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The Omnibus Clause: Its Application in Nebraska

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THE OMNIBUS CLAUSE: ITS APPLICATION IN NEBRASKA

I. INTRODUCTION

A and *B* are good friends. *A* owns a car and has a liability insurance policy which covers his liability while using the car. Suppose *B*, with *A's* express permission, borrows the car to travel to a near-by town (*X*) to see a ball game. Instead of returning after the game *B* drives to another near-by town (*Y*) to visit his girl friend. *B* is involved in an accident at an intersection in town *Y*. Is *B*, the first permittee, covered by *A's* liability insurance policy?

Or suppose *B* takes his friend *C* along to the ball game. Then *B* permits *C* to drive the car home after the game. *A* knows nothing of *C's* presence in the car. *C's* negligent driving causes an accident with resultant property damage to another car. Is *C*, the second permittee, covered by *A's* liability insurance policy?

Problems such as these have provided a fertile field for litigation in this country.[1] The issue in such litigation usually is resolved to a determination of whether permission to use the automobile was given by the named insured.[2] If the use of the automo-

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[1] "Since the first standard automobile liability policy was promulgated in 1936, the omnibus clause of the policy has been the subject of more litigation than any other single clause." Austin, *Permissive Use Under the Omnibus Clause of the Automobile Liability Policy*, 9 INS. COUNSEL J. 49 (1962).

"In many states, a gross and malformed body of case law, full of broadly conceived public policies and narrowly drawn semantic distinctions, has grown out of litigation involving the standard 'omnibus clause' in comprehensive automobile liability insurance policies." Cohen & Cohen, *Automobile Liability Insurance: Public Policy and the Omnibus Clause in New Jersey*, 15 RUTGERS L. REV. 155 (1961). See generally, 5 A.L.R.2d 600 (1949); 126 A.L.R. 544 (1940); 106 A.L.R. 1251 (1937); 72 A.L.R. 1375 (1931); 41 A.L.R. 500 (1926); 6 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE INSURANCE § 3943 (1945); Ashlock, *Automobile Liability Insurance: The Omnibus Clause*, 46 IOWA L. REV. 84 (1960).

[2] The named insured in the omnibus clause and as used hereafter refers only to the person specifically designated on the face of the policy. 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4354, at 234 (1962). Some omnibus clauses provide other persons than the named insured with the authority to grant permission to use the automobile. For exhaustive articles treating the important question of who has authority to give permission under these broader clauses, see Ashlock, *Automobile Liability Insurance: The Omnibus Clause*, 46 IOWA L. REV. 84, 91 (1960); Austin, *Permissive Use Under the Omnibus Clause of the Automobile Liability Policy*, 29 INS. COUNSEL J. 49 (1962).

bile at the time of the accident was not permitted by the named insured, the insurer is not liable for the damages. The particular clause in the insurance policy which has to be interpreted to solve these problems is the so-called "omnibus clause" which typically reads as follows:

> [T]he unqualified word "insured" includes the named insured and also includes . . . any person while *using* an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the *actual use* of the automobile is by the named insured or with his permission.[3]

The insurer's intent under this clause is to provide liability coverage to persons using the vehicle with the named insured's permission[4] even though they knew nothing about their liability coverage, paid no consideration for the coverage, and had no independent insurable interest.[5] The broad purpose of the omnibus clause, as interpreted by many courts, is the protection of the public against damages resulting from accidents arising because of the negligent use of automobiles by irresponsible and uninsured users of automobiles.[6]

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[3] Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 78, 125 N.W.2d 179, 182 (1963). (Emphasis added.) See generally, Sweitzer, *The Standard Policy*, 7 INS. COUNSEL J. 53 (1940). Prior to the 1930's the omnibus clause of automobile insurance policies read substantially as follows: "[T]he term 'insured' shall include the named insured and any person while riding in or legally operating such automobile, and any other person or organization legally responsible for its operation, provided . . . it is being used with the permission of the named insured." Rowe, *The Standard Policy*, 1 INS. COUNSEL J. 19 (1934). See 32 N.D.L. REV. 255 (1956) for history and development of the omnibus clause.

[4] Permission may be express or implied. A good example of the finding of implied permission is Coons v. Massachusetts Bonding & Ins. Co., 12 App. Div. 2d 701, 207 N.Y.S.2d 819 (1960). The plaintiff was riding as a passenger in the rear seat of an automobile driven by his brother, who suddenly stopped the automobile near the center of the street and got out and walked away leaving the motor running, and two other passengers also got out and followed the driver, leaving the plaintiff as the sole occupant of the car. The plaintiff, who had no operator's license at the time, got into the front seat, put the car in gear, and attempted to move it from the center of the street. He panicked when a police vehicle came along and he struck several automobiles. Under such circumstances, it was implied that the plaintiff had permission to drive the car and insurer was obligated to defend the plaintiff in an action brought against him. In many instances, it is a jury question as to whether permission existed. See Bekaert v. State Farm Mut. Ins. Co., 230 F.2d 127 (8th Cir. 1959).

[5] Haynes v. Linder, 323 S.W.2d 505 (Mo. Ct. App. 1959).

[6] This interpretation of the clause's purpose is used when the legislature demands that the clause be included in the policy involved in the individual case. The purpose of the omnibus statute in Nebraska, NEB. REV. STAT. § 60-534 (Reissue 1960), was declared in Protective Fire &

This article will discuss the various judicial interpretations of the omnibus clause. Special emphasis will be given to Nebraska law as affected by the recent Nebraska Supreme Court decisions in *Protective Fire & Cas. Co. v. Cornelius*[7] and *Metcalf v. Hartford Acc. & Indem. Co.*[8]

II. RECENT NEBRASKA CASES INTERPRETING THE OMNIBUS CLAUSE

In *Protective*,[9] Martin Schwartzman, who operated a business called Marty's Auto Parts, permitted Jerry Van Hoozer, his employee, to use one of Martin's cars, a 1941 Chevrolet. Van Hoozer testified that the permission was to try out the auto with the eventual purpose of buying it. Martin testified, and the trial court found, that the permission was limited to tinkering or working on the automobile which did not include implied permission to try out the vehicle.[10]

Van Hoozer, accompanied by his friend Glenda, took the car to Van Hoozer's mother's home to show it to her. Van Hoozer permitted Glenda to drive the car on the way back to her house. On the way back she had an accident with an automobile owned and operated by one Trenary.

The action arose under the Declaratory Judgments Act[11] to determine coverage and the extent of liability under two automobile

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Cas. Co. v. Cornelius, 176 Neb. 75, 79, 125 N.W.2d 179, 182 (1963): "The statute is remedial in nature and has for its purpose the protection of the public against damages resulting from accidents arising because of the negligent use of automobiles by irresponsible and noninsured permittees. The statute should be construed to accomplish the purpose and policy of the legislation."

The court, in *Protective,* went on to say that the purpose of the omnibus clause itself was "to fix the liability of additional insureds and to eliminate ambiguities and defenses with reference thereto as a matter of public policy." *Id.* at 78, 125 N.W.2d at 181 (1963). See generally, Boyer v. Massachusetts Bonding & Ins. Co., 277 Mass. 359, 178 N.E. 523 (1931); Baesler v. Globe Indem. Co., 33 N.J. 148, 162 A.2d 854 (1960); Hawley v. Indemnity Ins. Co. of No. America, 257 N.C. 381, 126 S.E.2d 161 (1962); Hinton v. Indemnity Ins. Co. of No. America, 175 Va. 205, 8 S.E.2d 279 (1940).

7 176 Neb. 75, 125 N.W.2d 179 (1963).

8 176 Neb. 468, 126 N.W.2d 471 (1964).

9 Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N.W.2d 179 (1963).

10 Brief for Appellee, pp. 4, 12, Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N.W.2d 179 (1963).

11 176 Neb. at 76, 125 N.W.2d at 181.

insurance policies alleged to cover the same automobile accident. The Empire Fire and Marine Insurance Co. was Schwartzman's insurer. The omnibus clause in their policy was the one involved in the case. Protective Fire and Casualty Co. was Glenda's insurer. Their policy covered Glenda's liability while she was driving a non-owned automobile. Protective's liability was limited to liability over and above other valid and collectible insurance.

The trial court held that Empire Fire and Marine Insurance Co. was not liable for Glenda's and Van Hoozer's negligence under the omnibus clause as interpreted in reference to the omnibus statute.[12] The Nebraska Supreme Court reversed, holding Empire primarily liable for the negligence of both Glenda and Van Hoozer to the extent of its policy limits.[13] The court reasoned that, since Van Hoozer was using the automobile with Schwartzman's (the named insured) permission, Empire was obligated to defend the Trenary suit against both Glenda and Van Hoozer.

In *Metcalf*,[14] the named insured was the City Sanitary Exterminating Co. The defendant was the insurer. The insurance liability policy involved covered a 1958 Chevrolet station wagon. The wording of the omnibus clause was the same as in the *Protective* case.[15]

Monroe Usher, president of the City Sanitary Exterminating Co. and sole owner of its stock, gave his son Douglas permission to use the car for the evening. Nothing was said about restrictive use or operation of the station wagon that evening.[16] Douglas, Robert Holder, and two young ladies went to a basketball game. Afterwards Douglas developed a headache and let Holder do the driving. Holder was involved in an accident out of which the litigation arose. The court held that since the use of the car was with the permission of the named insured, the operator, Robert Holder, was an additional insured under the omnibus clause.[17]

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[12] NEB. REV. STAT. § 60-534 (Reissue 1960).

[13] 176 Neb. at 85, 125 N.W.2d at 185.

[14] 176 Neb. 468, 126 N.W.2d 471 (1964).

[15] See note 4 *supra*.

[16] "There is evidence in the record that Monroe Usher had told Douglas on previous occasions that he was not to permit anyone else to drive the family cars while he was using them. There is evidence in the record that the automobile used by permission of the father was not to be driven outside the city of Lincoln. The latter evidence is not material here, for the reason that the accident did not occur during the period of the alleged deviation." Metcalf v. Hartford Acc. & Indem. Co., 176 Neb. 468, 471, 126 N.W.2d 471, 474 (1964).

[17] 176 Neb. at 475, 126 N.W.2d at 475.

Before treating the meaning and implication of these decisions, it may initially be of interest to examine other courts' handling of problems arising from the interpretation and construction of the omnibus clause.

III. WHEN FIRST PERMITTEES ARE ADDITIONAL INSUREDS

The courts employ three basic doctrines[18] in determining whether a first permittee is an additional insured under the omnibus clause: (1) the conversion doctrine;[19] (2) the initial permission doctrine;[20] and (3) the minor deviation doctrine.[21]

Under the conversion doctrine, once the named insured gives permission to use the vehicle, the permittee's liability is not covered unless the use is reasonably within the scope of the permission granted, within the time limits imposed by the parties, and operated within the geographical limits contemplated by the parties.[22]

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18 See generally, Putnam, *The Standard Automobile Policy, What Persons and Which Vehicles Are Covered*, 11 ARK. L. REV. 20 (1956); 3 ALA. L. REV. 419 (1950); 9 BAYLOR L. REV. 210 (1957); 22 LA. L. REV. 626 (1962); 46 MICH. L. REV. 694 (1948); 36 MINN. L. REV. 157 (1952); 32 N.D.L. REV. 255 (1956); 28 TEXAS L. REV. 719 (1950); 37 WASH. L. REV. 424 (1962).

19 *E.g.*, Gibson v. Bruner, 406 Pa. 315, 178 A.2d 145 (1961); Exner v. Safeco Ins. Co., 402 Pa. 473, 167 A.2d 703 (1961); Eagle Fire Co. v. Mullins, 238 S.C. 272, 120 S.E.2d 1 (1961); Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958); 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4367 (1962); 7 AM. JUR. 2D *Automobile Insurance* § 120 (1963).

20 *E.g.*, Standard Acc. Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847 (7th Cir. 1957); Dominguez v. American Cas. Co., 217 La. 487, 46 So. 2d 744 (1950); Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960); 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4366 (1962); 7 AM. JUR. 2D *Automobile Insurance* § 121 (1963).

21 *E.g.*, Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 209 F. Supp. 83 (N.D. W. Va. 1962); State Farm Mut. Auto. Ins. Co. v. Birmingham Elec. Co., 254 Ala. 256, 48 So. 2d 41 (1950), noted in 3 ALA. L. REV. 419 (1950); Speidel v. Kellum, 340 S.W.2d 200 (Mo. Ct. App. 1960); Fehl v. Aetna Cas. & Sur. Co., 260 N.C. 440, 133 S.E.2d 68 (1963); Lloyds America v. Tinkelpaugh, 184 Okla. 413, 88 P.2d 356 (1939); Solitrero v. Maryland Cas. Co., 109 S.W.2d 260 (Tex. Civ. App. 1937); 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4368 (1962); 7 AM. JUR. 2D *Automobile Insurance* § 122 (1963).

22 "Probably the majority of jurisdictions adhere to the conversion rule, namely, that where the use made of the automobile by the bailee sufficiently exceeds the scope of the permission given so as to make the bailee liable to the insured in an action for conversion such use is not covered. . . . Nor is this an unreasonable rule. It would be odd, rather, to say that the automobile is operated with the permission or

Courts applying this doctrine generally say that coverage exists as long as there are only minor and inconsequential deviations as to time and place of operation.[23] The reason for this extension can best be illustrated by an example of the harsh results which flow from a strict application of the rule. In *Sauriolle v. O'Gorman*,[24] coverage was denied when the first permittee, who was sent on an errand to another city, had an accident during a detour of about one-half mile from his prescribed route. The court reasoned:

> If the consent to the initial possession of the car spells liability regardless of the extent of the driver's departure from the permitted use, then the insurer here would have been liable for any injury inflicted by Shea's negligent operation of the car; as, for instance, if, at the time of its occurrence, instead of making a detour of a half mile, he had, without the owner's consent, been embarked on a trip to Boston or to California.[25]

The most liberal doctrine used by the courts is labeled the initial permission or the "hell and high water" rule.[26] Under this doctrine, once the original permission to use the vehicle is given by the named insured, the user is an additional insured no matter what

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consent of the insured in order to impose liability on the insurer, and yet to say that such use is not with the permission of the named insured if he should sue the bailee for conversion. Of course, this does not mean that every immaterial deviation would automatically cut off the policy protection. It merely declares that such use must be reasonably within the intention of the parties at the time consent is given, or a use to which the insured would have consented had he known of it." 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4367 (1962).

23 Savage v. American Mut. Liab. Ins. Co., 158 Me. 259, 263-64, 182 A.2d 669, 671 (1962). The court said they would not deny coverage "where the actual use is primarily for the purpose for which permission was given and there are no more than minor deviations as to time and place of operation. Under such circumstances the risk of accident is not appreciably increased and permission would undoubtedly have been given for such use if it had been sought. Under such a rule the insurer entrusts to the insured the extension of policy coverage but full effect is given to the restrictions imposed by the insured when he permits the use of the insured vehicle by another. In these days when reduced premiums are being offered to those who maintain a low level of accident liability, the ability of an insured owner to impose effective restrictions on permitted use by another becomes important to the insured as well as to the insurer." See also, Freshkorn v. Marietta, 345 Pa. 416, 29 A.2d 15 (1942).

24 86 N.H. 39, 47, 163 Atl. 717 (1932).

25 *Id.* at 47, 163 Atl. at 722.

26 Appleman originated the term "hell or high water." 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4366 (1962). It means that once a permittee gets initial permission to use the car he may use the car in any manner and still be an additional insured under the insurance policy.

use he makes of the vehicle.[27] All that has to be shown in these liberal courts is that the user had initial permission to use the car in some way (regardless of limitations and restrictions).

New Jersey accepted the initial permission rule in *Matits v. Nationwide Mut. Ins. Co.*[28] In dissent, Judge Hall mentioned that the initial permission rule had never met with great favor[29] in the courts and argued that the initial permission rule was too radical and such a rule should be adopted by the legislature in the first instance:

> The "initial permission" rule, with the extreme results it dictates, rests upon a broad conception of policy that a shift to it, or indeed its adoption in the first instance, should come only from the Legislature, which alone can properly determine its desirability and control its ramifications.[30]

The judicial trend today seems to be to find a middle ground between the two extreme rules. This intermediate position is known as the "minor deviation" rule. This doctrine holds that once

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[27] "In support of the liberal rule it has been reasoned that the language of the omnibus clause which provides that the insured should include any person operating the insured's automobile with the permission of the insured is not restricted, but is used in its broadest possible sense, and under the rules of construction generally applicable, the language used must be given a broad construction and such words would be practically meaningless and the object of such a clause made nugatory if it were necessary to determine in every case whether, at the time and under the circumstances of the accident, the driver was proceeding within the limitations of the permission of the insured to use the car. Also, it has been said that where the legislature had enacted a comprehensive scheme of motor vehicle legislation designed to assure that persons who cause automobile accidents are able to answer financially to their innocent victims, the liberal or 'initial permission' rule which is based on a broad interpretation of the omnibus clause should be adopted rather than the conversion or minor deviation rules which are based on narrower interpretations of the clause, since under these two rules coverage turns on the scope of permission given in the first instance, rendering coverage uncertain in many cases, fostering litigation as to the existence or extent of any alleged deviations, and ultimately inhibiting the achievement of the legislative goal." 7 AM. JUR. 2D *Automobile Insurance* § 121 (1963).

[28] 33 N.J. 488, 166 A.2d 345 (1960).

[29] *Id.* at 498, 166 A.2d at 350. See also Hawley v. Indemnity Ins. Co. of No. America, 257 N.C. 381, 387, 126 S.E.2d 161, 167 (1962), where the court stated: "It does not seem reasonable to assume that parties to an insurance contract covering a vehicle used in business contemplate an indiscriminate use for the social and separate business purposes of employees of named insured unless permission, express or implied, is given for such additional uses. To hold that the scope of any permission cannot be limited would be strange . . . ."

[30] 33 N.J. 488, 498, 166 A.2d 345, 350 (1960).

the user gets original permission from the named insured, he is an insured unless he deviates grossly from the original permission.[31] The basis of this rule is that it most nearly approximates the intention of the contracting parties and the risk contemplated by the insured.[32]

There is a very thin line between the conversion doctrine as it is applied by the courts and the minor deviation doctrine. One court has said that the minor deviation doctrine is not really a separate rule at all.[33]

The earlier liability policies provided that any person *using* the car with the permission of the named insured was an additional insured.[34] In order to reverse the trend of liberal decisions, the insurance companies changed the standard omnibus clause to provide that the *actual use* had to be with the named insured's permission. The addition of the word *actual* was an obvious attempt to convince the courts that the construction intended by the contracting parties was embodied in the conversion rule rather than the more liberal views.[35]

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31 "The 'minor deviation' rule, followed in the majority of jurisdictions, seems to me to be the only sound one so long as the extent of coverage is allowed to be governed by the unilateral act of the insured and the standard omnibus clause is permitted by the appropriate supervising authority. Prohibitions and restrictions as to use in all its elements are thereby regarded in accordance with the contract and not cast aside. I would, however, recognize such only where they amount to more than a mere admonition and the assured primarily had in mind the risk of accident. Those having some other basis, such as family discipline or personal convenience of the owner, should not be given controlling effect. Absent applicable prohibition or restriction, coverage would depend, objectively, on the use at the time having some connection with that permitted and not being so grossly different that it could be unquestionably said the owner would have prohibited it had he been expressly advised. All situations can be fairly determined on this basis." Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 506, 166 A.2d 345, 354 (1960) (dissent).

32 Wallin v. Knudtson, 46 Wash. 2d 80, 278 P.2d 344 (1955).

33 "The 'minor deviation' rule is, in reality, not a rule at all. It necessarily turns upon the facts in each case, being a modification of the other two rules and depending entirely upon the extent of the deviation. It would seem to afford little opportunity for uniformity in application because of the difficulty, in any event, of saying whether a deviation is slight or gross. At best it provides an escape from either of the other two more extreme rules, presenting the opportunity for endless litigation in seeking a definition of the extent of the deviation in each case." Arnold v. State Farm Mut. Auto. Ins. Co., 260 F.2d 161, 164 (7th Cir. 1958).

34 See note 3 *supra*.

35 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4354 (1962).

This construction of the words *actual use* was recognized by some courts,[36] but many refused to change their former interpretations and refused to find that the word *actual* made any change.[37] Courts which adopted the *actual use* distinction have construed it to mean that the very use (particular use) to which the car was being put at the time of the accident had to be permitted by the named insured or there would be no coverage for the user.[38] This is simply the conversion doctrine.

In addition to the above doctrines, Chief Justice Weintraub of the New Jersey Supreme Court suggested in dissent that permission to use could come either before or after the accident which caused liability.[39] Chief Justice Weintraub's ratification argument has little support in agency or contract law. Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.[40] This doctrine does not conform to the law of insurance contracts because it can be exercised without consideration to or manifesta-

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[36] Hawley v. Indemnity Ins. Co. of No. America, 257 N.C. 381, 126 S.E.2d 161 (1962); Gulla v. Reynolds, 151 Ohio St. 147, 85 N.E.2d 116 (1949); Conrad v. Duffin, 158 Pa. Super. 305, 44 A.2d 770 (1945); Messer v. American Mut. Liab. Ins. Co., 193 Tenn. 19, 241 S.W.2d 856 (1961).

[37] Fireman's Fund Indem. Co. v. Freeport Ins. Co., 30 Ill. App. 2d 69, 173 N.E.2d 543 (1961); Waits v. Indemnity Ins. Co. of No. America, 215 La. 349, 40 So. 2d 746 (1949); Hauser v. Aetna Cas. & Sur. Co., 187 So. 684 (La. Ct. App. 1939); Collins v. New York Cas. Co., 140 W. Va. 1, 82 S.E.2d 288 (1954).

[38] "It can mean nothing else." Johnson v. Maryland Cas. Co., 34 F. Supp. 870, 871 (W.D. Wis. 1940).

[39] "[S]uppose the named insured, for the purpose of disciplining his erring son . . . denies him the use of the car for 30 days or during certain hours of the day. I think it would be absurd to hold the son who violated the prohibition was beyond the protection of the policy. That is the last thought the father would have had in mind. In brief the named insured may deny or restrict "permission" for reasons wholly foreign to insurance coverage and with no intention whatever to deny the policy protection he bought. The carrier should not be permitted to make capital of such privately motivated actions." Baesler v. Globe Indem. Co., 33 N.J. 148, 157, 162 A.2d 854, 859-60 (1960). "Since the named insured is vested with plenary power to determine who shall benefit under the contract, it should not matter whether the named insured's approval preceded or followed the use of the car. The named insured's interest in affording that protection is no less after than before the event. To deny the authority of the named insured to forgive or to ratify is to visit consequences he surely did not want." *Id.* at 158-59, 162 A.2d at 860.

[40] RESTATEMENT (SECOND), AGENCY § 82 (1958).

tion by the purported principal and without *fresh* consent by the other party.

The District Court of the United States for the Nebraska District expressly rejected this argument and said that permission to use had to exist prior to the accident.[41]

IV. WHEN SECOND PERMITTEES ARE ADDITIONAL INSUREDS

The tougher problem presented in *Protective* and *Metcalf* involves the question of when a second permittee user is or should be included as an additional insured within the meaning and intent of the omnibus clause.[42]

There is no problem if *A*, named insured, says to *B*, the first permittee, "You may use the car in any way you wish, and you may let *C* use the car in any way he wishes." In this case it would be obvious that *C* would be using the car with the named insured's permission. The questions arise when the named insured gives permission to *B* to use the car with no instructions as to allowing others to use the car.

Here, we are faced with the distinction between use and operation. The two words are not synonymous and cannot be used interchangeably.[43] *Use* is defined: " 'Act of employing anything, or state of being employed; application; employment.' Roget's Thesaurus gives as synonyms, 'employment, application (to a purpose)' and others."[44] *Operation* means the direction and control of the automobile's mechanism for the purpose of propelling.[45] When a person is riding in a car he is *using* it.[46] When he is operating or driv-

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41 "A subsequent expression of willingness to have done an act necessary to establish contractual relationship, after rights have become fixed, cannot supply the legal gap existing from the act having not in fact been done." Johnson v. State Farm Mut. Auto. Ins. Co., 194 F.2d 785 (8th Cir. 1952). See also, Bekaert v. State Farm Mut. Auto. Ins. Co., 230 F.2d 127 (8th Cir. 1956).

42 See generally, 22 LA. L. REV. 626 (1962); 32 N.D.L. REV. 255 (1956); 37 WASH. L. REV. 424 (1962).

43 Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N.W.2d 179 (1963); Rose v. Gisi, 139 Neb. 593, 298 N.W. 333 (1941).

44 Persellin v. State Auto. Ins. Ass'n, 75 N.D. 716, 722, 32 N.W.2d 644, 647 (1948).

45 Freeman v. Nationwide Mut. Ins. Co., 147 Conn. 713, 716, 166 A.2d 455, 457 (1960).

46 "Certainly, it would be a narrower application of the term used, ignoring the general considerations mentioned, to require one using the car to use it in its entirety. The daughter of the insured was using the

ing the vehicle he is also *using* it. So driving and riding are two types of *use*. Of course, there are other ways in which a car may be used.[47]

If *A* grants *B* permission (without any other restrictions) to use the car by operating it, it would seem correct to assume that there is implied permission for *C* to use the car by riding in it, but not to use the car by operating it. The majority of courts so hold.[48] There are, however, numerous exceptions to this general rule.

Some courts do not apply this rule when the first permittee remains a passenger in the automobile. These courts say that the named insured is held to have given implied permission to a third person to drive when the first permittee, to whom the car was entrusted by the named insured without any express prohibition against letting another drive, retains possession of the car but turns over its operation to another while such first permittee remains an occupant of the car.[49]

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seat, which she occupied. She was using the sides and top to shelter her from the weather. She was using the wheels and tires, for upon them she was propelled through space. She was using the motor of the car, for by its power the vehicle in which she was riding was propelled along the road. Is all of this use to be ignored, simply because she did not hold the wheel—manipulate the gear shift, press the accelerator or brake pedal? Manifestly, this is restricting the full reasonable words, which the insured has written." American Auto. Ins. Co. v. Taylor, 52 F. Supp. 601, 603 (N.D. Ill. 1943). See also, Hardware Mut. Cas. Co. v. Mitnick, 180 Md. 604, 26 A.2d 393 (1942); Brown v. Kennedy, 141 Ohio St. 457, 48 N.E.2d 857 (1943).

47 Fidelity & Cas. Co. v. Lott, 273 F.2d 500 (5th Cir. 1960) (using the vehicle as a gun rest); Wiebel v. American Farmers Mut. Ins. Co., 51 Del. 151, 140 A.2d 712 (Super. Ct. 1958) (pushing vehicle by hand); Bolton v. North River Ins. Co., 102 So. 2d 544 (La. Ct. App. 1958) (slamming the door); Bowman v. Preferred Risk Mut. Ins. Co., 348 Mich. 531, 83 N.W.2d 434 (1957) (releasing hand brake, and turning wheels); Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961) (slamming the door); Handley v. Oakley, 10 Wash. 2d 396, 116 P.2d 833 (1941) (loading and unloading a vehicle). See generally, 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4354 (1962); 11 MERCER L. REV. 391 (1960).

48 *E.g.*, Peterson v. Sunshine Mut. Ins. Co., 273 F.2d 53 (8th Cir. 1960); Standard Acc. Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847 (7th Cir. 1957); General Cas. Co. of America v. Woodby, 238 F.2d 452 (6th Cir. 1956); Aetna Cas. & Sur. Co. v. De Maison, 213 F.2d 826 (3rd Cir. 1954); Haynes v. Linder, 323 S.W.2d 505 (Mo. Ct. App. 1959); Baesler v. Globe Indem. Co., 33 N.J. 148, 162 A.2d 854 (1960). See generally, 15 ALA. L. REV. 610 (1963); 9 VAND. L. REV. 569 (1956).

49 *E.g.*, Standard Acc. Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847 (7th Cir. 1957); Fireman's Fund Indem. Co. v. Freeport Ins. Co., 30 Ill. App. 2d 69, 173 N.E.2d 543 (1961); Constanzo v. Pennsylvania Threshermen Ins. Co., 30 N.J. 262, 152 A.2d 589 (1959); Maurer v. Fesing, 233

Cases in which the first permittee is not a passenger, but where the courts have found implied permission for the third person (second permittee) to operate include: (1) where the third person is engaged in some errand or activity for the benefit, advantage, convenience,[50] or purpose of the first permittee;[51] (2) where the named insured has knowledge that the first permittee is loaning the use of the vehicle to others and nevertheless remains silent;[52]

Wis. 565, 290 N.W. 191 (1940). See generally, 6 AM. U.L. REV. 47 (1957); 9 VAND. L. REV. 569 (1956).

50 Third Nat'l Bank v. State Farm Mut. Auto. Ins. Co., 334 S.W.2d 261 (Ky. 1960). The named insured had gone overseas and left his car with his father and brothers. Tom, one of the brothers, took two girls to a ball game and let one of them take the car to a restaurant while he played ball. The driver caused an accident. The court held that she was an insured under the omnibus clause. "We have no difficulty in concluding that the blanket permission given by Claude Sammons for his brother Tom to use the car while he was overseas was broad enough to imply the further authority on Tom's part to permit its operation by a third person for a purpose incidental to Tom's own use of the car, and for Tom's convenience. The facts in this case show that Tom did not himself drive the girls to the restaurant because he had to get to the ball game and did not have time. He had brought them from Raceland to Ashland, and they were under his protection. When he let Joyce have the car to go to the restaurant it was as much (or more) for his own convenience as for hers, for it relieved him, as her escort, of taking her himself. Similarly, on a previous occasion when they had arrived almost at game time Joyce had parked the car so that Tom would lose no time getting onto the playing field. Claude Sammons having left the car for the general, unlimited use of his father and brothers, that one or more of them might permit its occasional and temporary operation by a third party under conditions so natural as in this case can reasonably be assumed to have been expected by him, and thus embraced within the authority conferred on the father and brothers. Therefore, Joyce Sewell was included within the definition of "insured" under the policy." *Id.* at 262-63.

51 *E.g.*, Duff v. Alliance Mut. Cas. Co., 296 F.2d 506 (10th Cir. 1961); Harrison v. Carrol, 139 F.2d 427 (4th Cir. 1943); Allstate Ins. Co. v. Mathis, 232 Ark. 484, 339 S.W.2d 132 (1960); Third Nat'l Bank v. State Farm Mut. Auto. Ins. Co., 334 S.W.2d 261 (Ky. 1960); Longwell v. Massachusetts Bonding & Ins. Co., 63 So. 2d 440 (La. Ct. App. 1953); Aetna Life Ins. Co. v. Chandler, 89 N.H. 95, 193 Atl. 233 (1937). *But see*, Baesler v. Globe Indem. Co., 33 N.J. 148, 155, 162 A.2d 854, 858 (1960): "Neither our own research nor that of counsel has turned up a single case holding that a second permittee, who uses an insured automobile for his own purposes, unaccompanied by the first permittee, and against the express instructions of the named insured as to use, is nonetheless using the automobile with the permission of the named insured."

52 American Employers' Ins. Co. v. Cornell, 73 N.E.2d 70 (Ind. Ct. App. 1947), *rehearing denied*, 74 N.E.2d 748, (Ind. Ct. App. 1947); Shoup v.

and (3) where for all practical purposes the first permittee is the real owner of the car but title has been taken in the name of the named insured for reasons of convenience. The courts reason that the first permittee stands in the shoes of the named insured, so therefore permission flowing from the first permittee is held to be with the implied permission of the named insured.[53] This latter doctrine is based on the broadness of the initial grant of permission from the named insured to the first permittee, which has to be determined as a question of fact.[54] It is interesting to note that in all of these cases the court has reached the conclusion by finding some type of implied permission for the second permittee to operate the automobile.

It has been argued that the second permittee must get *express* permission from the named insured before the omnibus clause covers his liability.[55]

The most liberal view taken by the courts on the issue of when

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Clemans, 31 N.E.2d 103 (Ohio Ct. App. 1939); Odden v. Union Indem. Co., 156 Wash. 10, 286 Pac. 59 (1930).

[53] *E.g.*, Utica Mut. Ins. Co. v. Rollason, 246 F.2d 105 (4th Cir. 1957); Standard Acc. Ins. Co. v. Allstate Ins. Co., 72 N.J. Super. 402, 178 A.2d 358 (App. Div. 1962); Krebsbach v. Miller, 22 Wis. 2d 171, 125 N.W.2d 408 (1963). *Contra,* Samuels v. American Auto. Ins. Co., 150 F.2d 221 (10th Cir. 1945).

General permission is much more readily implied if the permission is for a social rather than a business purpose. Jordan v. Shelby Mut. Plate Glass & Cas. Co., 142 F.2d 52 (4th Cir. 1944); Trinkle v. American Employers Ins. Co., 180 F. Supp. 233 (W.D. Ky. 1959); Scott v. Massachusetts Bonding & Ins. Co., 273 S.W.2d 350 (Ky. 1954).

[54] 7 AM. JUR. 2D *Automobile Insurance* § 116 (1963); 7 APPLEMAN, INSURANCE LAW & PRACTICE § 4365 (1962).

[55] American Auto. Ins. Co. v. Jones, 163 Tenn. 605, 608-09, 45 S.W.2d 52, 53 (1932): "The insurer has a right to assume that the risk he undertakes shall not be enlarged. The extent of the risk is the basis of all tabulated premium charges. And this is one of the forms of insurance, of which fire policies are an illustration, wherein there is a recognized personal element resting on standards of character, responsibility, and competence. In this class of cases, theoretically, certainly, the insurer looks first to the standing and reputation of the named insured, and trusts him to select and delegate to responsible employees, only, the 'use' or operation-controlling, guiding, driving-of its cars covered, and on this theory agrees to cover such 'additional assured.' No power passes, in the contemplation of the parties, to such an agent to delegate in turn this responsibility. Such a diversion of use can hardly be said to be impliedly with the consent of the named assured, or within the contemplation of the insurer. It is a departure too radical and foreign, and involves an unjustifiable extension of the risk covered by the contract."

a second permittee is given liability coverage is illustrated by two recent cases decided in Connecticut and New Jersey.

In *Indemnity Ins. Co. v. Metropolitan Cas. Ins. Co.*,[56] the named insured gave the car to her salesman, Smith, to take a group of people to Philadelphia to tour a brewery. On the way back, one of the guests was driving when the accident occurred. The guest had been expressly prohibited from driving by the named insured. The court held that the driver was an insured under the omnibus clause, saying:

> Since in this context the words *operation* and *use* have different meanings and the omnibus clause requires only that the *use* of the automobile be with the permission of the named insured, any prohibition as to the *operation* of the automobile is immaterial to a determination of coverage. Thus, even though a driver has been expressly prohibited from *operating* the car, he is covered if the car was being *used* for a purpose permitted by the named insured.[57]

Commenting on the New Jersey case, the court, in *Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, said:

> Parenthetically, it may be noted that the factual situation in the New Jersey case fits the second line of decisions noted above in that the use was authorized and the first permittee was in the car at the time of the accident. Disdaining to decide the case in accordance with this line of authorities, the New Jersey court chose to base its finding of coverage on the holding that it is not necessary to find either express or implied permission or authority running from the owner to the driver; that the necessary permission must be found only with respect to the use and not to the driver.[58]

In *Freeman v. Nationwide Mut. Ins. Co.*,[59] the named insured corporation's president directed Freeman to chauffeur Mrs. Clement to visit her daughter. On the way back, Mrs. Clement was driving when the accident happened. The court held Mrs. Clement to be an insured, saying:

> Had it been the intention of the defendant when it wrote the terms of the contract of insurance to limit the application of the omnibus clause to situations in which the operation of the automobile rather than the use to which it was being put was determinative, the defendant could have done so by including the word "operation" in the policy.[60]

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[56] 33 N.J. 507, 166 A.2d 355 (1960), commented on in Cohen & Cohen, *Automobile Liability Insurance: Public Policy and the Omnibus Clause in New Jersey*, 15 RUTGERS L. REV. 155 (1961). See also, 3 WM. & MARY L. REV. 520 (1962).

[57] 33 N.J. at 514, 166 A.2d at 358. See also, Allstate Ins. Co. v. Fidelity & Cas. Co., 73 N.J. Super. 407, 180 A.2d 168 (App. Div. 1962).

[58] 209 F. Supp. 83, 86 (N.D. W. Va. 1962).

[59] 147 Conn. 713, 166 A.2d 455 (1960). *Accord*, Persellin v. State Auto. Ins. Ass'n, 75 N.D. 716, 32 N.W.2d 644 (1948).

[60] 147 Conn. at 716, 166 A.2d at 457.

Both of these courts read the requirement of permission to use the car by operating it right out of the omnibus clause.[61]

V. WHERE NEBRASKA STANDS

In *Protective,* the district court of Lancaster County found that Van Hoozer had permission only to work on the 1941 Chevrolet. Van Hoozer had testified that he had permission to try out the automobile.[62] The supreme court said it was immaterial what the initial permission provided, if there was permission to use the car in some way.[63] The court adopted the rule that a deviation from the permitted use is immaterial, the only essential factor being that permission be given for some use in the first instance. It appears that Nebraska can now be included with the rest of the states that recognize the liberal initial permission rule.[64]

The court, in *Protective,* recognized that the words in the policy itself (actual use) meant that the conversion rule should be followed.[65] Then they reasoned that the words *actual use* were superseded by the word *using* because of the omnibus statute. The application of this statute to the policy in the case was severely questioned by appellee's counsel and amicus curiae on the motion for rehearing.[66] By applying this statute as a part of the policy, the

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[61] In both of these cases, the car was being used within the original permission (trip to brewery in *Indemnity* and trip to visit daughter in *Freeman*).

The Illinois court in Hays v. Country Mut. Ins. Co., 28 Ill. 2d 601, 607, 192 N.E.2d 855, 859 (1963), criticized the judicial removal of the requirement of permission to use the car by driving it: "When the insured purchases extended coverage he seeks to protect those whom he allows to use his car from the risks of financial disaster as he would guard them against danger from mechanical defects. Ordinarily he has no interest in buying protection for those who use his car without permission. The insurer, on the other hand, limits the risk assumed by requiring permission, since usually the insured will use discretion in permitting others to use his car, if only as a matter of self-interest in avoiding damage to his property." See also, 15 ALA. L. REV. 610 (1963).

[62] Brief for Appellee, p. 8, Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N.W.2d 179 (1963).

[63] 176 Neb. at 79, 125 N.W.2d at 182.

[64] See note 20 *supra.*

[65] 176 Neb. at 82, 125 N.W.2d at 184.

[66] NEB. REV. STAT. § 60-534 (Reissue 1960) reads: "Liability policy; owner's policy; contents. 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 to be granted; and (2) shall insure the person named therein and any other

court was able to skirt the *actual use* meaning and interpret *using* under the liberal view.

It appears that the court, in *Protective,* used the omnibus statute as a device to escape the restrictive meaning of *actual use.* Since the court, in *Metcalf v. Hartford Acc. & Indem. Co.,* expressly rejected the difference between *use* and *actual use*[67] it would seem that it would not now be necessary to apply the statute to every liability policy in order to employ the initial permission doctrine as a judicial tool. The court, in *Metcalf,* did not have to apply the initial permission doctrine because the use of the car was within the scope of the named insured's initial permission, while in *Protective* the trial court expressly found that the use at the time of the accident was not within the scope of the initial permission.

If the court had been forced to apply the initial permission doctrine in *Metcalf* to reach the result, it is suggested that it would have used the doctrine without reference to the omnibus statute. Perhaps then, the *Metcalf* decision means that the omnibus statute does not supersede every automobile policy omnibus clause as was thought by some who analyzed the *Protective* case.[68]

The application of the initial permission doctrine clearly reverses the judicial thinking in Nebraska as to when a first permittee is covered as an additional insured.[69] In *Witthauer v. Employers' Mut. Cas. Co.,*[70] an employee used a truck for personal

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person, as insured, *using* any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles . . . ." (Emphasis added.) This statute is found in the Motor Vehicle Safety Responsibility Act, NEB. REV. STAT. §§ 60-501 to -569 (Reissue 1960). The argument made by counsel for Empire on request for rehearing was that NEB. REV. STAT. § 60-534 (Reissue 1960) was not applicable to the policy of Schwartzman. Section 60-534 was said to specifically relate back to section 60-533 which dealt with only policies of liability insurance required to be certified as provided in sections 60-529 to 60-531 as proof of financial responsibility after a previous revocation or suspension of driver's privileges. Schwartzman's policy was not one required to be certified under the Safety Responsibility Act and therefore counsel for Empire argued that the omnibus statute did not apply to the liability policy in this case. See 34 NEB. L. REV. 675 (1955) for a discussion of the Safety Responsibility Act.

67 176 Neb. 468, 472, 126 N.W.2d 471, 474 (1964).

68 Brief for Amici Curiae, Metcalf v. Hartford Acc. & Indem. Co., 176 Neb. 468, 126 N.W.2d 471 (1964).

69 The Nebraska cases are discussed in Risjord, *Automobile Liability Insurance,* 38 NEB. L. REV. 245 (1959).

70 149 Neb. 728, 32 N.W.2d 413 (1948).

purposes contrary to his instructions. The court recognized the *actual use* distinction and said that this deviation was enough to remove the driver from coverage under the omnibus clause. This application of the conversion rule is no longer valid law after *Protective* and *Metcalf*.

In *Bekaert v. State Farm Mut. Auto. Ins. Co.*,[71] the federal district court, in interpreting an automobile policy, incorporated the omnibus statute into the policy. They did not use the rationale of *Protective*, however. The court said that

> Nebraska has never made any such liberal or extreme interpretation and application of its statutory omnibus-clause prescription . . . as that any permission, whether general or special, given by a named insured to the use of the automobile by another, will, as a matter of law, extend coverage to the permittee in whatever use he may make of the car, unless his possession thereof shall have become unlawful as against the named insured . . . .[72]

Nebraska has now accepted the above rule as a result of *Protective* and *Metcalf*.

VI. WHEN SECOND PERMITTEES ARE COVERED

In *Protective*, the trial court expressly found that Glenda had no express or implied permission to drive the car.[73] In spite of this and in spite of the rule that findings of fact by a court in a law action have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong, the court said that the issue was one of law and the findings of fact were immaterial.[74] The Nebraska court thus found that, even when Glenda had no permission from the named insured to drive the car, she was still an insured under the omnibus clause as superseded by the omnibus statute and Schwartzman's insurer, Empire, was obligated to defend any actions for negligence brought against her.[75]

If the trial court had accepted the testimony that the permission was to try out the car with the eventual purpose of buying it, they could easily have found that Glenda had implied permission from Schwartzman to operate the car. Cases have held that a car dealer who lends a car for a tryout by a potential customer impliedly consents to operation by the customer's family and social

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[71] 230 F.2d 127 (8th Cir. 1956).

[72] *Id.* at 129.

[73] Brief for Appellee, pp. 4, 12, Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N.W.2d 179 (1963).

[74] 176 Neb. at 85, 125 N.W.2d at 185.

[75] *Ibid.*

group.[76] Glenda, Van Hoozer's friend, would probably fit into this category.[77]

The trial court, even accepting that the permission was only to work on the car, could have followed the line of cases which hold that as long as the first permittee is a passenger permission by implication of law arises when a second permittee operates the car.[78] In *Johnson v. State Farm Mut. Auto. Ins. Co.*,[79] the federal district court ruled that, where the named insured allowed her foster son to use the car and the foster son allowed a friend to drive, the friend was not an insured under the omnibus clause. The court recognized, but did not follow, the above rule as to a second permittee:

> [C]onsent given to an original permittee to use the automobile, unless specifically limited in fact, constitutes, for purposes of the standard omnibus clause, consent by implication of law to a use thereof by a second permittee to serve some purpose, benefit or advantage of the first permittee, such as where the original permittee is riding in the car or the car is being driven in his interest or for a purpose mutual to him and the second permittee.[80]

The court, in *Protective* and *Metcalf*, could have reached the same result in the case by applying the above rule. The court, however, did not discuss permission or consent by implication of law, but saw fit to find coverage without finding permission for the second permittee to drive the car.

As a result of these decisions, all that is required in Nebraska for a second permittee to be an additional insured under the omnibus clause is for the first permittee to get permission of some kind to use the car. Then, as long as the first permittee is a passenger in the car, he may delegate the driving to anyone and the driver is covered. Instead of reaching a result based upon implied permission to operate, it seems that the court has read permission out of the omnibus clause and statute. Thus Nebraska appears to follow the rationale of *Freeman v. Nationwide Mut. Ins. Co.*[81] and *Indemnity Ins. Co. v. Metropolitan Cas. Ins. Co.*[82]

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[76] American Employers' Ins. Co. v. Liberty Mut. Ins. Co., 93 N.H. 101, 36 A.2d 284 (1944).

[77] There was conflict in the testimony as to whether Glenda was engaged to Van Hoozer. Schwartzman had seen them together several times and knew they were close friends.

[78] See note 49 *supra*.

[79] 194 F.2d 785 (8th Cir. 1952).

[80] *Id.* at 787.

[81] 147 Conn. 713, 166 A.2d 455 (1960).

[82] 33 N.J. 507, 166 A.2d 355 (1960).

The Nebraska court, in *Protective,* went even further than these two cases. In those cases the use for which the car was being employed while the second permittee drove was within the original permission.[83] In *Protective,* the permission was only to tinker with the car, and the car was being used to drive between Jerry's mother's house and Glenda's house. *Metcalf* seems to be squarely in accord with *Freeman* and *Indemnity* in that the use of the car in *Metcalf* was within the scope of the original permission.[84]

The court, in *Protective,* thus applied the two most liberal rules of omnibus clause interpretation in the same case. This double application goes further than any of the courts which apply either of the rules. The courts which apply the two rules have never applied them simultaneously as did the Nebraska court in *Protective.*

VII. ANALYSIS AND CONCLUSION

When an insurer and insured agree on an insurance policy, the consideration for the contract is decided upon a basis of the risk involved. The insurer assumes the risk of liability arising out of any use of the vehicle by the named insured and agrees to grant him coverage for any liability arising therefrom. The insurance company, through the omnibus clause, also assumes the risk of liability arising from the use of the vehicle by a person permitted by the named insured to so use. Therefore, the use which caused the liability must be by the named insured or with the named insured's permission. In *Protective,* the use that caused liability was Glenda's negligent operation of the car. This use was found not to have been permitted by the named insured. It is suggested that this risk was never accepted by the insurer and the two contracting parties never so intended that an unpermitted use which caused liability should be covered.

Here is where the difficulties of defining the word *use* or *using* cause a sticky problem. Glenda was using the car to get back to her home. She was also using the car by operating it. Robert Holder was using the car for dating purposes. He was also using the car by operating it. The use by operation is the use upon which liability must be grounded. Under the omnibus clause, if the use which

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[83] See note 61 *supra.*

[84] Metcalf v. Hartford Acc. & Indem. Co., 176 Neb. 468, 126 N.W.2d 471 (1964). In Harper v. Hartford Acc. & Indem. Co., 14 Wis. 2d 500, 509-10, 111 N.W.2d 480, 486 (1961), the court stated: "[I]mplied authority to delegate permission to the use of the car by another is restricted to the same use for which the initial permission was given . . . ." See also, Feirich, *The Omnibus Clause,* 50 ILL. B.J. 610 (1962).

caused liability was not permitted, the user could not be an additional insured.

Further, when Marty gave Van Hoozer permission to use the car, it could be implied that he also gave him permission to allow friends to ride in the car while Van Hoozer was driving it. Now suppose, by some strange fact situation, that Glenda became liable to a third party because of her negligence while riding in the car.[85] She would then be an insured on an implied permission theory because her permitted use had given rise to her liability. Clearly, Van Hoozer would have been an insured under the initial permission theory, but he was not the cause of the accident and, therefore, was not liable for damages to Trenary, the other car owner.

The Nebraska court refused to overrule the trial court's finding of no implied permission for Glenda to drive. Since her liability was founded upon an unpermitted use of the car, it would seem that permission no longer has any meaning in the omnibus clause cases as applied to second permittees while the first permittee is riding in the car.

The real basis for the *Protective* and *Metcalf* decisions lies in the broad purpose, implied in the omnibus clause and statute, of protecting the public against damages resulting from accidents arising from the negligent use of automobiles by irresponsible and non-insured permittees.[86]

If the court, in *Protective,* had gone the other way and held Empire not primarily liable for Glenda's liability, it is probable that Trenary would have had no compensation from a liability insurer for his damages, since *Protective's* non-owner clause in Glenda's policy required that before Glenda was covered under the policy she had to be using the non-owned auto with the owner's permission.[87] The court, in fact, held that Protective had to pay anything above the collectible insurance from Empire even in spite of the fact that Glenda had no permission to drive from Schwartzman.[88] The court thus held both insurance companies liable without discussing implied permission.

The effect of applying the initial permission doctrine as to first permittees and erasing permission as to second permittees who op-

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[85] A passenger who grabbed the steering wheel became liable as a user in Thibodeaux v. Brown Oil Tools, Inc., 192 F. Supp. 495 (W.D. La. 1961).

[86] See note 6 *supra.*

[87] Brief for Appellant, p. 21, Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N.W.2d 179 (1963).

[88] 176 Neb. at 85, 125 N.W.2d at 185.

erate the car will be to attach insurance coverage to the car as long as the first permittee gets permission to use the car and remains in it either as a driver or a passenger. This could cause an increase in insurance rates in order to compensate for the added risk of liability for accidents caused within the wide scope of these two doctrines. Whether a substantial increase would be necessary remains to be seen.

The important question revolves around who should innovate these new policies regarding liability insurance: the court, the legislature, or the insured person himself. In *Continental Cas. Co. v. Padgett,* the court said in regard to accepting the liberal initial permission rule:

> The decisions mentioned in the last cited case which take the so-called liberal or extreme view have been again pressed upon us on this appeal and have been again considered; but we find ourselves unable to follow them. In the absence of legislation requiring automobile policies to provide for broader coverage than is afforded by the usual omnibus clause, we do not feel justified in extending the terms of the insurance contract beyond its plain meaning.[89]

It would seem that the legislature is the body that should be the innovator of such extremely liberal policies. They are better equipped to study the needs of the insurance buying public. The two liberal doctrines laid down in *Protective* and *Metcalf* may not have any drastic effects on the insurance premium rates, but perhaps some previous investigation would have been advisable.[90]

It is interesting to note that the standard form of the family automobile liability insurance omnibus clause has again been changed, apparently to combat interpretations such as used by the Nebraska court. The changed omnibus clause now reads:

> [A]ny person using the 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 . . . .[91]

It is difficult to say whether the court will accept this clause. An acceptance of this clause would require a different result in a

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89 219 F.2d 133, 137 (4th Cir. 1955).

90 A person may insure himself against damages caused by an uninsured motorist by purchasing a comprehensive collision policy, or a medical payment policy. Neb. Laws c. 342, p. 1093 (1963) requires that each auto liability policy offers an uninsured motorist clause which will protect the driver to a $10,000 unit per person.

91 Risjord, *Some Phases of Omnibus Automobile Liability Insurance,* 40 DENVER L. CENTER J. 241 (1963). (Emphasis added.) This change was suggested in Austin, *Permissive Use Under the Omnibus Clause of the Automobile Liability Policy,* 29 INS. COUNSEL J. 49 (1962).

case like *Protective*. Perhaps the court will reject the clause and again say that the statute supersedes it. This remains to be seen. The meaning of the clause is obvious. If a person has no permission from the named insured to drive the car, he is not an additional insured.

The two Nebraska cases probably reached correct results. The only problem is the way in which the results were reached. In both cases, there was ample precedent consistent with general rules of contract interpretation to hold that the second permittees (Glenda in *Protective* and Holder in *Metcalf*) had implied permission to drive the cars. This reasoning could have been used even under the recently changed clause. The doctrine of implied permission is readily adaptable to the omnibus clause problems. It remains to be seen if the court will ignore the new language of the omnibus clause or return to the better doctrine of implied permission.[92]

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[92] See text accompanying notes 49-54 *supra*.