

## PERMISSIVE USE

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The issue of permissive use can come up in any personal or commercial automobile policy. Permissive use has to do both with who operates the vehicle and how that person operates the vehicle. Did the driver have permission to operate the vehicle? Did the driver's trip exceed the scope of permission?

Personal automobile policies typically consider the named insured, spouses, and resident relatives as insureds under the liability section of the policy. These insureds need not have permission to operate the vehicle. However, for other vehicle operators outside these defined roles, the liability section of the policy provides coverage if the use of the vehicle is with the insured's consent. This is sometimes called an insurance policy omnibus clause.

No problem arises if the insured gives someone express permission to use the insured vehicle. Issues arise when that permission is not express but implied. *American Family Mut. Ins. Co. v. Hall*, 764 N.E.2d 780, 785 (Ind. Ct. App. 2002) (Indiana recognizes implied as well as express permission). Most insurance contracts do not require express permission.

Jurisdictions have used three different rules for the issue of permissive use. *Vanliner Ins. Co. v. Sampat*, 320 F.3d 709, 712-13 (7th Cir. Ind. 2003). Under the strict or conversion rule, express or implied permission must be given for the particular use. The timing of the permission and the geographical distance must be within the scope of the permission given. Any deviation negates coverage. The "moderate" or "minor deviation" rule allows a slight deviation from the initial permission given. Whether a deviation is material and thereby negates coverage depends on a number of factors including the purpose of the initial permission and the geographic distance of the deviation. The rule providing the broadest scope of coverage is the "liberal" rule, under which permission must only be given initially and any subsequent use remains with the initial permission even though that use may be for a purpose not contemplated by the owner when he parted with possession of the vehicle. The purpose of the liberal rule is to benefit the public-- the argument being that the public has no interest in allowing litigation on the details of determining permission.

Indiana follows the liberal rule first announced in *Arnold v. State Farm Mutual Automobile Insurance Co.*, 260 F.2d 161 (7th Cir. Ind. 1958). In *Arnold*, State Farm argued that an employee was not a permissive user of an insured vehicle because he deviated from his employer's intended purpose by purchasing and consuming alcohol, resulting in the employee's killing a child on a bicycle. The court soundly rejected that argument. "We do not see that the extent of the deviation is material." *Id.* at 165.

The Indiana Supreme Court recognized the application of the liberal rule in *Warner Trucking Inc. v. Hall*, 686 N.E.2d 102, 106-107 (Ind. 1997). The liberal rule provides that

one who has permission of an insured owner to operate his vehicle continues as such a permittee while the vehicle remains in his possession, even though the ultimate use of the vehicle may not have been contemplated by the insured owner at the time of entrustment. *Id.* at 107. The permittee's deviation from the use originally intended by the vehicle owner does not terminate the initial grant of permission by the owner. *See Manor v. Statesman Ins. Co.*, 612 N.E.2d 1109, 1113 (Ind. Ct. App. 1993), *tran. denied*.

An exception has been created to the liberal rule whereby the initial permission to use a vehicle is no longer effective if the insured places an "express restriction" on the permission and that express restriction is violated. *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 212-14 (Ind. Ct. App. 2006). In these circumstances, the focus is not on whether the operator deviated from a use contemplated by the insured, rather the determinative question is whether the operator's use of the vehicle was restricted in the first place. *Id.* Thus, in a coverage dispute, permissive use cannot be implied when an express restriction on the scope of permission prohibits the use at issue. *Id.* The distinction between implied permission and express restriction can be seen most clearly in the cases of *Warner Trucking* and *Arnold*. Both involved employees deviating from the permission given by consuming alcohol and causing an accident. However, in *Warner Trucking* the court denied coverage because the company policy served as an express restriction that forbade drinking while driving, while the *Arnold* case contained no such drinking prohibition.

Normally, implied permission cannot overcome an express restriction on the use of a vehicle. However, a court may not enforce an express restriction if the practice is to ignore that express restriction. In the case of *Universal Underwriters Insurance Co. v. Tutwiler Cadillac, Inc.*, 2008 U.S. Dist. LEXIS 35979 (S.D. Ind. May 1, 2008), the insured car dealer had a written policy requiring a sales manager's approval before use of a demonstrator vehicle. However, the dealer did not follow the policy. The court looked more closely at actual daily practices than the express restriction. "[E]ven when an employer maintains a company policy which prohibits the use of company vehicles for certain reasons, coverage will apply under an omnibus clause where the employer acquiesces in an employee's violation of company policy by relaxing those prohibitions." *Id.* (citing *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 214-15 (Ind. App. 2006)).

It should be noted that the issue of permissive use is not addressed by Indiana statute other than requiring that an automobile policy insure the *owner* against liability when others drive his vehicle with his express or implied permission. I.C. 27-1-13-7. The statutes do not require coverage for all permissive users. *Manor*, 612 N.E.2d at 1115.

The determination of permissive use is usually fact-sensitive.

The issue of permissive use can arise in a rental car arrangement. In the case of *Kelly v. Hamilton*, 816 N.E.2d 1188 (Ind. Ct. App. 2004), an injured passenger rented a vehicle pursuant to a rental agreement that prevented anyone under 21 from driving. The driver at the time of the accident was 19. The driver's mother had insurance for nonowned vehicles so long as the nonowned vehicle was used with permission. In granting

summary judgment for the insurer, the court held that permission given by the passenger did not trump the initial express age restriction contained in the rental agreement.

In the case of *American Family Mutual Insurance Co. v. Hall*, 764 N.E.2d 780 (Ind. Ct. App. 2002), permissive use was found for a negligent motorist living with the named insured's daughter, who jointly owned the insured vehicle. The court found that the negligent motorist used the vehicle often with the consent of the girlfriend, who placed no restriction on the negligent motorist's use of the vehicle. Since the policy did not require "express" permission, implied permission was sufficient. Prior, repeated use of an insured vehicle may be enough to find implied permission. Mere silence by the named insured was found to sometimes be sufficient to establish implied permission. "[W]e conclude that the evidence demonstrating Kuhn's prolonged, frequent and habitual use of the vehicle without any objection by Jones indicates that she consented and impliedly gave Kuhn permission to use the vehicle." *Id.* at 786.

In contrast, no permissive use was found in *State Farm Mutual Automobile Insurance Co. v. Gonterman*, 637 N.E.2d 811 (Ind. Ct. App. 1994), because the named insured expressly told her daughter not to allow anyone else to operate the vehicle. The court rejected evidence showing the daughter gave permission and the driver had used the insured vehicle numerous times. "Since Susan [insured daughter] violated the express restrictions placed upon her use of the vehicle by permitting Gonterman to drive it, Susan's initial permission to use the vehicle was terminated." *Id.* at 814. The *Gonterman* court also rejected the argument that the insured daughter had apparent authority to allow someone else to operate the vehicle because the driver did not know that Susan's parents had expressly restricted her from allowing others to use the vehicle. As a result, the court held that driver was not an insured under the policy, and therefore the insurance company had no duty to indemnify the driver's liability, if any, nor any duty to defend the driver in litigation.

In the case of *State Farm Mutual Automobile Insurance Co. v. Latham*, 793 F. Supp. 183 (D. Ind. 1992), a federal district court found no permissive use when the named insured allowed a friend to drive and then a passenger drove the vehicle without the permission of the named insured or the friend. However, the court left open coverage for a possible negligent action against the friend for leaving the keys in the vehicle.

One case does seem to take a less liberal approach to a policy's omnibus clause. In the case of *United Farm Bureau Mutual Insurance Co. v. Ludwig*, 744 N.E.2d 1061, 1063 (Ind. Ct. App. 2001), no permission was found where the policy required the consent of the named insured, not the insured daughter, who was also an insured under the policy as a resident relative when the insured mother told her daughter no one was permitted to use vehicle. However, the daughter allowed her boyfriend to drive. The court denied that the boyfriend was a permissive user because the policy allowed only the named insured, the mother, to give permission, not the daughter.

Some insurance policies contain a coverage exclusion for any "insured," while "using a vehicle without a reasonable belief that that 'insured' is entitled to do so." *Mroz v.*

*Indiana Ins. Co.*, 796 N.E.2d 830, 832 (Ind. Ct. App. 2003). In *Mroz*, Indiana Insurance argued that the insured's son did not have a reasonable belief he was entitled to use the covered vehicle because his driver's license was suspended. The court applied a five-part test implicitly adopted by the Indiana Supreme Court in the case of *Smith v. Cincinnati Ins. Co.*, 790 N.E.2d 460, 461 (Ind. 2003):

- (1) whether the driver has the 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;
- (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 that she was entitled to drive.

*Mroz*, 796 N.E.2d at 833.

The court in *Mroz* found controlling that the driver's license had been suspended so he could not have had a reasonable belief that he was entitled to drive the insured vehicle. In the *Cincinnati Insurance Co.* case, the supreme court held that a fifteen-year-old without a valid driver's license could not have had a reasonable belief she was entitled to operate the insured vehicle, even if she had permission from the insured owner. If a driver had a valid license, it would seem under the five-part test that coverage may be denied if the driver exceeded the scope of the permission. Contrast that position with the permissive use case law that allows great latitude to deviate from the permission granted.

### **Summary**

- (1) Indiana courts will construe the issue of permissive use liberally.
- (2) Permission may be expressed or implied.
- (3) Insured owner does not have to contemplate purpose of a driver's trip and the driver may deviate from the use contemplated by owner.
- (4) Initial express restriction will be upheld.
- (5) The initial restriction will be upheld even if the restriction is unknown by ultimate user of the vehicle.
- (6) A court is more likely to deny coverage under a reasonable belief exclusion if the driver does not have a valid license or the driver exceeds the scope of the permission granted.
- (7) Ultimate determination of permissive use will depend on unique facts of each case.

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