

## FINDING LIABILITY COVERAGE

By  
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### I. THE BASICS

#### A. PURPOSE

We represent injured clients. We find the tortfeasor negligent and prove our clients were injured by the tortfeasor's negligence. Great! Now what? That is the purpose of liability coverage. Once we can show our client is entitled to money damages, we want to collect money for them. Unfortunately, most people are not independently wealthy, which means we need to find insurance to cover our clients injuries. Hence, liability coverage.

#### B. RULES OF CONSTRUCTION

The insurance contract is a contract of adhesion. The policyholders have not been able to bargain for anything in the policy. The courts therefore resolve all ambiguities in favor of an insured. Wachovia Bank & Trust Co v. Westchester Fire Ins. Co., 276 N.C. 348, 172 S.E.2d 518(1970). The courts also interpret all exclusions of coverage strictly against the insurer. State Capital Insurance Co v Nationwide Mutual Ins. Co., 78 N.C App. 542, 337 S.E.2d 866 (1985).

In addition, the party seeking coverage must prove coverage is extended and the insurer must prove there is no coverage, which is usually based on the exclusions. Walker v. Durham Life Ins. Co., 90 N.C.App. 191, 368 S.E.2d 43 (1988).

#### C. GENERAL RULE

Liability insurance follows the vehicle. However, in order to determine liability coverage, we still have to look at more than the vehicle. You have to look at whether the auto is covered, whether the person is covered and whether the act is covered.

## II. VEHICLES

### A. WHAT IS COVERED?

Standard auto policy

- 1) The standard auto policy defines a **covered auto** as:
  - a. Any vehicle shown in the Declarations—(this means any vehicles you have told your agent about)
  - b. Newly acquired auto
  - c. Any trailer you own
  - d. Any auto or trailer not owned by you while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its
    - i. breakdown;
    - ii. repair
    - iii. servicing
    - iv. loss; or
    - v. destruction.
  
- 2) **New Acquired Auto** means any of the following types of vehicles you become the owner of during the Policy Period:
  - a. Any private Passenger auto or station wagon type; or
  - b. Pick up truck or van that
    - 1) Has a gross weight as specified by the manufacturer of less than 10,000 pounds; and
    - 2) is not used for the delivery or transportation of goods and materials unless such use is:
      - a. incidental to your business of installing maintaining or repairing furnishings or equipment; or
      - b. for farming or ranching.
  
- \*\* Business is defined in the policy as trade, profession or occupation.
  
- 3) Newly Acquired Auto caveats to coverage
  - a) If it replaces a vehicle, it will have the same coverage as the replacement vehicle, if you ask us to insure it within 30 days of becoming the owner.
  - b) If it is in addition to your other vehicles, it will have broadest coverage of any vehicle you own, if you ask us to insure it within 30 days after you become the owner.
  - c) If you ask for the vehicle to be insured within the 30 days, it will be insured as of the date you owned the vehicle. If you have asked after the 30 days, the coverage will not start until the date you request the coverage.

## B. WHAT IS NOT COVERED?

Standard Auto policy (EXCLUSIONS)

- 1) No liability coverage is provided for the ownership, maintenance or use of
  - a) any vehicle other than your covered auto which is
    - 1) owned by you; or
    - 2) furnished for your regular use

This exclusion was held valid in Haight v. Travelers/Aetna Property Casualty Corp., 132 N.C. App. 673, 514 S.E.2d 102, disc. rev. denied 350 N.C. 831, 537 S.E.2d 824 (1999). The sensible reason is so we do not go get a 1978 vehicle for insurance and expect a 2002 Hum V to be insured under it unless you have requested it to be insured in accordance with the newly acquired vehicle section of the policy.

- b) any vehicle other than your covered auto which is
      - 1) owned by any family member or
      - 2) furnished for the regular use of a family member

However, there will still be coverage for **your** maintenance or use of any vehicle owned by any family member or furnished for the regular use of any family member

## C. CASE TOPICS

- 1) Newly acquired auto issues
  - ownership and timing of adding the vehicle to the policy.
  - time of accident not necessarily important.

Example: If you buy vehicle 8/1/02 and have accident 8/15/02. You report the claim 8/20/02. There should be coverage for that vehicle to the broadest coverage on the policy.

- 2). Rental vehicles—an exception to the general rule that insurance follows the vehicle.

United Service's Auto Association v. Universal Underwriters Ins., 332 N.C. 333, 420 S.E.2d 155 (1992)- The test driver's policy was primary over the garage liability policy.

Jeffries v. Snappy Car Rental Inc., 128 N.C. App. 171, 493 S.E.2d 767 (1997)—rental car company used super escape clause in lease agreement to make renter's policy primary.

Hertz Corporation v. New South Insurance, 129 N.C. App. 227, 497 S.E.2d 448 (1998)—note the court did not strike down the two mutually repugnant excess clauses but held renter to be primary and rental company as excess.

With rental coverage you must remember to review the cases and look at the rental agreement. Most of the time the renter's policy is primary over the rental company's policy.

### III. THE PERSON

#### A. WHO IS COVERED

The standard auto policy:

Definition:

1) Insured as used in this Part (liability coverage for bodily injury and property damage) means:

- a) you or any family member for the ownership, maintenance or use of any auto or trailer
- b) any person using your covered auto

2) who is you?

- a) The named insured shown in the declarations and
- c) The spouse if a resident of the same household

3) Family Member

Person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child

4) Residency is defined by the courts

Great American Insurance Company v. Allstate Insurance Company, 78 N.C. App. 653, 338 S.E.2d 145 (1986)- Davis v. Maryland Cas Co., 76 N.C. App. 102, 331 S.E.2d 744 (1985)- an unemancipated minor child of divorced parents can be a resident of both households.

Things you look for to help determine residency are: where does one get his/her mail, what is his/her address for voter registration; what address is on his/her driver's license; where are his/her clothes kept, etc.

## B. WHO IS NOT COVERED?

- 1) Thief or one not in lawful possession
  - a) driver is in lawful possession of the vehicle, but yet has no reasonable belief to be driving; there are only minimum limits available to the innocent victims.
  - b) If the driver is not in lawful possession and does not have a reasonable belief to be driving, then there is no coverage

Lawful possession is defined by the statute N.C. Gen. Stat. §20-179.21(b)(2). If you show they were in lawful possession than you can get minimum financial responsibility limits which are currently \$30,000 per person and \$60,000 per accident for bodily injury and \$25,000 for property damage (30/60, 25)

Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976)- There could be lawful possession for the driver of a loaned vehicle who was using the vehicle for his personal use, even though he was prohibited from using the vehicle for anything other than company business.

Stanley v. Nationwide Insurance Company, 71 N.C. App. 266, 321 S.E.2d 920 (1984). Even though the driver lied about having a driver's license and got the keys to the car, he could still be held to be in lawful possession of the vehicle.

Each case is fact specific to your scenario. Items you should be looking for:

- 1) relationship between the owner and driver
- 2) implied or express permission.
- 3) Does driver know of any restrictions placed on using the vehicle
- 4) Deviation from permission
- 5) Car keys-where were they
- 6) Did driver ever use it before
- 7) Was it reported stolen.

An unlicensed driver can still have lawful possession and qualify under the reasonable belief entitlement. Aetna Casualty and Surety Company v. Nationwide Mutual Insurance Company, 95 N.C. App. 178, 381 S.E.2d 874 (1989), aff'd, 326 N.C. 771, 392 S.E.2d 377 (1990).

**The policy states there is no liability coverage for one using a vehicle without a reasonable belief that that insured is entitled to do so. However, this exclusion does not apply to a family member using your covered auto which is owned by you.**

In Newell vs. Nationwide, 334 N.C. 391, 432 S.E.2d 284 (1993) a son clearly had no reasonable belief he could be driving. The above language changes the result of Newell.

- 2) Employee who injures another employee during course of employment. Ragland v. Harris, 2002 N.C App. 894, 566 S.E.2d 827 (2002).
- 3) Acting basically as a taxi cab driver (doesn't include a share the expense car pool).
- 4) Those who are working or engaged in the business of selling, repairing, servicing, storing or parking vehicles to include road testing and delivery (doesn't apply if it is your covered auto and used by you or any family member or any agent, partner or employee of you or any family member).

#### **IV. ACTS**

##### **A. WHAT IS COVERED BY LIABILITY COVERAGE**

Standard policy language definitions

- 1) Definition of insuring agreement: We will pay damages for **bodily injury or property damage** for which any **insured** becomes **legally responsible because of an auto accident**.
- 2) Bodily injury means bodily harm, sickness or disease including death that results
- 3) Property damage means physical injury to, destruction of, or loss of use of tangible property

The liability of the insured arises out of the ownership, maintenance and use of the vehicle.

## B. WHAT ACTS ARE NOT COVERED?

- 1) Does not arise out of the use of the automobile

There are shooting cases that may or may not arise out of the use of an automobile. The distinction in my opinion relies on how the gun was carried in the car and the reason it was fired. Review, Reliance Insurance Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977). Hartford Fire Ins. Company v. Pierce, 127 N.C. App. 123, 489 S.E.2d 179 (1997), Scales v. State Farm Mut. Auto. Ins. Co., 119 N.C. App. 787, 460 S.E.2d 201 (1995) and Nationwide Mutual Insurance Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341 (1997).

Throwing a beer can and hitting a pedestrian is not arising out of the use of the vehicle and there would be no coverage. Providence Washington Ins. Co. v. Locklear by Smith, 115 N.C. App. 490, 445 S.E.2d 418 (1994).

Walking for help is considered arising out of the use of the vehicle. Falls v. N.C. Farm Bureau, 114 N.C. App. 203, 441 S.E.2d 583 (1994).

- 2) Intentionally caused bodily injury or property damage (only beyond the minimum financial responsibility law of NC, which is now 30/60, 25).

Beware when filing suit, you do not name the defendant's act as intentional or it could limit your liability coverage; argue careless and reckless, gross negligence, willful and wanton.

- 3) Workers Compensation Act. If you are in the course of employment and injure fellow employee coverage your sole remedy could be Workers Compensation. Ragland v. Harris, *supra*.
- 4) If liability arises out of insured's ownership or operation of a vehicle while it is being used as a public or livery conveyance
- 5) If you are employed or otherwise engaged in business of selling, repairing, servicing, storing or parking vehicles designed for use mainly on public highways, includes road testing and delivery; doesn't apply if it's the use of your covered auto by you, any family member or any partner agent or employee of you or any family member. This exclusion applies only beyond the minimum limits.

- 6) Using any vehicle while insured is employed or otherwise engaged in business not described above. Doesn't apply to private passenger auto, pick up or van that you own or don't own while used as a temporary substitute which is out of normal use because of breakdown, repair, servicing, loss or destruction

## **V. MULTIPLE POLICIES**

### **A. PRIMARY V. EXCESS OWNER V. DRIVER**

If you have more than one vehicle or one insured than can be liable and have possible liability coverage, you must determine which policy will be primary and which will be excess. The liability part of the policy focuses on the vehicle, then on the person. If the vehicle was a non-owned auto then you have excess coverage pursuant to the other insurance clause in the policy. In essence after you have exhausted the owner's policy, you then have the driver's policy (or other party who may also be liable) to pursue before getting to UIM coverage.

Other insurance clause: The policy states: If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Remember that if the excess clauses read the same, the courts have held them to be mutually repugnant and void them making them share in a pro rata basis. Onley v. Nationwide Ins. Co., 118 N.C. App. 686, 456 S.E.2d 882 (1995).

### **B. VICARIOUS LIABILITY**

It is important to remember agency principles and respondeat superior. We must ask what was the driver doing at the time, where was he going, was he going at the instruction of any one, etc.

If the person was working at the time of the accident, you can have additional employer liability under respondeat superior and negligent entrustment depending on your facts. Many employers have a general liability policy to protect their business from negligent acts of its employees. However, be careful here because you could also end up in an exclusion depending on the type of vehicle or the type of activity engaged in at the time of the accident.

## **C. FAMILY PURPOSE DOCTRINE**

Family purpose imposes liability upon the owner or person with ultimate control of a motor vehicle for its negligent operation by another when it is shown

- 1) the operator was a member of his family or household and was living in his home
- 2) the vehicle was owned, provided and maintained for the general use, pleasure and convenience of his family; and
- 3) the vehicle was being so used by the family member at the time of the accident with implied or express consent.

Williams v. Wachovia Bank and Trust Co., 292 N.C. 416, 419-420, 233 S.E.2d 589, 592 (1977).

The family purpose doctrine can help you keep a parent in a lawsuit and ultimately hold them personally liable and can thus get to the parent's individually owned property. If you can keep a parent in the lawsuit, it puts pressure on the insurance company to attempt settlement to protect its named insured's assets.

It is also important when a parent is suing his/her unemancipated minor. The parent will have to show family purpose doctrine to reach the other parent to keep the suit alive. See Camp v. Camp, 89 N.C. App. 347, 365 S.E.2d 675 (1988).

## **D. UMBRELLA POLICES**

Umbrella policies operate as excess policies. In order to purchase, the tortfeasor must have 100,000/300,000 auto liability coverage.

Adjusters know very little about umbrella policies. They usually show up as a PUP policy on the insurance system.

## **VI. MISCELLANEOUS**

### **A. DECLARATION (DEC) PAGES AND THE POLICY**

Be sure if you are looking for more coverage, get a copy of the dec page from the insurance company along with the copy of the policy in effect at the time of your loss. You need to be sure the coverage amount is accurate. In addition, the policies are constantly being revised. What may be the case in 2002 may not have been the case in 2000.

In addition, the adjusters may deny coverage based on what they have known and the policy could have changed which does away with that

exclusion. It is always best to check and make the insurance company provide the proof.

## **B. COVERAGE DENIAL**

This is not always a bad thing. Once you get a letter of denial of coverage, it immediately puts the uninsured motorist carrier on the hook

If you need the coverage, then you will have to file a declaratory judgment action.

You can also proceed with the lawsuit against the negligent party and wait for the insurer to pursue the declaratory judgment action. This method causes the insurance company to spend more money many times. In a permissive use denial case, the insurance company should hire defense attorney for the driver who was named in the suit, another attorney for the owner named in the suit and another attorney to represent the insurance company in the denial of coverage.

In addition, if the insurance company wants to deny coverage, the adjuster usually has to put its home office on notice. Many times the insurance company may not deem it worth the expense to proceed with \$10,000.00 in defense fees for a \$5,000.00 case.

## **C. HOMEOWNERS**

There are several different types of insurance policies on this. You need to be sure you get the policy and read it. Mobile Home policies read differently for liability purposes than do a Deluxe Homeowner's policy. There are also renter's insurance policies and landlord policies. To know if the act is going to be covered you will have to obtain a copy of the policy

## **VII. SUMMARY**

When you are looking for any liability coverage remember you must read the policy and determine:

- 1) Is the Person who did the negligent act covered? (Are there any other persons you can include to be negligent)
- 2) Is the specific Act covered
- 3) Is the "Thing" covered (vehicle/property)

If a case is worth more than the primary limits, be sure to exhaust all avenues of finding additional liability coverage.