Loyola University Chicago Law Journal

Volume 5
Issue 1 *Winter 1974*

Article 13

1974

Illinois Insurance Law - All Aboard the Omnibus: An Extension of Omnibus Coverage under Automobile Liability Policies

Joseph Stalmack Jr.

ILLINOIS INSURANCE LAW—All Aboard the Omnibus: An Extension of Omnibus Coverage under Automobile Liability Policies

Most automobile insurance policies contain a provision commonly referred to as an "omnibus clause." The purpose of this clause is to establish which parties are covered by the policy.[1] A typical omnibus clause provides that any person using the insured automobile with the permission of the named insured will be covered by the policy provided that his actual operation or use is within the ambit of such permission.

This clause protects the named insured, the persons within its scope, and the general public. It gives a person injured in an accident involving the insured automobile the right to seek recovery from the insurer in cases where the insurer would not otherwise be liable because the automobile was not driven by the named insured.[2] It also gives the additional insured the protection of automobile insurance without his having procured the policy. If a driver other than the insured fits the scope of the description in the omnibus clause, he will have insurance to the same degree and effect as if he were named in the policy.[3] The clause thus protects the general public by assuring that injured parties will have a financially responsible source to look to for recovery.

The omnibus clause has given rise to much litigation in various jurisdictions. The problem most often litigated occurs when the named insured gives his permission to operate the vehicle to one person—the first permittee—and he, in turn, gives his permission to another—a second permittee. The question that arises in such situations is whether the second permittee was within the scope of the express or implied permission of the named insured and was thus covered by the clause.

The Illinois Supreme Court in *Maryland Casualty Company v. Iowa Mutual Insurance Company*[4] answered this question concerning the scope of the named insured's initial permission with a simple, uniform

1. Many states have statutory provisions which require the inclusion of the omnibus clause in insurance policies. In Illinois the provision is ILL. REV. STAT. ch. 95½, § 7-317 (1971).
2. *See* 12 G.J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:293, at 306 (2d ed. 1964).
3. *Id.*
4. 54 Ill. 2d 333, 297 N.E.2d 163 (1973).

and liberal rule, saying that once permission has been granted, coverage is fixed.

On July 21, 1968, Thomas Smythe, twenty years of age, drove one of his family's two automobiles to a party in a nearby town. He had permission to use either of the two automobiles at any time he wished. Two years earlier, when a fellow student had, without his knowledge or permission, used his car, Smythe's parents had told him never to allow anyone other than a member of the family to use the family automobile.

While at the party, Smythe met two of his friends, William Horton and John Higgins. The three boys decided to meet later in another town. Higgins left the party in Horton's pick-up truck. When the party ended, Smythe took Higgins' vehicle and Horton took the Smythe family autmobile. The testimony was in conflict as to whether Smythe actually told Horton that he could drive the Smythe car. However, it is clear that Smythe knew that Horton was taking the car. Smythe did not tell Horton about his parents' instructions not to allow friends to use the car.[5] While driving the Smythe automobile, Horton was involved in a collision with a second vehicle, injuring the driver and passenger of the other autmobile.

The injured parties brought suit against Horton claiming negligence. Maryland Casualty Company, the liability insurer of Smythe's automobile, sought a declaratory judgment against Iowa National Mutual Insurance Company, the automobile liability insurer of Horton's (the second permittee's) father, to determine which policy covered young Horton. Both plaintiff's and defendant's insurance policies contained omnibus clauses.[6] The Circuit Court of Champaign County directed a verdict against both insurers. The effect of the directed verdict was that both insurance policies were found to have extended coverage to Horton.

---

5. *Id.* at 338, 297 N.E.2d at 166.

6. *Id.* at 335-36, 297 N.E.2d at 164. The plaintiff's omnibus clause read as follows:

> Persons Insured: Under the liability and medical expense coverages the following are insured:
> (a) with respect to an owned automobile, . . .
> (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 actual use thereof is within the scope of such permission . . . .

The defendant's omnibus clause read as follows:

> Persons Insured: Under the liability and medical expense coverage, the following are insured: . . .
> (b) with respect to a non-owned automobile,
> (1) the named insured,
> (2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be within the permission, of the owner and is within the scope of such permission. . . .

The plaintiff appealed and the defendant cross-appealed. The appellate court in *Maryland Casualty Company v. Iowa Mutual Insurance Company*[7] reversed the trial court, holding that no coverage was afforded by either policy.

Plaintiff petitioned for leave to appeal to the Illinois Supreme Court. Following the entry of the trial court judgment, the plaintiff had assumed the defense of the claims made against Horton, the second permittee, and had disposed of them. The plaintiff's position was that the supreme court should reverse the judgment of the appellate court holding that the defendant's policy did not provide coverage and affirm the judgment exonerating the plaintiff. Plaintiff would then have a possibility of recovering from defendant the sums it had expended in settling the claims against Horton.

The Illinois Supreme Court granted plaintiff's petition for leave to appeal and reversed the appellate court *in toto*.[8] The supreme court held that once initial permission has been granted by the named insured, coverage is fixed, except in situations of theft or similar circumstances.[9] This rule construing omnibus clauses is a significant departure from the previous law in Illinois and most other jurisdictions. In order to appreciate fully the changes and impact brought about by the decision, it is necessary to explore the previous rulings interpreting omnibus clauses in Illinois and other jurisdictions.

Past Interpretations of the Omnibus Clause in Illinois

The previous leading decision in Illinois which set the scope of coverage under the omnibus clause was *Hays v. Country Mutual Insurance Co.*[10] The factual background of *Hays* was similar to the situation presented in the principal case. The insured granted permission to his stepdaughter to drive the family automobile to a nearby town to attend a movie, but he instructed her that only she was to drive and that she had permission for the limited and specific purpose of going to town for the movie and coming home. The insured's son accompanied his sister on the trip. In town, the son permitted a friend to operate the automobile, although the boy had no express authority from the insured or anyone else to grant this permission. The friend offered Doris Hays a ride, she accepted, and subsequently, the insured

7. 5 Ill. App. 3d 384, 283 N.E.2d 27 (1972).
8. 54 Ill. 2d at 343, 297 N.E.2d at 168.
9. *Id.* at 342, 297 N.E.2d at 168.
10. 28 Ill. 2d 601, 192 N.E.2d 855 (1963).

automobile was involved in an accident in which Doris Hays was injured.

Hays recovered a judgment against the driver (the second permittee) of the automobile in which she was a passenger, but the insurer of the automobile denied coverage to the driver on the theory that he did not come within the policy's omnibus clause. Hays then filed suit against the automobile liability insurer. The trial court sustained the insurer's motion for a directed verdict. The appellate court reversed, finding that the driver was covered by the omnibus clause because he had been operating the vehicle with the implied permission of the named insured.[11]

Upon appeal to the Illinois Supreme Court, the appellate court was reversed.[12] The court held that the express prohibition by the named insured to his stepdaughter concerning the limited purpose of the trip and permitting her alone to operate the vehicle precluded the finding of implied permission to the second permittee and effectively relieved the insurer of its liability under the omnibus clause.[13]

The court in *Hays* said that to hold that the driver was covered by the omnibus clause would be "a substantial departure from the ordinary meaning of the words of the policy."[14] The court observed that there are situations in which permission can be inferred from the surrounding facts, but it held that none existed in this case. It is interesting to note that while the court recognized appellee's arguments that omnibus clauses and insurance coverage in general should be liberally interpreted in light of the "broad public policy aimed at compensation for traffic victims"[15] and that the requirement of permission should not be technically or restrictively interpreted,[16] the court stated that these arguments did not justify reading the requirement of permission out of insurance contracts on the "ground that it is wholly purposeless, technical, and fortuitous."[17]

The court further supported its position by reasoning that when an insured purchases extended coverage, he seeks to protect those whom he allows to use his automobile; generally, the insured has no interest in protecting those who operate his automobile without his permis-

11. Hays v. Country Mutual Insurance Company, 38 Ill. App. 2d 1, 186 N.E.2d 153 (1962).
12. 28 Ill. 2d at 612, 192 N.E.2d at 861.
13. *Id.* at 608, 192 N.E.2d at 859.
14. *Id.* at 606, 192 N.E.2d at 858.
15. *Id.*
16. *Id.* at 607, 192 N.E.2d at 859.
17. *Id.*

sion.[18] The court concluded, "Public policy, as indicated by legislative enactments, does not require extension of the insurance contract beyond these interests of the parties and their expressed intention."[19]

The real impact of *Hays* was felt through its dicta, in which the court established four tests for extending omnibus coverage to second permittees. Coverage might be extended where the first permittee was the owner of the automobile for all practical purposes, even though the named insured held title, at least in the absence of an express prohibition to the contrary;[20] where the first permittee was a passenger in the automobile while the second permittee operated the vehicle;[21] where the first permittee benefited from the use of the vehicle by the second permittee;[22] and, finally, where it could be established that the named insured had knowledge of the fact that the first permittee allowed others to operate the vehicle and never objected to the situation.[23] If any of these conditions surrounded the second permittee's use of the automobile, the court in *Hays* suggested, implied permission from the named insured to the second permittee might be recognized.[24]

Subsequent Illinois decisions have applied the *Hays* guidelines in finding implied permission where one of the four tests was met.[25]

Construction of Omnibus Clauses in Other Jurisdictions

The *Hays* opinion was in the mainstream of the majority rule concerning the scope of omnibus clauses. The majority holds that the named insured's initial permission does not, in itself, authorize the first permittee the power to permit others the use of the vehicle.[26] It is recognized that express permission is not needed in all cases but that

18. *Id.*
19. *Id.*
20. *Id.* at 608-09, 192 N.E.2d at 859.
21. *Id.* at 609, 192 N.E.2d at 859-60.
22. *Id.*
23. *Id.*
24. *Id.* at 608, 192 N.E.2d at 859.
25. *See* Inter-Insurance Exchange of Chicago Motor Club v. Travelers Indemnity Co., 57 Ill. App. 2d 17, 206 N.E.2d 518 (1965); Wolverine Insurance Co. v. Eldridge, 326 F.2d 748 (7th Cir. 1964); Lumbermen's Mutual Casualty Co. v. Poths, 104 Ill. App. 2d 80, 243 N.E.2d 40 (1968); Poths v. Farmers Insurance Exchange, 104 Ill. App. 2d 455, 244 N.E.2d 632 (1969). Some writers felt that *Hays* was the final word construing coverage under the omnibus clause. Larrabee, *Who's Aboard the Omnibus*, 60 Ill. Bar. J. 470, 477 (1972), commented: "After eight years, it may be concluded that *Hays* has withstood the test of time and has furnished a utilitarian set of guidelines in additional permittee cases in Illinois."
26. Annot., 4 A.L.R.3d 10, 25 (1965). *See* State Farm Mutual Automobile Insurance Co. v. Williamson, 331 F.2d 517 (9th Cir. 1964); Ewing v. Colorado Farm Mutual Casualty Co., 133 Colo. 447, 296 P.2d 1040 (1956); Hardware Mutual Casualty Co. v. Shelby Mutual Insurance Co., 213 F. Supp. 669 (N.D. Ohio 1962); Volk v. Cacchione, 395 Pa. 636, 150 A.2d 849 (1959); Krebsbach v. Miller, 22 Wis. 2d 171, 125 N.W.2d 408 (1963).

the named insured's original permission may be granted by implication to second permittees.[27] Generally, courts hold that there is implied permission when the facts coincide with the four situations as enunciated by *Hays*.[28]

One important departure from the majority rule concerning second permittees is *Odolecki v. Hartford Accident and Indemnity Company*.[29] In *Odolecki*, the named insured permitted her son to use the family automobile when he was home from college, but she told him never to permit others to operate the vehicle. One night the first permittee allowed a friend the use of the automobile, and the friend was involved in a collision. The insurer refused this second permittee coverage under the omnibus clause, and the second permittee filed an action against the insurer to have himself declared an additional insured.

When the case reached the New Jersey Supreme Court, it held that the omnibus clause did extend coverage to the second permittee, despite the fact that the named insured had expressly prohibited the first permittee authority to delegate the use of the automobile to third persons.[30] In reaching its decision, the court expressly overruled *Baesler v. Globe Indemnity Company*,[31] a case relied on by the Illinois Supreme Court in *Hays*. The facts in *Baesler* were virtually identical to those in *Odolecki*, but the *Baesler* decision had held that there was no coverage under the omnibus clause.

In *Odolecki*, a case involving a second permittee, the court used a rule which is generally applied only in a case involving a first per-

27. *See* Financial Indemnity Co. v. Hertz Corp., 226 Cal. App. 2d 689, 38 Cal. Rptr. 249 (1964); Carr v. American Universal Insurance Co., 341 F.2d 220 (6th Cir. 1965); Hardware Casualty Co. v. Massachusetts Bonding and Insurance Co., 129 N.Y.S. 2d 304 (Sup. Ct. 1954); United Services Automobile Ass'n v. Preferred Accident Insurance Co., 190 F.2d 404 (10th Cir. 1951).

28. Where a first permittee is the owner of the automobile for all practical purposes, coverage has been upheld in Hinchey v. National Surety Co., 99 N.H. 373, 111 A.2d 827 (1955); *cf.* Norris v. Pacific Indemnity Co., 39 Cal. 2d 420, 247 P.2d 1 (1952); Fireman's Fund Indemnity Co. v. Freeport Insurance Co., 30 Ill. App. 2d 69, 173 N.E.2d 543 (1961). Where a first permittee is a passenger in the automobile, coverage has been upheld in Indemnity Ins. Co. of North America v. Metropolitan Casualty Ins. Co., 33 N.J. 507, 166 A.2d 355 (1960); Brooks v. Delta Fire & Casualty Co., 82 So. 2d 55 (La. App. 1955); Metcalf v. Hartford Accid. & Indem. Co., 176 Neb. 468, 126 N.W.2d 471 (1964). Where a first permittee is benefited by the operation of the automobile by a second permittee, coverage has been upheld in Aetna Life Ins. Co. v. Chandler, 89 N.H. 95, 193 A. 233 (1937); Pollard v. Safeco Ins. Co., 52 Tenn. App. 583, 376 S.W.2d 730 (1963). Where the named insured knew and never objected to the first permittee's delegation of the use of the automobile to others, coverage has been upheld in Odden v. Union Indemnity Co., 156 Wash. 10, 286 P. 59 (1930); Shoup v. Clemans, 31 N.E.2d 103 (Ohio App. 1939).

29. 55 N.J. 542, 264 A.2d 38 (1970).

30. 55 N.J. at 550, 264 A.2d at 42.

31. 33 N.J. 148, 162 A.2d 854 (1960).

mittee where the issue is whether the permittee has exceeded the scope of the permission given him and is thus excluded from omnibus clause coverage. The rule in New Jersey for that kind of situation is that once permission is granted by the named insured, the permission is held to extend to any and all uses of the vehicle by the first permittee. The only important element concerning coverage is that permission first be granted by the named insured.[32] This is called the initial permission rule.[33] The court in *Odolecki* extended this rule to cases involving second permittees, holding that once initial permission has been granted by the named insured to another person, coverage is fixed.

The court's first justification for the extension of the initial permission rule was that the earlier case, *Baesler*, had not been consistent with the New Jersey policy of "limiting litigation which turns on petty factual distinctions, particularly where these distinctions bear so little relationship to the subject of insurance coverage in the named insured's own mind."[34] The court said that rarely, if ever, does the named insured intend his restrictive permission to limit the scope of his own insurance coverage. Rather, he imposes the restriction only because he is fearful of his own liability.[35]

The court's second, more important reason for its decision was that the public policy of the state dictates that all people injured in automobile accidents should have financially responsible persons to look to for damges and that liability insurance is for the benefit of the public as well as the named insured.[36] As support for this argument, the court made reference to the New Jersey financial responsibility laws, explaining that the laws were an expression of the legislative desire to implement this public policy[37] and concluding that the policy was furthered by a liberal application of the omnibus clause.

Illinois Law Revised

The *Hays* rule stood substantially unchanged in Illinois for almost

32. Matits v. National Mutual Insurance Co., 33 N.J. 488, 166 A.2d 345 (1960), established the initial permission rule in New Jersey. *Matits* was decided shortly after *Baesler*.

33. *See* Annot., 4 A.L.R.3d 10, 30-31 (1965). There are two other rules with regard to the permitted scope of use by the first permittee. The first is the strict rule, holding that any deviation whatsoever from the initial permission is enough to keep coverage from applying. The second is the moderate rule. It holds that coverage will not be precluded if there is only a slight deviation. However, if there is a gross deviation, there will be no coverage under the policy.

34. 55 N.J. at 548, 264 A.2d at 41-42.

35. *Id.* at 548-49, 264 A.2d at 42.

36. *Id.* at 549, 264 A.2d at 42.

37. *Id.* at 546, 264 A.2d at 40. The financial responsibility laws cited are N.J.S.A. 39:6-23 to 6-104.

ten years. The decision in *Maryland Casualty*, however, revised the Illinois law with regard to omnibus clauses and brought it in line with the New Jersey rule.

In *Maryland Casualty*, the Illinois Supreme Court noted that the trial court's decision, finding that the second permittee was covered under both plaintiff's and defendant's omnibus clauses, had relied on *Hays* to the extent that it found the second permittee was engaged in an activity for the benefit of the first permittee.[38] The appellate court had also relied on *Hays* in reversing the trial court but had stated that there was no beneficial use in this fact situation.[39] Both courts had begun with the premise that in order for implied permission to exist in this case, the facts must bring it within one of the four *Hays* guidelines. This split between the lower courts in application of one of the guidelines emphasized that the question of coverage, in certain circumstances, turned on minor facts. It demonstrated the need in Illinois for a more uniform rule.

The supreme court, in reversing the appellate court, dealt with the *Hays* case by saying:

> We do not read the [*Hays*] opinion to hold that only in these four situations, and in no other, is there to be found implied permission, and the opinion makes it clear that the circumstances surrounding the original granting of permission may show it to have been sufficiently broad to include the implied authority to permit another to use the insured vehicle.[40]

The court then went on to formulate a much more liberal rule, and in so doing, it relied heavily on *Odolecki*.[41] Illinois had long followed the initial permission rule with regard to first permittees.[42] The Illinois court thus found it easy to extend that rule to apply to cases involving second permittees. The justices agreed with the court in *Odolecki* that the rule applicable to the scope of permission should be no different when a second permittee is involved than when the conduct of a first permittee is at issue.[43] The court quoted the New Jersey court's reasoning that there should be no "distinction between a case where a first permittee exceeds the scope of permission in terms of time, place, or purpose, and a case where he exceeds the scope

38. 54 Ill. 2d at 339, 297 N.E.2d at 166.
39. 5 Ill. App. 3d at 402, 283 N.E.2d at 40.
40. 54 Ill. 2d at 340, 297 N.E.2d at 166-67.
41. *Id.*
42. The case that established the initial permission rule in Illinois was Konrad v. Hartford Accident & Indemnity Co., 11 Ill. App. 2d 503, 137 N.E.2d 855 (1956).
43. 54 Ill. 2d at 342, 297 N.E.2d at 168.

of permission in terms of use of the vehicle by another."[44] The Illinois court concluded:

> We agree with the Supreme Court of New Jersey "that once the initial permission has been given by the named insured, coverage is fixed, barring theft or the like."[45]

One basis for the court's departure from its previous rule in *Hays* and its decision to follow the more liberal rule was its feeling "that the question of whether coverage is provided under an omnibus clause should not depend upon . . . tenuous factual distinctions."[46] The court apparently recognized the harmful effect which petty factual disputes have had on the question of coverage in applications of the *Hays* guidelines and wished to alleviate this problem. Also, while the court did not expressly state that public policy would best be served by a liberal rule, it did quote with approval this passage from *Konrad v. Hartford Accident & Indemnity Co.*,[47] the case that established the initial permission rule in Illinois:

> . . . the [initial permission] rule is based on the theory that the insurance contract is as much for the benefit of the public as for the insured, and that it is undesirable to permit litigation as to the details of the permission and use . . . .[48]

The court's reference to that part of *Konrad* indicates that it did approve the use of the public policy argument in the situation presented by the principal case.

In effect, the initial permission rule is now the only rule in Illinois with regard to the requirements needed to bring a driver within the scope of an omnibus clause. It is interesting to note that the court in *Hays* had specifically refused to adopt this view. It had said:

> The interests both of the insured and of the insurance company center upon the identity of the permittee, his relation to the insured and his ability and responsibility as a driver. The use to which he puts the vehicle while it remains in his control may be regarded as of secondary importance to the question of coverage. Decisions holding that coverage persists despite a deviation from the permitted scope in route, purpose, or duration of use do not therefore compel the conclusion that coverage should also extend to third persons whom the original permittee has, without authority, allowed to use the car. The rule that initial permission will suffice applies in reason only when that permission was granted to the user sought to be brought within the coverage of the policy.[49]

---

44. *Id.* at 341, 297 N.E.2d at 167.
45. *Id.* at 342, 297 N.E.2d at 168.
46. *Id.*
47. 11 Ill. App. 2d 503, 137 N.E.2d 855 (1956).
48. 54 Ill. 2d at 342, 297 N.E.2d at 168.
49. 28 Ill. 2d at 608, 192 N.E.2d at 859.

At the time *Hays* was decided, the court had felt that public policy, as indicated by legislative enactments, did not require the extension of the insurance contract beyond the interests and intention of the parties.[50] However, even at that time, the insurance contract was in fact being extended, specifically, whenever the courts applied the initial permission rule. Thus, the *Hays* rationale for refusing to consider an application of the initial permission rule was not consistent with insurance law as it then existed.

The *Hays* court had decided that use and identity were different aspects where permission was at issue and that the interests of the named insured and the insurance company under the omnibus clause centered upon the *identity* of the driver. The court in *Maryland Casualty* disagreed with this reasoning. It established that neither the use of the automobile nor the identity of the driver is important in applying the permission requirement of an omnibus clause. The only important factor is that the named insured grant his original permission to the first permittee.[51]

In *Maryland Casualty*, the court illustrated the inconsistency which existed under the *Hays* rule:

> Under our opinion in *Hays*, if Thomas Smythe had been present in the automobile at the time of the collision, coverage would unquestionably have been provided Horton under plaintiff's policy. The alleged limitation of the scope of the authority granted Thomas was that he was not to permit anyone else to use the automobile and there appears to be no valid reason to hold that the deviation from the scope of the authority granted him should serve to terminate that authority if he were not in the car, and not do so if he were a passenger at the time.[52]

In such a situation, it is clear that the identity of the driver is not, as *Hays* had insisted, the essential factor in determining coverage. Even under *Hays*, there would still be coverage for the second permittee. Hence, since the new rule does not depend on identity, it provides a uniform result which the *Hays* rule would disallow.

THE EFFECT OF *Maryland Casualty*

The effect of *Maryland Casualty* is evident. This decision extends insurance coverage under the omnibus clause to any situation where a first permittee has the initial permission of the named insured, regardless of any restrictions or prohibitions which the named insured

50. *Id.* at 607, 192 N.E.2d at 859.
51. 54 Ill. 2d at 342, 297 N.E.2d at 168.
52. *Id.*

attempts to place on the first permittee. This rule will bring a needed uniformity to cases involving omnibus clauses. No longer will technical factual resolutions be determinative of coverage. In Illinois there are now only two important factual determinations to be made: first, whether permission was initially granted, and second, whether the automobile was taken by theft. The real importance of the new rule is not that the courts will have to face less litigation; rather, it is that coverage will be extended in a uniform manner.

Most significantly, innocent victims will now have a financially responsible source to look to for recovery. This rule aids implementation of the public policy favoring insurance as a benefit not only for the insured but for the public as well.

The new Illinois rule, as formulated in *Maryland Casualty*, is simple, uniform and liberal. It is also the most desirable rule.

JOSEPH STALMACK, JR.