

PERMISSIVE USE: BEYOND CONSENT

I. IN GENERAL

Most automobile insurance policies provide coverage for three types of insureds: the named insured; persons using the insured auto with the permission of the named insured and anyone liable for the conduct of an insured. Permissive use clauses found in an “omnibus clause” are divided into two groups: those where the policy extends coverage to “any person while using the insured auto with the permission of the named insured, provided his actual operation is within the scope of such permission;” and those where the policy extends coverage to “[a]ny other person while using the insured auto with the permission of the named insured, provided his actual operation is within the scope of such permission.”¹ The current version of the Personal Auto Policy (ISO) restricts coverage through a nonpermissive use exclusion, which states:

We do not provide Liability Coverage for any “insured”:

8. using a vehicle without a reasonable belief that that the “insured” is entitled to do so.²

Determining whether a driver had permission to use the insured auto is a two-step test: (1) Did the driver have initial permission to use the auto? and (2) Was the use within the scope of permission? These two issues must be analyzed separately. Both permission to use the auto and the scope of permission may be expressed or implied.³ Permission to use and the scope of permission may also be limited. In Maryland, there is a presumption that the use was permissive.⁴ This presumption can only be rebutted where the evidence is conclusive.⁵

Permission implies the right to withhold permission. Co-owners of a vehicle do not need

¹ *Nationwide v Continental*, 87 Md. App. 261, 266-67 (1991).

² The PAP defines insured as: any person using your “covered auto.” That makes anyone, even a thief, an insured. The exclusion presumably limits this to “permissive users.”

³ *Nationwide v. GEICO*, 81 Md. App. 104, 119 (1989).

⁴ *See State Farm v. Martin Marietta*, 105 Md. App. 1 (1995).

⁵ *Id.* at 10.

permission. If use is by right, it is not a use by permission.⁶ The death of the named insured terminates permissive use.⁷

A. INITIAL PERMISSION

1. WHO MAY GRANT PERMISSION?

Most policies limit those who may grant permission to the named insured. In these policies, an omnibus insured may not grant permission.⁸ Some policies also permit the named insured's spouse or an omnibus insured to give permission.⁹ The Personal Auto Policy has no such restriction. "The focus shifts from the often-litigated concepts (Who can grant permission? Permission to do what? What is the scope of permission?) to the user's state of mind." Janquitto, *Maryland Motor Vehicle Insurance*, §7.11(H) (Michie 1992). Hence, an omnibus insured may be able to give permission.

2. EXPRESS OR IMPLIED

Permission may be either express or implied.¹⁰ Express permission may be oral or written. Implied permission may be shown by "circumstantial evidence showing a course of conduct indicative of mutual acquiescence or a lack of objection signifying permission and, thus, it flows by inference to fill the void created by the absence of an express statement."¹¹

Circumstantial evidence considered by the courts includes course of conduct, friendship or relationship of the parties, employment, lack of objection or mutual acquiescence. Appleman, *Insurance Law and Practice* (Berdal ed.) § 4365 (hereinafter referred to as "Appleman"). Course of conduct evidence includes: (1) whether there were prior instances of similar use; (2) whether the named insured was aware of the earlier use; (3) whether use was integral to the operation undertaken by the

⁶ *Cf. General Accident v. Perry*, 75 Md. App. 503, 526 n.19 (1988).

⁵ *Inland Mutual Insurance Company v. Peterson*, 148 F.Supp 392 (D.Md. 1957).

⁸ *Keystone Ins. Co. v. The Fidelity & Casualty Co. of N.Y.*, 256 Md. 423 (1970); *Selected Risks v. Miller*, 227 Md. 174 (1961); and *Wehland v. Nationwide Mutual Ins. Co.*, 336 F. Supp. 360 (D.Md. 1971).

⁹ See, e.g., *Selected Risks*, supra; and *Wehland*, supra..

employer and (4) whether the use continued over a period of time without objection.¹²

3. PERMISSION TO DO WHAT?

Disputes tend to arise with implied permission. The scope of the permission granted depends upon the particular use contemplated by the named insured at the time permission was granted.¹³ Permission may be limited temporarily, geographically, and to certain purposes. Most jurisdictions have applied three rules to determine the scope of the implied permission: (1) the liberal rule; (2) the minor deviation rule; and (3) the conversion rule. The liberal rule, or the “hell or high water rule,” provides that after the original entrustment of the auto, any use of the vehicle is considered to be within the scope of the permission granted.¹⁴ The minor deviation rule provides that if the use made by the permittee is not a gross violation of the terms of the bailment he is still afforded protection under the assured’s policy.¹⁵ The conversion rule provides that coverage can be denied only where the driver sufficiently exceeded the scope of permission given so that a suit for conversion can actually be brought against him.¹⁶

In *National Grange Mutual Insurance Company v. Pinkney*,¹⁷ the Court of Appeals specifically rejected the “liberal rule.” The Court refused to adopt any of the rules and opted to construe the scope of implied permission on a case by case basis. This is known as the “total facts” approach.¹⁸ The Court concluded that the insurance contract should be construed as any other contract:

If the trier-of-fact concludes after listening to all of the

¹⁰ Cf. Transportation Article, 14-102 (c).

¹¹ *Bond v. Pennsylvania National Mutual*, 289 Md. 379, 385 (1981).

¹² *Empire Fire and Marine Insurance Co. v. Liberty Mutual Insurance Co.*, 117 Md. App. 72, 699 A. 2d 482 (1997).

¹³ *See Cohen v. American Home Assurance Co.*, 255 Md. 334 (1969).

¹⁴ *National Grange Mutual Insurance Company v. Pinkney*, 284 Md. 694, 698 (1979)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 284 Md. 694, 698 (1979).

¹⁸ *Cohen v. American Home Assurance Co.*, 255 Md. 334 (1969).

testimony that the actual operation of the vehicle was within the scope of the permission granted, then [the insurer] will be obliged to defend. Obviously if the trier of fact believes that such actual operation was not within the scope of permission granted, then [the insurer] is not obligated under the omnibus clause.¹⁹

II. FIRST PERMITEES

A. RETAKING

There are few Maryland cases where the driver received his permission directly from the named insured. In *Nationwide Mutual Insurance Company v. Simms*,²⁰ the federal court, following the general rule, held that where a driver receives permission to use a car and then returns it, the subsequent retaking requires new permission.²¹ In *Simms*, an employee contended that his employer had given him implied permission to use a school bus for personal purposes. The court found that the employee received only limited permission for the use of the bus for work purposes. The *Simms* court explained that “implied permission . . . arises out of the usage or practice of the parties over a sufficient period of time prior to the date on which the question of implied permissive use occurred.”²² There must be some course of conduct that allows an inference that the employer and employee mutually acquiesce to the employee’s use of the insured auto for personal use.

B. RESTRICTIONS ON TIME & TERRITORY

In *American Home Assurance Co. v. Erie Insurance Exchange*,²³ both the permission to use and the scope of permission were express. The policy provided coverage for permissive users where the “actual operation” of the vehicle was within the scope of permission. Lawrence Heiston borrowed his neighbor’s car to pick up his wife and child from his in-laws. The trip

¹⁹ *Id.* at 707.

²⁰ 231 F. Supp. 787 (D.Md. 1964).

²¹ See *Appleman*, *supra*, §4369.

²² *Id.* at 796.

²³ 252 Md. 116 (1969).

was to take thirty to forty-five minutes as Heiston was supposed to get his wife and come straight back.

The accident occurred two and one-half hours later and Heiston had not yet picked up his wife. The Court held the “actual operation” was not within the scope of permission.

C. RESTRICTIONS ON WHO MAY DRIVE

In *Cohen v. American Home Assurance Co.*,²⁴ a mother gave her son permission to use her car on the condition that a friend, and not the son, drives the vehicle. The son drove anyway. The Court held that the son’s driving at the time of the accident was beyond the scope of permission.

D. RESTRICTION ON THE PURPOSE OF THE USE

Permission is not an all or nothing proposition. The insured may limit the scope of permission.²⁵ A leading case on this issue is *Fisher v. U.S.F. & G.*,²⁶ there, an employee had permission to drive a company vehicle home and to use it for company business. The employee was at home when he responded to a personal emergency in the company car and caused an accident. The employer had a policy manual that limited the use of company vehicles to company business and the employee admitted that he had been informed of this policy. He previously had been caught using the company vehicle for personal use and had been warned against using it for personal use in the future. He had been told that if he did so again he would be fired. He conceded that he had no express permission to use the vehicle on the night of the accident. He admitted not asking for express permission and said that he thought his employer "would object" if he asked. The court held that there was no coverage.²⁷

A second case dealing with the issue of limiting the scope of permission is *Washington*

²⁴ 255 Md. 334 (1969).

²⁵ See, e.g., *American Home Assurance Co. v. Erie Ins. Exchange*, 252 Md. 116 (1969).

²⁶ 86 Md. App. 322, 586 A.2d 783 (1991).

²⁷ *Id.* at 337.

*Metro Area Transit Auth. v. Bullock.*²⁸ There, Washington Metro Area Transit Authority ["WMATA"] sought a declaration that its employee, Bullock, was a non-permissive user while driving the company car. When the car was first issued to Bullock, WMATA permitted him to use the car for both company and personal use. Later, the company notified its employees that personal use would no longer be allowed. The company made concessions to the employees because it was taking away this privilege, but never again allowed the employees to use company cars for personal use. Bullock continued to use the car for personal use. While doing so he struck two pedestrians. Bullock contended that he never agreed to the company's concessions and the company's actions supported his allegations of implied permission.

WMATA was a self-insurer without an insurance policy. There was no policy language to construe. The court rejected Bullock's contention that he was not bound by the company's new limitation on the scope of his use of the auto and held that he was bound by the limitations whether or not he accepted the new conditions. Further, the court held that permission would not be implied because "there was no evidence that anyone in the WMTA management ... knew of, much less acquiesced in [the personal] use."²⁹

*Goodwin v. Home Indem. Co.*³⁰ (decided the same date as *Cohen, supra*) involved a driver who obtained the key to a truck in order to pick it up Saturday and repair it. Instead, the driver picked up the truck about 2:00 a.m. Saturday morning and "had just been 'riding around'". The Court held that "the permission granted to [the repairer] and the use contemplated and relied upon when permission was granted was to pick up the truck Saturday morning for the specific purpose of repair,

²⁸ 68 Md. App. 20, 509 A.2d 1217, cert. denied, 308 Md. 237, 517 A.2d 1120 (1986).

²⁹ *Id.* at 38.

³⁰ 255 Md. 364 (1969)

not a Friday night (or early Saturday morning) escapade.”³¹

E. SUMMARY OF FIRST PERMITTEES

The common theme among these cases is that the Court will endorse the intent of the named insured at the time of granting permission. We can also extract the following guidelines:

- (1) A retaking requires new permission.³²
- (2) An express restriction to a first permittee not to drive, but to have another drive, will be enforced.³³
- (3) An express territorial and temporal restriction will be enforced.³⁴
- (4) Permission to drive a car for repair purposes on a specific day does not include permission to drive for other reasons at other times.³⁵
- (5) An express restriction of personal use of a company car will be enforced.³⁶

III. SECOND PERMITTEES

Most of the disputes have involved “second permittees;” that is, drivers who received their permission to use an auto from one who previously obtained permission from the named insured. There is no problem where authority to delegate permission to drive is express. Implied permission may be found where the circumstances are such that the owner knew or should have known that delegation of permission was involved. Difficulties arise where delegation is expressly prohibited. In each situation, coverage will depend upon the specific language of the policy.

Policy language frequently insures “any person *using* the auto” with permission. What does it mean to “use” an auto? Does it only mean driving? The Maryland courts have held that it means much more. The first Maryland Court of Appeals decision to face this issue did not concern a second

³¹ *Id.*

³² *Simms*, supra.

³³ *Cohen*, supra. Compare second permittees, *infra*

³⁴ *Erie Insurance*, supra.

³⁵ *Goodwin*, supra

³⁶ *Bullock*, supra.

permittee. In *Casualty v. Mitnick*,³⁷ the named insured's granddaughter was in the auto while a third party drove. The Court decided that "use" in an omnibus clause did not refer merely to the actual driving of the car, but also "included borrower's making use of it by riding while driven by another."³⁸ Therefore, the granddaughter was covered.

Even where the person is "using" the auto with permission, most policies require that the "actual use" be within the scope of permission. Is "actual use" different from "use"? The first Maryland appellate decision on this issue was *Melvin v. American Auto Ins. Co.*,³⁹ a second permittee case. The Court interpreted a policy which provided coverage for "any other person or organization legally responsible for the use of (1) an automobile . . . not owned . . . by such a person or organization, or (2) . . . provided the actual use thereof is by a person who is an insured . . ." This is unusual policy language because the test is not permission, but use for the benefit of an insured. There the Court held that "actual use" is not synonymous with operation. Rather, "actual use" included "operation of a vehicle, where the operator is the agent or servant of another and subject to his immediate and present direction and control."⁴⁰ Because the second permittee was operating the auto, he was legally responsible for the use of the auto. Further, the "actual use" was to drive for the benefit of the first permittee. Therefore, the court extended coverage to a second permittee.

The Maryland federal court addressed the issue of second permittees in *Ohio Casualty Ins. Co. v. Pennsylvania National Mutual Casualty Ins. Co.*,⁴¹ there, Mrs. Schackert gave her son general permission to drive when she was not using the car and specific permission to take the vehicle to College Park for the weekend without any express limitation. The son, an omnibus insured, and his friend went on a double date. The son drove his date to her home. His friend then was given

³⁷ 180 Md. 604 (1942).

³⁸ *Id.* at 607.

³⁹ 232 Md. 476 (1963).

permission to use the Schackert vehicle to drive his date home. The court held that the named insured's son had implied authority to authorize his friend to drive. Therefore, the second permittee was "using such automobile with the permission of the named insured."⁴² *Ohio Casualty*, is in accord with *Federal Ins. Co. v. Allstate*,⁴³ discussed *infra*.

Zurich Ins. Co. v. Monarch Ins. Co. of Ohio,⁴⁴ was the first Maryland appellate decision to face the second permittee issue with a "permissive use" policy. The Court was faced with a case very similar to *Ohio Casualty*. John Quade, an omnibus insured, borrowed his sister's car and drove to the home of Lawrence Heiston.⁴⁵ Heiston asked Quade's permission to use the car. Quade responded that permission must come from Mrs. Fuller, and he gave Heiston her telephone number. Heiston called Ms. Quade, but the line was busy. Quade was led to believe that permission was given and delivered the keys to Heiston. They then picked up Heiston's girlfriend, who was sitting in the front seat while Quade sat in the back at the time of the accident. The policy provided coverage for "any other person using such automobile with the permission of the named insured provided his actual operation . . . is with permission."⁴⁶

The Court held that "neither Quade, Mrs. Fuller nor anyone else gave Heiston permission to use the car, and his permission behind the steering wheel was gained by deception."⁴⁷ The Court distinguished *Mitnick* on the basis that, although Quade was present in the car, "the benefit of the use of the car went to Heiston" because he had his girlfriend in the front seat.⁴⁸ This case supports the general proposition that fraud or misrepresentation in obtaining permission to use an auto

⁴⁰ *Id.* at 478-79.

⁴¹ 238 F. Supp. 706 (D. Md.), *aff'd*, 352 F.2d 308 (4th Cir. 1965) (per curium).

⁴² *Id.* at 707.

⁴³ 275 Md. 460 (1975).

⁴⁴ 247 Md. 3, 230 A.2d 330 (1967).

⁴⁵ Heiston was also the driver in *Erie Insurance Exchange*, *supra*

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 9.

vitiates the permission.⁴⁹

In 1974, the Court of Special Appeals held that a second permittee may be entitled to coverage even in the face of a specific restriction if the omnibus clause focuses solely on the “use” of the vehicle within the scope of permission rather than its actual operation. In *Maryland Indem. Ins. v. Kornke*,⁵⁰ an eighteen year old son lived at home with his parents. He had a general permission to use the car, but was told not to allow anyone else to drive the car. One day he had car trouble and hurt his arm while trying to fix it. Someone else volunteered to drive and an accident occurred. The policy extended coverage to any person using the automobile and any person legally responsible for its use. The court held that the second permittee drove the care for the convenience of the first permittee, who was in the car at the time of the accident and was benefited by the second permittee’s driving.

In *Federal Ins. Co. v. Allstate Ins. Co.*, 275 Md. 460 (1975), Max Schwartz gave his Cadillac to Direct Way to be driven to Florida. Direct Way hired Richard Frank to drive the automobile. Frank picked up his girlfriend and James Straz and they left for Florida with Frank at the wheel. Straz was driving at the time of the accident. The policy provided coverage for use of the auto with permission of the named insured provided the “actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission.” The Court observed:

The question which we have not previously had occasion to consider is whether a second permittee is also an insured under the omnibus clause such as the one here on the grounds that he is using the automobile “with the permission of the named insured.” Previous cases that have extended coverage to the second permittee were based on an omnibus clause naming, as an insured, any person “legally responsible” for the use of the automobile provided the actual use was with the permission of the named insured In such cases, the second permittee

⁴⁸ *Id.* at 10.

⁴⁹ *See* Appleman, §4635.

⁵⁰ 21 Md. App. 178 (1974).

was covered because, as the operator of the vehicle, he was “legally responsible” for the use, although the actual use was by the first permittee. The Allstate policy in question here does not contain such a phrase; consequently, the second permittee (Straz) is covered only if he was *using* the automobile with the implied permission of Direct Way.⁵¹

The Court held that there was implied permission from Direct Way to Frank to subdelegate the driving to Straz. The Court cited four factors supporting this “implied permission”:

1. The first permittee (Frank) was a passenger in the car and had control and direction of the car;
2. Subdelegation of permission to drive is not specifically forbidden;
3. The second permittee (Straz) was serving some purpose of Frank; and
4. Both Straz and Frank by driving the Schwartz vehicle to Florida were serving a purpose of the named insured (Direct Way).⁵²

The Court noted, but did not address, two exceptions to the general rule that a permittee may not allow a third party to use the named insured’s car: (1) the original permittee is riding in the car with the second permittee at the time of the accident, or (2) the second permittee’s driving is “occasioned by an emergency or a situation involving elements of urgency or necessity, benefiting the first permittee.”⁵³

In *Insurance Co. of North America v. State Farm Mutual Auto Ins. Co.*,⁵⁴ the Court of Appeals reversed the Court of Special Appeals and distinguished *Kornke*. There, a son borrowed his mother’s car. He had permission, but was told not to let anyone else drive the car. His friend was driving at the time of the inevitable accident and the son was a passenger. The policy provided for coverage of “any ... 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

⁵¹ *Id.* at 471 (Emphasis in original)(citation omitted).

⁵² *Id.* at 472.

⁵³ *Id.* at 386 n.1.

⁵⁴ 281 Md. 381 (1977).

permission.” The Court of Appeals held *Cohen* and *Goodwin* controlling and found the second permittee was not covered.

The final Court of Appeals decision on omnibus coverage for second permittees is *Bond v. Pennsylvania National Mutual Casualty Co.*⁵⁵ There, the named insured gave her daughter permission to operate the covered auto, but specifically prohibited her from allowing anyone else to use the car. At the time of the accident, the vehicle was operated by the daughter’s friend with the daughter’s permission. The policy provided coverage for “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.” According to the Court, the focus of permission centered on the relationship between the named insured and the first permittee and not between the first and second permittees. The driver’s right to sue the automobile was only as broad as the scope of permission granted the daughter. The mother had specifically restricted the daughter from allowing anyone else to drive.

The Court did not overrule *Kornke* and the two are distinguishable. In *Bond*, the policy required that the person operating the car get permission to operate it from the named insured. In *Kornke*, the policy covered “any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is . . . with the permission of [the named insured].”

In December 1989, the Court of Special Appeals held in *Nationwide v. GEICO*,⁵⁶ that a second permittee is entitled to primary coverage under an omnibus clause of an auto policy even where the named insured owner of the car has specifically prohibited the first permittee from allowing others to drive the car. There the policy provided coverage for “any person using the automobile with

⁵⁵ 289 Md. 379 (1981).

your permission. The actual use must be within the scope of that permission.”

John Bonnar bought a car for his daughter, Nancy, so that she could drive back and forth to school. She was generally instructed not to let anyone else drive and specifically instructed not to let her boyfriend, Steven Hughes, drive. Nonetheless, on March 20, 1987, the day of the accident, Steven was driving Nancy to school. The court cited *Bond, supra*, for the general rule that where the named insured specifically restricted the first permittee from allowing anyone else to drive there cannot be implied permission.⁵⁷ The *Nationwide* court distinguished *Bond* on the basis of the two possible exceptions to the general rule mentioned in *Bond* at footnote 1; *i.e.* (1) the first permittee was riding in the car or was benefited by its operation, and (2) the second permittee’s driving was occasioned by an emergency or a situation involving elements of urgency or necessity benefiting the first permittee. In *Nationwide*, the first permittee was riding in the car and benefited by its operation at the time of the accident.

The *Nationwide* Court held that the case was governed by *Kornke* and fell within the first exception, above. The Court then addressed the specific language of the policy. As stated above, the policy provided coverage for any other person using the auto with your permission. The actual use must be within the scope of permission. The court reasoned that although Mr. Bonnar had specifically instructed Nancy that Steven was not to drive, Steven did have permission to be a passenger. Therefore, he had permission to “use” the vehicle. *Id.* at 120. The Court then addressed the “actual use” of the car. “Actual use” refers to the particular use intended when permission is given. Here, the auto was being “used” by Nancy and Steven to go to school, which was the intended purpose of permission. Since Steven’s “use” was permissive and the “actual use” of going to school was within the scope of permission, the court found that Steven was an insured under the GEICO policy.

⁵⁶ 81 Md. App. 104 (1989).

A. SUMMARY OF SECOND PERMITTEES

Any person driving an insured auto with the permission of an insured [in the car] is likely to be covered. This is true even in the face of an express restriction by the named insured to the contrary. There probably will not be coverage if the driver obtained permission by fraud or mistake or if the purpose for which the auto is being used is beyond the scope of permission.

Of course, if an insured is not in the car at the time of the accident, a restriction on use will be enforced unless the second permittee is serving some purpose of the original permittee. To put it another way, if the second permittee is driving the insured auto for his own purposes and benefit and not that of the first permittee or insured the second permittee will not be covered.

IV. THE PERSONAL AUTO POLICY

The Personal Auto Policy issued by many insurers provides coverage simply to “any person using your covered auto.” As a substitute for the element of permissive use, the Policy contains an exclusion precluding coverage for any person “using a vehicle without a reasonable belief that the insured is entitled to do so.” Moving the treatment of permissive use to the exclusions invites courts to give it a more narrow construction. It shifts the focus from the express or implied permission of the named insured to the mind of the supposedly permissive user. The phrase “entitled to do so” presents problems as well. It changes the analysis from “having permission” to “feeling entitled.”

This clause was interpreted in Maryland in *General Accident v. Perry*.⁵⁸ There, Michael Perry purchased a truck which he titled in his and his mother’s names as co-owners because he did not have a driver’s license and could not title it in his own name. Michael was not listed on the policy as a possible operator. Michael had his parent’s permission to drive the truck on the Maryland public highways, but only to go to work or to a local store. Michael’s mother testified that she would

⁵⁷ *Contra Travelers Corp. v. Kaminski*, 304 F. Supp. 481, 485, 487-88 (D.Md. 1969).

have denied Michael permission to use the vehicle had he asked her for permission to drive the car on the evening of the accident.

The court began its analysis by an exhaustive review of fourteen cases, which addressed an issue related to this type of exclusion. The court recognized that there was a division in the out of state decisions as to whether or not the clause was ambiguous because the term “entitled” could have several reasonable interpretations. The court rejected those decisions and held that the clause was unambiguous. The court reasoned that the exclusion focuses on the state of mind of the user and not on permission. Therefore, “[w]hat is relevant, is whether the driver *believed* he was entitled to drive.” (emphasis in original). The court adopted the following test:

From the language of the clause it is clear that coverage is excluded if the driver (a) knew he was not entitled to drive the vehicle or (b) if he claimed he believed he was entitled to drive the vehicle, but was without reasonable ground for such belief or claim.⁵⁹

The first part of the test does not require that the driver prove he was entitled to drive the vehicle; rather it requires proof that he knew he was not entitled to drive the vehicle.⁶⁰ The *Perry* Court found that the driver believed that he had a right to use his truck.

The second part of the test addresses the objective reasonableness of the driver’s belief that he was entitled to drive. The court listed five factors considered by other courts in determining this issue:

1. Whether the drive had express permission to use the vehicle;
2. Whether the driver’s use of the vehicle exceeded the permission granted;
3. Whether the driver was “legally” entitled to drive under the laws of the applicable state;

⁵⁸ 75 Md. App. 503 (1988).

⁵⁹ *Id.* at 523.

⁶⁰ *Id.* at 524.

4. Whether the driver had any ownership or possessory right to the vehicle; and
5. Whether there was some form of relationship between the driver and the insured, or one authorized to act on behalf of the insured that would have caused the driver to believe he was entitled to drive the vehicle.⁶¹

The court held that Michael Perry didn't have a reasonable belief that he could drive on the public highways.⁶²

V. UNINSURED MOTORIST COVERAGE

Where the operator is a non-permissive user, passengers are not covered by uninsured motorist coverage. In *Erie Exchange v Reliance Insurance Co.*,⁶³ the policy defined a UM insured as "any person while occupying an insured highway vehicle." The court held that as the vehicle operated by a non-permissive user was not an "insured highway vehicle" as defined by the policy, the passenger could not be a UM insured. In *Nationwide v. Continental*,⁶⁴ the automobile was covered by a Maryland Commercial Uninsured Motorist Endorsement, CA 21 13 (05 83). The vehicle there was a "covered auto" so the court could not follow the analysis in *Erie Exchange*. Further there was no exclusion to apply. The court found there was no coverage based upon "the insurer and the insured's intent to avoid coverage of claims that arise from the negligence of a non-permissive user."⁶⁵

VI. RENTAL VEHICLES

"Rental vehicles" must have primary coverage; "replacement vehicles" may have "secondary" coverage. The Maryland Transportation Article requires owner of rental vehicles to have the same minimum *primary* limits as other vehicle. Transportation Article §18-102(a). However, as a result of 1996 and 1997 legislative changes, there is an exception for "replacement vehicles," permitting the security to be "secondary." Transportation Article, §18-102(a) (2) (ii); and §17-104(c)(2). A "replacement vehicle" is defined as:

⁶¹ *Id.* at 525.

⁶² *Id.* at 525-26.

⁶³ 63 Md. App. 612, 493 A.2d 405 (1985).

⁶⁴ 87 Md. App. 261 589 A. 2d 556 (1991).

⁶⁵ *Id.* At 274.

[a] vehicle that is loaned by an auto repair facility or dealer, or that an individual rents temporarily, to use while a vehicle owned by the individual is not in use because of loss, as "loss" is defined in that individual's applicable private passenger automobile insurance policy, or because of breakdown, repair, service, or damage.

Transportation Article, §§18-102(a) (2) and 17-104(c)(1). To achieve this "secondary" status, of course, the insurance contract must conform to the statutory provisions. The financial security requirements for "rental vehicles" remain unchanged.

VII. DUTY TO DEFEND AND DECLARATORY JUDGMENT ACTIONS

Difficult duty to defend issues are presented where the insured did not have permission to operate the motor vehicle. Where the complaint alleges that the driver was within the scope of the named insured's employment, it raises a duty to defend. In fact, there is a presumption that a non-owner operator of a motor vehicle is operating it with the permission of the owner.⁶⁶ But what about where the named insured and all concerned know the driver was not operating the vehicle with permission. May the insurer use this "extrinsic evidence" (evidence outside the complaint) to determine its duty to defend? After all it doesn't seem fair to "obligate the insurer to defend a complete stranger to the contract."⁶⁷ Some courts permit insurers to consult extrinsic evidence.⁶⁸ Other courts do not, requiring the insurer to provide a defense to the alleged insured.⁶⁹ No court in Maryland has directly addressed this issue. However, it appears that the rule is that extrinsic evidence may be consulted where the underlying tort suit is against only the driver. Where the action against the driver and the owner is based on a vicarious liability theory or the driver and the owner on a negligent entrustment theory, the jury in the underlying tort case will decide the issue and extrinsic evidence should not be

⁶⁶ See, e.g. *Toscano v Spriggs*, 343 Md. 320, 326, 681 A. 2d 61, 64 (1996); and *State Farm v Martin Marietta*, 105 Md. App. 1, 657 A. 2d 1183 (1995).

⁶⁷ Windt, *Insurance Claims & Disputes* § 4.05 (3rd Edition 1995).

⁶⁸ Id.

⁶⁹ See *Colon v. Aetna Life & Cas. Co.*, 66 NY2d 6, 484 N.E.2d 1040, 1041-42, 494 N.Y.S.2d 688, 689-90 (1989).

consulted.⁷⁰ Nonetheless, where both the named insured, and the first and second permittee all sign affidavits testifying to no permission, you may be able to short circuit the process.

Where the insurer is required to defend and the trier of fact finds that the driver was within the scope of employment, the insurer will be bound by that decision in most cases. If the insured feels aggrieved by the findings in the tort case, it may follow the *Atwood* procedure. That is, it may intervene within ten days of the verdict and file a declaratory judgment action. The trial judge should then hear the declaratory judgment action deciding first whether the issues were fairly litigated in the underlying tort action.⁷¹ Bear in mind that the *Atwood* procedure is only mandatory where a “critical issue, determining coverage, [was] not fairly litigated at trial.”⁷²

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Universal Underwriters Ins. Co. v Melody Lowe, 2000 Md App. Lexis 183 (Nov. 8, 2000)

⁷⁰ See, *Nationwide Mut. Ins. Co. v. Continental Cas. Co.*, 87 Md. App. 261, 589 A.2d 556 (1991), *Fisher, supra*.

⁷¹ *Nationwide v. Continental*, 87 Md App 261, 271-72 (1991)

⁷² *Wilkerson v Michael*, 104 Md App. 730 (1995)