A Primer on Auto Liability Coverage for Permissive Users

By James Nyeste

A common situation encountered by tort lawyers is the auto accident caused by a negligent driver who was not the named insured on the liability insurance policy covering the vehicle, resulting in injuries to third parties. The driver might not have liability insurance of his own, or his insurance might have only minimal limits. For both the injured third party and the negligent driver, the question becomes: "Will the liability insurance policy on the vehicle cover the driver who is not named on the vehicle's policy as an insured?"

The typical auto liability policy in Illinois will include as an insured person someone who is using the covered vehicle with the permission of the named insured (typically the owner of the vehicle). In a personal auto policy, the provision might read like subparagraph 2, below:

> Persons Insured
> Who Is Covered
> Section I [Liability Coverage] applies to the following as insureds with regard to an owned auto:
> 1. "You" [the Named Insured] and your "relatives";
> 2. Any other person using the auto with your permission.
>
> * * *

In a commercial auto policy, the provision might read like subparagraph (b), below:

> The following are "insureds":
> a. "You" [the Named Insured] for any covered "auto".
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> * * *

The permissive user clause is commonly referred to as the "omnibus clause." *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 243-44 (1998). Synonyms for "omnibus" as an adjective include "comprehensive" and "inclusive." Merriam-Webster's Dictionary and Thesaurus (2020).

Statutory mandate for the omnibus clause.

With few exceptions, the Illinois Vehicle Code requires that every motor vehicle designed for use on a public highway must be covered by a liability insurance policy. 625 ILCS 5/7-601(a). A "motor vehicle liability policy" under the Code is either an "operator's policy" or an "owner's policy." It is the "owner's policy" with which we are primarily concerned in this article and which you are most likely to encounter, because an "operator's policy" is a narrow product covering only a specific person for a motor vehicle not owned by him. 625 ILCS 5/7-317(c). As to an "owner's policy," the Code states at 625 ILCS 5/7-317(b):

> (b) Owner's Policy. Such owner's policy of liability insurance:

> 1. Shall designate by explicit description or by appropriate reference, all motor vehicles with respect to which coverage is thereby intended to be granted;
> 2. Shall insure the person named therein and *any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured* [emphasis added].

If such a permissive user provision is not contained in the insurance policy, Illinois courts have held that it must be read into the policy. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 243-44 (1998).

Named driver exclusion prevails.
Where the policy excludes a driver by name, however, that driver will be excluded from coverage even if he has permission from the named insured to drive the vehicle. *St. Paul Fire and Marine Ins. Co. v. Smith*, 337 Ill. App. 3d 1054 (1st Dist. 2003) (upholding named driver exclusion). However, a named driver exclusion that bars coverage for the sole named insured on the policy is inconsistent with section 7-317(b)(2) and unenforceable as contrary to public policy. *American Access Cas. Co. v. Reyes*, 2013 IL 115601 (2013).

The "initial permission" rule.
Many coverage disputes involving the omnibus clause have concerned whether and to what extent the driver had express or implied permission from the named insured to use the vehicle. There are all sorts of fact scenarios. Sometimes the driver had express permission from the named insured but deviated from the use that was intended. Sometimes, the driver is a stranger to the named insured but had permission from another person to whom the named insured had given permission. The questions of fact that could complicate the issue of "permission" are legion. Fortunately, Illinois case law simplifies the analysis required.

In construing the "permission" required by the omnibus clause, Illinois has long taken the most liberal position—the "initial permission rule." The Illinois Appellate Court has stated:

> [T]hree views are possible. First, that coverage exists only as long as there is strict compliance with the express permission and intended purposes of the owner. Second, that coverage will exist as long as deviations from these purposes are minor. Third, that once permission is granted coverage exists in spite of any deviation from the original permission. Illinois has adopted the last or more liberal rule, namely that initial permission once given is not affected by subsequent deviation. [Internal citations omitted].

State Farm Mut. Auto. Ins. Co. v. Mohan, 85 Ill. App. 2d 10, 16 (3rd Dist. 1967).

In *Konrad v. Hartford Accident & Indemnity Co.*, 11 Ill. App. 2d 503, 514 (2nd Dist. 1956), the court explained that the rule is based on the public policy that auto liability insurance is for the protection of the public and that it is undesirable to allow litigation over the nuances of permission and use of the vehicle.

> [A] deviation from the permission is immaterial; the only essential thing is that permission be given in the first instance; the 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.

Thus, the driver who has received initial permission to use the vehicle will be covered despite his failure to return the vehicle at the requested time, despite driving the vehicle further than the named insured allowed, or despite his use of the vehicle for a purpose not intended by the named insured.

Subsequent permittees, even strangers to the owner, are also covered under the initial permission rule. Thus, if the initial permittee allows another person to drive the vehicle, that subsequent permittee will also be covered by the omnibus clause. As put simply by the Illinois Supreme Court, "[O]nce initial permission has been given by the named insured, coverage is fixed, barring theft or the like." *Maryland Cas. Co. v. Iowa Nat. Mut. Ins. Co.*, 54 Ill. 2d 333, 342 (1973) (quoting the New Jersey Supreme Court in *Odolecki v. Hartford Accident & Indemnity Co*., 55 N.J. 542, 549-550 (1970).

The facts in *Maryland Cas. Co. v. Iowa Nat. Mut. Ins. Co.* are illustrative of how the issue of permission can get murky and why the initial permission rule makes sense. Robert Smythe and his wife owned a new 1968 Buick that was covered by an auto policy issued to Robert by Maryland Casualty Company. Mr. and Mrs. Smythe allowed their son, Thomas, to use the Buick whenever he wished. Thomas was 20 years old and a student at Southern Illinois University at Carbondale. One evening Thomas drove to a party in Boswell, Indiana, where he met his friends and fellow students, William Horton and John Higgins, who had arrived in their separate vehicles. At some point during the party, Thomas, Horton, and Higgins agreed to take their cars to a gasoline station in Hoopeston and then proceed in one car to Danville for something to eat. There was also some discussion about trading autos for this trip. Accordingly, Higgins asked Horton if he could drive Horton's pick-up truck, and Horton allowed him to do so. Shortly after Higgins left, however, Horton changed his mind about going to Danville and asked Smythe to go after Higgins and get Higgins to return the truck. Smythe then got in Higgins' Chevrolet and caught up with him, but Higgins refused to drive back to the party and proceeded on to Hoopeston. Smythe returned to the party back in Boswell. When the party was over, both Horton and Smythe prepared to leave for Hoopeston. Smythe got into the Higgins vehicle and Horton got into the Smythe Buick. While driving toward Hoopeston in the Smythe Buick, Horton caused a collision, resulting in injuries to Charles McElhaney and Harold Morlan. McElhaney and Morlan brought personal injury claims against Horton, and those claims gave rise to the instant coverage litigation, in which the principal issue was whether Horton was covered as a permissive user under the Smythes' policy with Maryland Casualty.

In addition to these facts, the testimony at trial was that Horton had met Mr. Smythe only one time, had never met Mrs. Smythe, and had never previously driven one of the Smythe cars. There was also testimony that, on one occasion, Mr. and Mrs. Smythe had instructed Thomas to never let anyone but a family member drive a family vehicle. Horton testified that, when they left the party in Boswell, Thomas told him that he wanted to drive Higgins' Chevrolet and that Horton should drive the Smythe Buick to Hoopeston. He further testified that Thomas had not informed

him that Mr. Smythe had ever forbidden Thomas to permit anyone other than members of the Smythe family to drive the car. Thomas, however, testified that he did not engage in any conversation with Horton about which automobile to drive.

In clarifying that the initial permission rule extends to subsequent users like Horton, the Illinois Supreme Court stated that it had examined the many reported decisions from around the country concerning express and implied permission and deviations from such permission and concluded that, in view of the numerous variations in the possible factual situations, there was nothing to be accomplished in attempting to distinguish or reconcile them, with one exception. Coverage under an omnibus clause should not be barred based on the tenuous factual possibilities except where the initial permission is terminated by "theft or the like." *Maryland Cas. Co. v. Iowa Nat. Mut. Ins. Co.*, 54 Ill. 2d at 342.

Further, the initial permission rule confers coverage even where it cannot be established that the initial permittee granted permission to the third person driving the vehicle. In other words, the burden of proving "theft or the like" is on the insurer trying to avoid providing coverage under the omnibus clause. *U.S. Fidelity & Guaranty Co. v. McManus*, 64 Ill. 2d 239 (1976).

But, of course, for there to be coverage for a permissive user, there must be some sort of *initial permission*. Where there was no permission of any sort to begin with, it is a mistake to talk about the initial permission rule and its liberal allowance for deviations and subsequent users. *Founders Ins. Co. v. Contreras*, 362 Ill. App. 3d 1052 (1st Dist. 2005) (where the driver had never received any permission to use the vehicle, the initial permission rule was irrelevant).

"Theft or the like" has been construed to include tortious conversion and repossession of the vehicle upon the owner's default on a loan. See *Harry W. Kuhn, Inc. v. State Farm Mut. Auto. Ins*. Co., 201 Ill. App. 3d 395 (1st Dist. 1990) (after owner gave initial permission, he demanded return of vehicle, and subsequent use was a tortious conversion); *Woodall v. Booras*, 182 Ill. App. 3d 1096 (2nd Dist. 1989) (tortious conversion); *Zimmerman v. State Farm Mut. Auto. Ins. Co*., 7312 Ill. App. 3d 1065 1st Dist. 2000) (driver of repossessed vehicle not covered as permissive user under policy issued to vehicle's owner).

The initial permission rule has been held to apply to operator coverage as well as to owner policies. So where the operator's own policy does not cover the accident vehicle but does provide coverage for his use of a non-owned vehicle with the owner's permission, the operator will have coverage under his own policy if the owner gave initial permission to a prior user who then gave permission to the operator. In so holding, the court in *St. Paul Fire & Marine Ins. Co. v. Guthrie*, 332 Ill. App. 3d 486, __, 773 N.E.2d 763, 766 (3rd Dist. 2002), stated, "When a person borrows a car from a friend or a co-worker, he expects that his [the borrower's] insurance will protect him in the event of an accident, even if it turns out that the car was owned by someone else. To hold otherwise would require a borrower to ask the lender for proof of ownership or risk being uninsured."

To trigger omnibus coverage it is unnecessary to plead permission.
It is a good idea to plead that the at-fault driver had permission to use the vehicle, but pleading such permission is not actually necessary for triggering omnibus coverage. It is up to the

omnibus insurer to show that there was no initial permission or that the permission was terminated by theft or the like. In *Clemmons v. Travelers Ins. Co.*, 88 Ill. 2d 469, 475-76 (1981), the Illinois Supreme Court stated:

> [I]t is not necessary for a complaint to allege permission in order to trigger the duty to defend. "If the complaint alleges facts within the coverage of the policy or potentially within the coverage of the policy the duty to defend has been established." [Citation omitted.] Under the allegations of this complaint, there clearly was the possibility that Reed was driving his employer's automobile with permission, and whether that was a fact was a matter for later investigation by Travelers. Nothing in the complaint suggested that coverage did not exist.

Must be as broad as the coverage for the named insured.
The liability coverage for a permissive user under the omnibus clause must be as broad as the coverage for the named insured. An exclusion or exception applicable only to a permissive user is void against public policy and will not be enforced, but an exclusion that would be applicable to both permissive users and the named insured will be enforced if it is not otherwise against public policy. *State Farm Mut. Auto. Ins. Co. v. Smith*, 197 Ill. 2d 369 (2001) (exclusion for use of vehicle in an auto business was unenforceable because it applied only to permissive users); *Pekin Ins. Co. v. Fidelity & Guar. Ins. Co.*, 357 Ill. App. 3d 891 (4th Dist. 2005) (same); *Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121 (2005) (exclusion for use of vehicle in a food delivery business was *enforceable* as to a permissive user because it also would have applied to the named insured).

For private passenger autos, permissive users must get same limits as named insured.
In *State Farm Mut. Auto. Ins. Co. v. Illinois Farmers Ins. Co.*, 226 Ill. 2d 395 (2007), the court allowed the use of a "step-down" provision in a car insurance policy, which reduced the policy limits for permissive users. However, this decision was overruled by legislation effective January 1, 2008. Section 143.13a of the Illinois Insurance Code (215 ILCS 5/143.13a) provides as follows:

> Any policy of private passenger automobile insurance must provide the same limits of bodily injury liability, property damage liability, uninsured and underinsured motorist bodily injury, and medical payments coverage to all persons insured under that policy, whether or not an insured person is a named insured or permissive user under the policy. If the policy insures more than one private passenger automobile, the limits available to the permissive user shall be the limits associated with the vehicle used by the permissive user when the loss occurs.

Taxicabs, car dealers, commercial truckers, tow trucks, and rental cars.
Insurers of commercial vehicles have raised a host of issues concerning permissive user coverage, including whether certain types of motor vehicle policies are exempt from any omnibus coverage mandate, whether their omnibus clauses can exclude certain types of permissive users, whether the initial permission rule should apply, and whether their coverage is primary or secondary.

In *American Country Ins. Co. v. Wilcoxon*, 127 Ill. 2d 230 (1989), the Illinois Supreme Court considered whether the insurer of a taxicab company could exclude coverage for a pedestrian's injuries caused by a cabdriver who had not entered into a lease with the cab company whose cab he was driving. Checker leased one of its cabs to Willie White under a written lease that provided that White agreed to be the sole driver of the cab, but White gave possession of the cab to David Overstreet, who subsequently drove the cab and injured Anthony Wilcoxon, a pedestrian. Wilcoxon sued Checker and Overstreet. American Country, the insurer of Checker, contended that its bond did not provide coverage. The bond had an omnibus clause tracking the language of the omnibus clause statutorily required in financial responsibility bonds covering vehicles used for the transportation of passengers for hire, Ill. Rev. Stat., ch. 95 1/2, par. 8-104 (now 625 ILCS 5/8-104). The omnibus clause insured the cab's "Owner/Principal[,] his agent, or any person operating the motor vehicle with his express or implied consent." However, a rider to the bond provided that "consent" meant operation of the vehicle pursuant to a written lease. The rider further provided, "It is the specifice [sic] agreement and intention of [the insurer] and CHECKER that the doctrine known as the Initial Permission Doctrine shall not apply." The Illinois Supreme Court, relying on its decision in *Maryland Cas. Co. v. Iowa Nat. Mut. Ins. Co.*, 54 Ill. 2d 333, 342 (1973), held that the rider was contrary to public policy and invalid and that the bond was subject to the initial permission rule.

In *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group*, 182 Ill. 2d 240 (1998), Universal Underwriters insured a car dealer under a garage policy, with a clause insuring the following permissive users:

> Any other person or organization *required by law* to be an insured while using an auto covered by this Coverage Part within the scope of your permission. [Emphasis added].

Id. at 242. Universal argued that it did not have to provide liability coverage to a customer who negligently caused a collision and injuries to third parties while test-driving one of the dealership's vehicles because the customer had his own auto liability insurance that met Illinois' mandatory minimum limits. Universal argued that its garage policy only needed to cover permissive users who would otherwise be uninsured or underinsured. Relying on the title to Chapter 7, Article III of the Vehicle Code ("Proof Of Financial Responsibility For The Future"), Universal argued that the omnibus coverage mandate of section 7-317 applies only to policies issued to those motorists who, having had their driving privileges revoked or having failed to pay a judgment, must show proof of financial responsibility for the future. The Illinois Supreme Court disagreed, holding that section 7-317's definition of "motor vehicle liability policy" and its omnibus coverage mandate apply throughout the "Act," meaning the Illinois Vehicle Code, unless the context clearly indicates another meaning. 625 ILCS 5/1-101.1. Accordingly the omnibus coverage mandate applies to section 7-601(a), which, with few exceptions, requires liability insurance for every motor vehicle on the highway. Universal nevertheless argued that its car dealer policy was excepted from 7-601(a)) under the exemption for "vehicles complying with laws which require them to be insured in amounts meeting or exceeding the minimum amounts required under [section 7-601]." 625 ILCS 5/7-601(b)(6). The court disagreed, holding that the 7-601(b)(6) exemption made car dealers subject to different (higher) minimum liability insurance

limits but did not remove the mandated omnibus clause required by section 7-317(b)(2). Consequently, Universal had to provide omnibus coverage to the customer who was test-driving the car dealer's vehicle, regardless whether the customer had his own coverage.

In *Zurich American Ins. Co. v. Key Cartage, Inc.*, 236 Ill.2d 117 (2010), the Illinois Supreme Court held that liability policies for commercial truckers are *not* required by Illinois statute to have an omnibus clause and that, consequently, an exclusion in the omnibus clause of a commercial trucking policy was not against public policy. The Supreme Court reversed the decision of the appellate court, which had relied on *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group*, 182 Ill. 2d 240 (1998), to hold that section 7-317(b)(2) applied to the entire Illinois Vehicle Code, including the Commercial Transportation Law (625 ILCS 5/18c-1101 *et seq*.) that regulates trucking. In reversing, the Supreme Court held that the appellate court had read its *Universal* decision too broadly. As the court explained in *Universal*, section 7-317(b)(2)'s omnibus requirement is part of the statutory definition of "motor vehicle liability policy," which applies throughout the "Act," meaning the entire Illinois Vehicle Code, "*unless the context clearly indicates another meaning*." (Emphasis added.) *Universal*, 182 Ill.2d at 245. The court then went on to explain that the word "Act" in section 7-317 should not be construed to include the Commercial Transportation Law because to do so would give rise to several contradictions and inconsistencies—among them, the Commercial Transportation Law, section 18c-4902, provides that the insurance requirements for motor carriers of property shall be prescribed by the Illinois Commerce Commission, while section 7-317(g) provides that the Department of Insurance has final approval of motor vehicle liability insurance policies regulated under section 7-317. Accordingly, the court concluded that the definition of motor vehicle liability insurance policies set forth in section 7-317, including the omnibus requirement in section 7-317(b)(2), does not apply to commercial truckers regulated under the Commercial Transportation Law.

Pekin Ins. Co. v. Fidelity & Guarantee Ins. Co., 357 Ill. App. 3d 891 (4th Dist. 2005), involved coverage issues arising from an accident caused by a vehicle coming unhitched from a tow truck. The towed vehicle, a delivery van, crossed into oncoming traffic and collided with another vehicle. The injured parties sued the tow truck company, the tow truck driver, the delivery van's owner, and the delivery van driver. Pekin insured the tow truck, and Fidelity insured the delivery van. In the coverage action between Pekin and Fidelity, the court was faced with omnibus coverage issues and which, if either, of the policies should be primary. Tow trucks are subject to specific insurance requirements under 625 ILCS 5/12-606(d), which is silent, however, as to any requirement for an omnibus clause. The court held that tow trucks nevertheless are subject to the omnibus coverage mandate of 625 ILCS 5/7-317(b)(2). Additionally, the court held that the delivery van owner and delivery van driver were permissive users of the tow truck because the van driver had participated in operating the tow truck's equipment to negligently attach the delivery van to the tow truck before it came loose. With respect to Fidelity's insurance on the delivery van, the court held that the tow truck company and tow truck driver were permissive users of the van being towed and that, relying on *State Farm Mut. Auto. Ins. Co. v. Smith*, 197 Ill. 2d 369 (2001), Fidelity's business use exclusion for permissive users was unenforceable. However, the tow truck company and the tow truck driver were not allowed to deselect their statutorily mandated Pekin coverage, making Pekin the primary insurer as to them.

As in the case of taxicabs, *supra*, the Motor Vehicle Code specifically mentions the requirement for omnibus clauses in the financial responsibility bonds and liability insurance applicable to rental cars. Sections 5/9-103 and 5/9-105 provide that the bond or policy must cover judgments rendered "against the customer or against any person operating the motor vehicle with the customer's express or implied consent." 625 ILCS 5/9-103 (bonds) and 105 (policies). The general rule in Illinois, including with respect to most omnibus coverage, is that the insurance on the vehicle is primary, and the insurance of the driver is secondary. However, the Illinois courts that have considered this question in the context of rental cars have concluded that the general rule should not apply. Instead, car agencies and renters may contractually agree that the driver's policy will be primary. *State Farm Mut. Auto. Ins. Co. v. Hertz Claim Management Corp.*, 338 Ill. App. 3d 712 (3rd 2003) (where supplemental coverage is declined, customer's own policy is primary and rental car company's mandated coverage is excess; supplemental coverage, if purchased, would be primary).

With respect to new and used car dealers, the mandated omnibus coverage is primary except when the driver has his own liability insurance with limits at least as great as $100,000 for bodily injury to or the death of any person and $300,000 for bodily injury to or the death of any 2 or more persons in any one accident. In that event, the permissive user's insurance will be primary and the dealer's insurance shall be secondary. However, with respect to customers on test-drives, the dealer's insurance is always primary. 625 ILCS 5/5-101(b)(6) (new vehicle dealers) and 625ILCS 5/5-102(b)(4) (used vehicle dealers).

Excess and umbrella policies

Excess and umbrella policies are not required to provide permissive user auto liability coverage, although many do. Where permissive user coverage is provided, it may be subject to conditions and exclusions not found in the underlying auto liability policy, and those limitations may apply to permissive users specifically, rather than equally to the named insured. Thus, the omnibus clause may have an exception for permissive users engaged in an auto business, which would be prohibited in a primary auto policy, *State Farm Mut. Auto. Ins. Co. v. Smith*, 197 Ill. 2d 369 (2001).

When an excess or umbrella policy provides auto liability coverage but does not expressly have an omnibus clause, it might nevertheless have a "Who is insured" provision stating that any insured on the underlying policy will be an insured under this policy, thus providing permissive users with coverage on the umbrella policy as well as on the underlying auto policy.

Or the "Who is insured" provision on the excess or umbrella policy might say that "any *additional insured*" on the underlying policy will be an insured on this policy. The excess or umbrella insurer may argue that this language was intended to refer only to additional insureds on the underlying policy who were added by endorsement. However, there are many Illinois cases referring to omnibus clause permissive users as "additional insureds," *e.g.*, *Country Mut. Ins. Co. v. Anderson*, 257 Ill. App. 3d 73, 75 (1st Dist. 1993), so this language in the excess or umbrella policy can be a route to extra coverage for the permissive user. Permissive user coverage was found under an umbrella policy on this basis in *Harco Nat'l. Ins. Co. v. Incipe LLC*, No. 2020 CH 4957 (Cir. Ct. Cook Co., Michael Mullen, Judge), Judgment Order, July 21, 2021.

Conclusion

The purpose of the omnibus clause is to protect the public by ensuring that adequate resources are available to compensate for injuries sustained as a result of automobile accidents. Whether you are representing the injured person or the at-fault permissive driver, be sure to get a complete copy of the policy covering the vehicle, be wary of any exceptions or exclusions purporting to limit or bar coverage for the permissive user, and be aware of the possibility of excess and umbrella coverage for the permissive user additional insured.