.*, 215 La. 349, 40 So. 2d 746 (1949); *Parks v. Hall*, 189 La. 849, 181 So. 191 (1938). Simply stated, this rule holds that coverage exists if the named insured gives express or implied permission for use in the first instance, and coverage is not vitiated by any subsequent deviation from the scope of permission by the permittee. About 1963, insurers began issuing policies which revised the coverage language as set forth in note 1, *supra*, in an apparent attempt to write out the initial permission rule by restricting coverage to operation within the scope of permission. There has been surprisingly little recognition of this significant policy revision in the Louisiana jurisprudence. Perhaps as a result of poor presentation of issues by counsel, most courts have continued to apply the initial permission rule without discussing the revised language.

3. 241 La. 186, 127 So. 2d 734 (1961); see Comment, "Omnibus Clause"—*Problems in Louisiana Jurisprudence*, 22 LA. L. REV. 626 (1962).

there was neither express nor implied permission flowing from the named insured to the operator.

Following *Rogillo*, the courts of appeal developed rather liberal standards for finding implied permission. Where the named insured gave general dominion over the automobile to the first permittee, the courts held that the first permittee had the implied authority of the named insured to grant permission to others to use the vehicle, unless such authority was expressly and specifically restricted. The courts were willing to find implied permission even in the face of a specific prohibition if there were prior known but unprotested violations of the prohibition or other evidence of the erosion of the prohibition.⁴

However, when the supreme court again considered the permission issue in *American Home Assurance Co. v. Czarniecki*,⁵ a more restrictive approach was adopted. In *Czarniecki*, the named insured, without imposing any express restrictions, entrusted his automobile to the first permittee for use on a double date. Subsequently the first permittee allowed the defendant operator with whom he was double dating to use the automobile to take his date home and return to the party where the first permittee remained. The court expressed the opinion that allowing another to use the automobile was a substantial deviation from the permission granted the first permittee for which there was no express or implied authority flowing from the named insured.⁶

In two cases decided during the current term, the supreme court has reconsidered this issue with decisions which point toward a reversion to the more liberal approach. In *Hughes v. Southeastern Fidelity Insurance Co.*,⁷ the named insured and Cate had an established practice of exchanging vehicles for their own convenience. While the named insured was using Cate's vehicle, Cate took the named insured's automobile on a tour of local night spots with several friends. During the evening, Cate allowed Andrews to drive the automobile while Cate remained in the automobile as a passenger. They were involved in a serious accident while Andrews was driving. Relying on *Czarniecki*, the court of appeal held that there was no coverage for Andrews because there was no express or implied permission

4. *E.g.*, *Peterson v. Armstrong*, 176 So. 2d 453 (La. App. 3d Cir.), *writ denied*, 178 So. 2d 658 (1965); *Coco v. State Farm Mut. Auto. Ins. Co.*, 136 So. 2d 288 (La. App. 3d Cir. 1961), *writ denied*, Feb. 21, 1962.

5. 255 La. 251, 230 So. 2d 253 (1970).

6. The court quoted and seemed to place reliance on the revised policy language limiting coverage to the scope of permission. 255 La. at 267, 230 So. 2d at 258-59.

7. 340 So. 2d 293 (La. 1976).

from the named insured for his operation. The supreme court reversed, finding that implied permission flowed from the customary practice of exchanging vehicles without any express restrictions and from the fact that the first permittee remained an occupant of the vehicle. *Czarniecki* was distinguished as a first time loan from which such general authority could not be implied. A concurring opinion suggested that judicial reconstruction after the accident of the implied terms of the permission granted by the named insured should not be used to deprive injured parties of insurance protection.

In *Morgan v. Matlack, Inc.*,⁸ suit against the insurer had been dismissed on a motion for summary judgment. The evidence indicated that the named insured had generally admonished his children against lending the family car to others except "in emergencies and when circumstances warranted that they had to." Finding a genuine issue of material fact, the supreme court reversed and remanded with the observation that when the named insured grants discretionary authority to lend under non-specific circumstances, "he cannot thereafter complain when the discretion is exercised and a second permittee is allowed to use the vehicle."⁹

The liberalization of approach appears to be warranted by the manner in which automobiles are frequently used in modern society. The named insured, as the premium payer, ought and does by the policy language have the right to decide who may use the automobile with the protection of the liability coverage. However, it should be recognized that persons, particularly young people using the family automobile, frequently allow others to drive without giving serious thought to permission and insurance coverage. Recognition of this common practice should impose upon named insureds the duty to be specific with respect to any limitations on the scope of the permission granted. Otherwise, permission should be implied if it can be said that a reasonable named insured would have consented to the use of the vehicle had he been present at the time the decision to entrust the vehicle to the operator was made. In the absence of an express prohibition, permission should be implied unless the vehicle was entrusted to an unlicensed driver or an intoxicated person, for some dangerous or outrageous purpose, or under other circumstances clearly indicating that no reasonable named insured would have consented to such use.¹⁰

8. 342 So. 2d 167 (La. 1977).

9. *Id.* at 169.

10. A similar approach is suggested for limitations on the scope of permission under the revised policy language. The initial or subsequent permittee should not

UNINSURED MOTORIST COVERAGE

In *Seaton v. Kelly*,¹¹ the Louisiana Supreme Court placed the first restraint on the expanding concept of stacking multiple uninsured motorist coverages since holding policy restrictions against stacking invalid in the *Deane*¹² and *Graham*¹³ cases. In the 1975 case of *Barbin v. United States Fidelity and Guaranty Co.*,¹⁴ the supreme court approved the stacking of coverages for multiple vehicles insured under the same policy not only for persons expressly insured under the policy, but also for passengers insured "while occupying an insured automobile," holding under a strained interpretation of the policy that occupancy of any insured vehicle activated coverage for all vehicles.¹⁵ *Seaton* was factually similar to *Barbin* with the exception that the multiple vehicles were insured under separate policies issued by the same insurer. The court held that a passenger was entitled to recover only under the policy on the vehicle he was occupying at the time of the accident. He was not insured under separate policies on other vehicles owned by the same owner.¹⁶ *Seaton* is correct, but it emphasized the anomaly of the stacking concept which depended in this instance upon whether the insurance company prefers to insure separate

have coverage for operation or use outside the scope of permission granted by the named insured, but any limitation on the scope of permission should be either express or clearly implied. Also, policies providing protection for insureds while using non-owned automobiles usually restrict coverage to situations where the actual operation or use by the insured is "with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission." In *Czarniecki* the court held that the second permittee likewise had no reasonable belief that he had the permission of the owner to use the auto. With respect to privately owned vehicles, it is suggested that an insured can reasonably believe the person in possession of the automobile has the authority of the owner to permit others to drive under reasonable circumstances unless he has notice of a restriction on that authority. However, in the absence of additional facts a reasonable belief probably would not exist with respect to commercial or publicly owned vehicles, since use is generally restricted for such vehicles.

11. 339 So. 2d 731 (La. 1976).

12. *Deane v. McGee*, 261 La. 686, 260 So. 669 (1972).

13. *Graham v. American Cas. Co.*, 261 La. 85, 259 So. 2d 22 (1972).

14. 315 So. 2d 754 (La. 1975); see discussion in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Insurance*, 37 LA. L. REV. 494 (1977).

15. In family automobile policies, there usually are no "occupancy" limitations for the named insured and any relative as defined in the policy.

16. This decision apparently does no violence to decisions following *Deane* and *Graham* which have permitted stacking by persons expressly insured under two or more policies who are injured while occupying one of the insured automobiles notwithstanding policy language to the contrary. See, e.g., *Crenwelge v. State*

vehicles under separate policies or to issue one policy applicable to multiple vehicles. The judicially created stacking concept, which had outlived its usefulness in light of recent legislation permitting the purchase of increased uninsured motorist limits, has been wisely restricted by Act 623 of 1977.¹⁷

In 1972, the legislature extended the applicability of uninsured motorist coverage to include losses caused by "underinsured" motorists.¹⁸ Subsequent amendments broadened the definition of an uninsured motor vehicle "to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of damages suffered by an insured."¹⁹ In *Guillot v. Travelers Indemnity Co.*,²⁰ the plaintiff was injured as a result of the negligence of her husband. The automobile in which they were riding was insured under a policy providing both liability and uninsured motorist coverages. Finding

Farm Mut. Auto. Ins. Co., 277 So. 2d 155 (La. App. 3d Cir. 1973). In *Seaton*, the court expressly noted that "if a plaintiff is an insured under two or more policies or one policy covering two or more automobiles, pays premiums or has premiums paid for his benefit for two or more different uninsured motorist coverages, he can cumulate the coverages." 339 So. 2d at 734.

17. 1977 La. Acts, No. 623, amending LA. R.S. 22:1406 (Supp. 1976) provides in part:

(c) If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance, in accordance with the terms of subsection D(1), then such limits of liability shall not be increased because of multiple motor vehicles covered under said policy of insurance and such limits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy; provided, however, that with respect to other insurance available, the policy of insurance or endorsement shall provide the following:

With respect to bodily injury to an injured party while occupying an automobile not owned by said injured party, the following priorities of recovery under uninsured motorist coverage shall apply:

- (i) the uninsured motorist coverage on the vehicle in which the injured party was an occupant is primary;
- (ii) should that primary uninsured motorist coverage be exhausted due to the extent of damages, then the injured occupant may recover as excess from other uninsured motorist coverage available to him. In no instance shall more than one coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant.

See the discussion of Act 623 in *The Work of the Louisiana Legislature for the 1976 Regular Session—Insurance*, 38 LA. L. REV. 128 (1977).

18. LA. R.S. 22:1406(D)(2)(b) (1950), as amended by 1972 La. Acts, No. 137.

19. LA. R.S. 22:1406(D)(2)(b) (1950), as amended by 1974 La. Acts, No. 154.

20. 338 So. 2d 334 (La. App. 3d Cir. 1976).

that the bodily injury damages sustained by the plaintiff exceeded the liability limits of the policy, the court awarded plaintiff recovery of the excess under the uninsured motorist coverage of the same policy, holding the policy exclusion which would have prevented such recovery in conflict with the uninsured motorist coverage statute.²¹ This holding seems consistent with the obvious legislative purpose of making uninsured motorist coverage available to injured persons for whom liability coverages are inadequate.

Ordinarily, the person claiming uninsured motorist coverage has the burden of proving that the negligent driver was uninsured or underinsured. However, for a situation where such proof is not possible, most policies contain an extension of coverage for a "hit and run vehicle" as defined in the policy. *Hensley v. Government Employees Insurance Co.*²² reaffirmed the validity of the policy requirement of physical contact with the hit-and-run vehicle in denying coverage to a plaintiff who allegedly collided with a vehicle as a result of the negligence of a third, unidentified vehicle.²³

Although the negligent motorist did not stop at the accident scene, the plaintiff in *Arceneaux v. Motor Vehicle Cas. Co.*²⁴ was denied coverage because the plaintiff could have identified the hit-and-run vehicle with reasonable diligence from evidence, including the license number, readily available to him from the police report. On the other hand, in *Kinchen v. Dixie Auto Insurance Co.*,²⁵ the plaintiff was not denied coverage under the hit and run provision, despite his failure to give notice within thirty days of the accident as required by the policy. The court properly applied the general rule recognized in Louisiana that breach of a notice provision will not permit avoidance of coverage unless the insurer proves actual prejudice resulting from the delay.

*Soniat v. State Farm Mutual Auto Insurance Co.*²⁶ was the first Louisiana decision to award penalties and attorney's fees for failure to make timely payment of an uninsured motorist claim. The claims under uninsured motorist coverage are first party claims between an insured and his own insurer which would be governed by the penalty provisions of

21. LA. R.S. 22:1406 (1950 & Supp. 1975). The *Guillot* decision may be inconsistent with *Arado v. Central National Insurance Co.*, 337 So. 2d 253 (La. App. 4th Cir. 1976), but it is difficult to determine whether the court in *Arado* was applying Louisiana law or the law of the state in which the policy was issued.

22. 340 So. 2d 603 (La. App. 1st Cir. 1976).

23. See also *Collins v. New Orleans Pub. Serv.*, 234 So. 2d 270 (La. App. 4th Cir. 1970).

24. 341 So. 2d 1287 (La. App. 3d Cir. 1977).

25. 343 So. 2d 263 (La. App. 1st Cir. 1977).

26. 340 So. 2d 1097 (La. App. 4th Cir. 1976).

section 658 of the Insurance Code. However, they are a unique type of claim in which the liability of the insurer is predicated upon the liability of a third party and in which the fixing of the amount of the claim is difficult because of the inexact science of measuring general damages for personal injuries. Other courts have refused to award penalties and attorney's fees for failure to pay uninsured motorist claims on the ground that the insurer has no obligation to pay until the legal liability of the alleged uninsured motorist is established, an issue to which the insurer has a right to a judicial determination.²⁷ *Soniat* involved unusual circumstances in which the insurer conceded liability for the policy limits of its uninsured motorist coverage, but refused to pay those limits unless and until the insured released a liability claim against the driver of the insured vehicle. In view of the unusual nature of an uninsured motorist claim, the penalty provision should be applied, if at all, only in situations where the insurer has clearly engaged in outrageous conduct to gain an economic advantage unrelated to the good faith negotiation of the uninsured motorist claim alone.

27. See, e.g., *Schoelen v. Fidelity & Cas. Co.*, 318 So. 2d 90 (La. App. 3d Cir. 1975).