Permissive user?

How to establish coverage and not fall into an insurance company's coverage denial trap

By Olivia K. Leary and Caroline X. Feldstein

Plaintiffs' attorneys know that they need to have a complete understanding of all potential avenues that can provide compensation for a client's harms. In a motor vehicle accident scenario specifically, determining whether a driver possessed valid insurance coverage at the time of the incident is crucial to locating possible recovery sources. This analysis can be further complicated if an involved driver is not named in the associated auto insurance policy. In response to this common issue, this article will examine what to do when permissive use is at issue, the legal framework in which permissive use can be established and the order of liability when a driver and named insured are separate individuals or entities.

Whether an unnamed driver is insured can affect a personal injury plaintiff's recovery from multiple angles. If your client was a permissive-use driver at the time of the motor vehicle accident and coverage is denied, Proposition 213's exclusion of non-economic damages may apply and your client may also be denied uninsured/underinsured motorist coverage. Alternatively, should a defendant driver be a permissive user at the time of the incident, your client's recovery can be minimized if coverage of the driver is denied.

Establishing coverage for your permissive-use client

Many of us may have encountered situations where a client is injured in a motor vehicle accident while using another's vehicle. Following the accident, the insurance company denies coverage for the client. Although an insurance company may initially attempt to deny coverage for an unnamed driver, this assertion can often be refuted. As a plaintiff's attorney, if you fail to properly analyze a carrier's denial of coverage, you may pass on a great case or inadvertently limit the client's recovery.

When a claim is opened with an insurance company, the insurer first examines whether coverage applies. Although the auto insurance policy may explicitly allow for coverage for unnamed or permissive-use drivers, it is not uncommon for the insurer to improperly conclude that the driver is uncovered.

Generally, a person is not required to be independently insured or a named insured if the vehicle they operate is covered. California law supports this norm. The Insurance Code requires automobile insurance policies to provide coverage for permissive-use drivers via the vehicle's liability policy (Ins. Code, § 11580.1, subd. (b)(4).) However, it is imperative that the attorney request and review the entire policy language for the automobile

insurance at issue. Although California law generally holds that auto coverage must insure permissive-use drivers, the ability to provide permission can be limited with clear and conspicuous language within the policy terms. (See Veh. Code, § 16056; *Haynes v. Farmers Insurance Exchange* (2004) 32 Cal.4th 1198, 1205.) Valid limitations will be discussed further below.

The establishment of coverage is a crucial moment in your case. Demonstrating valid permissive use triggers coverage for your client under the registered owner's policy. There are various ways to establish permissive use. Usually, insurance carriers provide either a questionnaire or request a recorded statement that details the circumstances of the permitted use. Often, these questions will not explicitly ask whether or not your client had permission to drive. Instead, the questions will ask for information regarding the relationship of your client and their insured, how your client was provided the keys, to whom the keys were returned, how often your client drives that vehicle, whether the vehicle was being used for any kind of work and whether your client compensated their insured for using the vehicle.

Given the gravity of establishing coverage, it is crucial that a plaintiff's attorney have a strong understanding of the myriad ways permissive use can arise. Broadly, for an unnamed or permissive-use driver to get coverage, the insured must have granted permission to use the vehicle when the motor vehicle accident occurred. This burden is on the plaintiff to demonstrate

that the requisite permission was granted. (See *Taylor v. Roseville Toyota, Inc*. (2006) 138 Cal.App.4th 994, 1004-1005.)

Permission can be express or implied. Express permission is often readily apparent and occurs in situations in which an insured purposely provides their vehicle to be used by another. Implicit permission however is usually less obvious. An analysis of the available circumstances surrounding the vehicle's use and relationship of the insured and driver is required to establish implied permission, such that implied permission is treated as a question of fact. (See *Taylor v. Roseville Toyota, Inc*. (2006) 138 Cal.App.4th 994, 1004-1005.)

Relationships between the insured and driver, such as a husband-wife, parent-child or employer-employee, allow for an inference of implied permission based on these relationship norms. (See *Taylor v. Roseville* (2006) 138 Cal.4th 994, 1006-1007; C.A.C.I. 720.) For instance, if a mother, the insured, allows her adult son to operate her vehicle to run errands, the son's use of the vehicle is likely implicitly permitted. One day, the son needs to go to the store to purchase groceries. Although the son may not expressly ask permission to use the vehicle on that day, the general practice of his mother permitting her son to use the vehicle for this purpose implies that permission is present on this occasion.

Additionally, say an insured employer routinely provides their vehicle to their employee to deliver goods. The employee comes into work each day, grabs the keys to the vehicle and performs the necessary deliveries. One day, like most other days, the employee arrives at work and takes the vehicle without expressly asking his employer if he can do so. The employee is operating the vehicle to deliver goods when he is rear-ended. Although the employee did not ask his employer's explicit permission to drive the vehicle, the common practice within this relationship would imply permission for the employee's operation of the vehicle.

Permission can also be passed from one permittee to another. For instance, if the insured provides permission for one person to use their vehicle and this first permittee provides permission to another, the permission passes from the first permittee to the second. Absent constraints on the transfer of permissive use, the insured in this scenario is considered to have given implied permission to the second permittee. (*Peterson v. Grieger, Inc*. (1961) 57 Cal.2d 43, 54.)

The scope of permissive use can be limited or unlimited. Like the recognition of express or implied permission, the scope of permission at issue is determined from explicit statements and implied by the available circumstances. If there is an assertion the permission was restricted, you must first identify the nature of these restrictions (time, place, location, etc.). After the identification of any restrictive terms, you must evaluate whether the driver deviated from said restrictions when the motor vehicle accident occurred. (See *Peterson v. Grieger, Inc*. (1961) 57 Cal.2d 43; C.A.C.I. 721.)

It is improper for an insurance carrier to unilaterally deny coverage for permissive-use drivers. An insurer's assertion that an unnamed driver automatically lacks coverage is unsupported by applicable state law and general insurance practices. A client may be covered by an automobile insurance policy even if they are not a named insured and even if the carrier initially denies coverage. Should a client have the insured's permission to use the vehicle at the time of the motor vehicle accident, the automobile coverage will likely apply.

As detailed, permissive use can arise in a number of situations. Permission can be granted explicitly or implicitly and can be passed by one permittee to another. If permission was not explicitly granted, an analysis of the circumstances at issue, the relationship between the insured and the permittee and the scope of the permission is necessary to determine whether coverage applied to the driver at the time of the incident at issue. Please bear in mind that although the above analysis can strongly support the establishment of coverage through permission, the granting of permissive use can be limited by specific policy terms. Therefore, it is very important that the attorney review the applicable policy in full for any use restrictions.

Liability: Who is on the hook for your client's harm?

Now that you have an understanding of how to establish coverage on behalf of a permissive-use client, we can apply the same framework to a defendant driver. In the alternative, say you represent a personal injury client who was harmed in a motor vehicle accident. The at-fault driver was a permissive-use operator at the time of the incident and is therefore unnamed in the policy. Both the owner of the vehicle and the permissive-use driver have independent automobile insurance. Which person is primarily responsible for your client's harms?

Under Vehicle Code section 17152, both the owner and permissive-use driver can be liable for the plaintiff's harms and be made party to the related lawsuit. Although the owner of the vehicle may not be physically involved in the motor vehicle accident at issue, the owner who provided permission is vicariously liable for the actions of the permitted driver. (Veh. Code, §§ 17150, 17151, subd. (a), and § 17155.)

Although generally both an owner and permissive-use driver are liable for harms arising out of a motor vehicle accident, it is important to note that the owner's liability can be constrained. Under Vehicle Code section 17151, subdivision (a), an owner is not liable for exemplary damages against a driver and the owner's monetary liability can be capped. Although an owner's liability may be constrained, it is recommended that the plaintiff's attorney still name both the owner and the driver as defendants to the suit to maximize potential recovery. (Veh. Code, § 17152.)

Although there are certain constraints on an insured owner's liability, the insurance coverage of the owner is considered the primary insurance for an injured party's recovery. Should a permissive-use driver also possess their own automobile insurance coverage, this would apply secondly. Thus, should your client's harms exceed the policy limit settlement with an owner's insurance, the insurance covering a permissive-use driver may then be available to fill in this gap.

Conclusion

As plaintiffs' attorneys, it is our duty to maximize the potential recovery for our client's harms. A denial of coverage, whether against a plaintiff or a defendant, constrains compensation available for an injured client. In situations involving permissive use, knowing when and how to push back on a carrier's invalid denial of coverage allows you to help your client achieve full compensation for their harms. As discussed throughout this article, once coverage is established on behalf of your client, they can recoup both economic and non-economic damages as well as pursue a potential uninsured/underinsured motorist claim. If a defendant's permissive use is at issue, garnering coverage over the permissive user allows your client to recover against the liable third-party insurance policy. And don't forget – should an owner and a driver each have automobile insurance, both are likely on the hook for your client's harms.

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