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### **PAYNE V. ERIE INSURANCE EXCHANGE: COVERAGE FROM THE NAMED INSURED TO THE FIRST PERMITTEE AND BEYOND**

**James P. Steele**

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Earlier this year, Maryland's intermediate appellate court, the Court of Special Appeals, decided when and how the liability coverage in an insurance policy's omnibus clause passes from the named insured through the first permitted user, the "first permittee," to the second permitted user, the "second permittee." *Payne v. Erie Insurance Exchange* centers on the grant of permissive use from the named insured to the first permitted driver and what happens when the first permittee lets another person use the vehicle in question. Simply put, coverage under an omnibus clause will not extend to a second permittee unless the first permittee is physically present in the vehicle and the vehicle is being used for a purpose consistent with the named insured's grant to the first permittee.

#### **Background**

*Payne* arose out of an automobile accident that occurred on February 11, 2008. David J. Payne, Sr. was driving his car when it was struck by a Subaru Legacy that was driven by Ameen Ragher Abdulkhalek. Alan Dwyer owned the Subaru and was the named insured under the policy at issue. Dwyer bought the car for the use of his daughter, Karen, who suffered periodically from lupus. Karen lived at home with her parents and her three children. Abdulkhalek was the father of Karen's children but did not live in Dwyer's home. Dwyer had given Karen strict instructions that Abdulkhalek was not to drive the car.

On the day of the accident, Karen was feeling ill from lupus. She asked Abdulkhalek to use the Subaru to pick up two of her children from school. Abdulkhalek did not head straight to school but instead went to an Exxon station, "where he remained for approximately three minutes." Shortly after leaving the station, he rear ended Payne's vehicle.

#### **The Litigation**

The accident gave rise to litigation between Payne and his insurance carrier, Erie, over whether the omnibus clause of the policy extends coverage to Abdulkhalek to cover Dwyer's damages. The trial court denied Payne's motion for a declaratory judgment and for summary judgment but granted Erie's motion for summary judgment. Payne appealed, arguing that Abdulkhalek was covered as the second permittee of the grant of use from Dwyer to Karen.

#### **The Court of Special Appeals' Ruling**

The Court of Special Appeals ruled that under the facts of the case, the grant of permissive use stopped at Karen and did not pass on to Abdulkhalek. In so deciding, the court looked at a number of factors, including the distinction between "use" and "operation" of a vehicle, whether the first permittee was actually present in the vehicle, the scope of permission from the named insured to the first permittee, the distinction between an emergency and mere "inconvenience," and the designated purpose of the permitted use.

The court examined other cases where accidents occurred while second permittees were driving motor vehicles at the request of first permittees. In those cases, the first permittee was physically present in the vehicle and the second permittee was behind the wheel at the first permittee's request. Though not "operating" the vehicle, the first permittee in those cases was still "using" it. As a passenger, first permittee remains entitled "to use the vehicle for a permitted purpose even though the literal operation of the vehicle is delegated to someone else."

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The court noted that the first permittee must be actually present in the vehicle for coverage to extend to the second permittee. The law deems the first permittee to be the “using” the vehicle, while the second permittee is a mere “agent” or “chauffeur.” Maryland law “has never extended coverage under an omnibus clause to an absentee use of the vehicle by the first permittee, such as sending the second permittee on an errand while the first permittee stays home.” The rationale behind this rule is that, “the first permittee is present in the car as master of the ship even when not literally standing at the helm.” Thus, “[p]ermitted use embraces permitted operation but is significantly broader. It includes both the active modality of driving and the passive modality of being driven.”

Even where the first permittee is in the vehicle, the “use” must be for a designated purpose. That is, the “use of the vehicle must still be for the specific purpose for which the permissive use was granted by the named insured in the first instance.” In *Payne*, Abdulkhalek’s trip to the Exxon station was not within the scope of permitted uses Payne granted to Karen.

The court also focused on the scope of permission granted by Payne to Karen. Payne explicitly forbade Karen to let Abdulkhalek drive the Subaru. Both Payne and Abdulkhalek confirmed the explicit prohibition in their deposition testimony. True, Karen, a first permittee, asked Abdulkhalek to drive the car. But, the court noted the proper focus in defining the scope of a grant of permissive use is “on the relationship between the named insured and the first permittee and not on the relationship between the first permittee and the second permittee.”

The court noted the difference between a mild admonition such as “Do not let anyone else drive the car,” and an explicit prohibition such as Payne’s prohibition of Abdulkhalek. “Circumstantially implied consent that may trump a modest admonition does not have the same force against an unequivocal command.” The court noted two factors that may extend coverage to a second permittee even with an express prohibition by the named insured: (1) the physical presence of the first permittee in the vehicle; and (2) the second permittee’s operation of the vehicle was necessitated by an emergency.

The court was careful to distinguish between a true emergency and an “inconvenience.” In *Payne*, the school was only a couple of blocks from the Payne house, so the children could easily have walked home. Abdulkhalek did not need to drive them. The court noted succinctly, “[a]n inconvenience is not an emergency.”

## Summary and Conclusion

In summarizing the decision, the court noted how one should think about grants of permission:

Under an omnibus clause, the exclusive creator of a permitted use of a vehicle is the named insured. It is he who establishes the purpose for which the use is given. It is he, therefore, who establishes the limits on the range or scope of such use. It is the first permittee who is the exclusive beneficiary of the permissive use. The scope of the permitted use is bounded by what will benefit or serve the purposes of that first permittee.... As a mere grantee of the use, the first permittee cannot alter or modify the purposes for which it was granted or create a new purpose. For any subsequent use of the vehicle to come under the coverage of the omnibus clause, such use must be in the service of the purpose for which the grant was originally made....

When the first permittee designates an agent to drive him or her some place, that is not a second grant of permissive use. It is only an incident or implementation by the first permittee of the original grant of the use. The so-called “second permittee” is simply an agent for the limited purpose of driving.

The court concluded the opinion by noting none of the required factors were present in the case. Abdulkhalek was prohibited from driving the Subaru but did so without Karen being present in the car, and he did not use the vehicle for a permitted purpose consistent with Payne’s original grant to Karen. Therefore, the omnibus clause of Payne’s policy with Erie did not cover damages from Abdulkhalek’s accident with Dwyer.

Payne has appealed this ruling to Maryland’s highest appellate court, the Court of Appeals. The parties will need to brief and argue the matter, and then the Court of Appeals will provide the final word. For now, coverage extends to a second permittee when the first permittee is physically present in the vehicle and the use is necessitated by an emergency.

## About the Author

**James P. Steele** is a Member at **Carr Maloney P.C.**, counseling insurers on complex coverage matters and litigating insurance coverage disputes. He may be contacted at [jps@carmaloney.com](mailto:jps@carmaloney.com).

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