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NOTES

The Entitlement Exclusion in the Personal Auto Policy: The Road to Reducing Litigation in Permissive Use Cases or a Dead End?

INTRODUCTION

Bill Smith holds a Personal Auto Policy with Company A which provides coverage for himself and his family, but which contains an entitlement exclusion clause, disallowing coverage for “any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so.”¹ Late one night, John Smith, the fourteen-year-old unlicensed son of the insured, took the family’s vehicle for a joyride without his father’s knowledge. After consuming several beers, John was involved in a collision that killed two members of the Brown family. The Browns brought suit against Bill and John Smith requesting compensation for personal injuries and property damages. Company A refused to indemnify and defend Bill Smith for all claims arising out of this accident, stating that the policy did not cover John Smith because he did not have a reasonable belief of entitlement to use his father’s vehicle.

In determining whether to grant Company A’s motion for summary judgment, the court is faced with many issues regarding the applicability of the entitlement exclusion clause. Namely, is John Smith covered because of his status as a family member, regardless of whether he reasonably believed he was entitled to use the vehicle? Can he have a reasonable belief that he was entitled to operate a vehicle as an unlicensed and intoxicated driver? Are all of these issues important, or will

¹ ALLIANCE OF AMERICAN INSURERS, 1989 POLICY KIT FOR STUDENTS OF INSURANCE 2A8 (1989) [hereinafter KIT].

coverage be denied simply because he did not have his father's permission? What if John Smith had permission to operate the motor vehicle for a specific purpose and deviated from that purpose — would that negate his reasonable belief? What if he delegated that permission to a third person and the third person caused the accident — would the third person be covered?

This hypothetical demonstrates the many issues facing courts today in construing the language of the standard personal automobile insurance policy's entitlement exclusion clause, which excludes coverage for "any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so."² Although this policy language was implemented by the Insurance Service Office³ in the late 1970s⁴ and has been used by insurance companies across the country,⁵ there has been a great deal of confusion regarding its interpretation.

The explanation behind inconsistent interpretations of the entitlement exclusion clause can be traced back to the provisions of the traditional omnibus clause, often referred to as the "permissive use clause," which provided coverage for any person "provided that the actual use thereof is with the permission of the named insured."⁶ The issue under the permissive use clause was whether the owner of the vehicle gave express or implied permission to the user to operate the vehicle; therefore, the focus was solely on the actions of the policyholder.⁷

² *Id.*

³ "The Insurance Service Office, Inc. ["ISO"] has promulgated model policies which have been adopted as standard by many states." ROWLAND H. LONG, *THE LAW OF LIABILITY INSURANCE* § 3.03 (1995).

⁴ ISO Circular, Personal Auto Policy Developed (Apr. 30, 1976), attached to Personal Auto Policy, 1975-1976.

⁵ ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 409 (student ed. 1988).

⁶ SPENCER L. KIMBALL, *CASES AND MATERIALS ON INSURANCE LAW* 399 (1992). The permissive use clause, or some form of it, has been found in insurance policies as early as 1955. Maximilian A. Pock, *Insurance*, 46 *MERCER L. REV.* 261, 284 (1994).

The 1955 Standard Automobile Policy covers any person while using the automobile, provided that the actual use "is with the permission of the named insured." The 1963 Family Combination Automobile Policy is more convoluted, if not recondite. It "covers any other person using such automobile with . . . permission . . . provided his actual operation or (if he is not operating) his other actual use thereof is with . . . permission, or reasonably believed to be with . . . permission . . . and is within the scope of such permission."

Id. (quoting JUNE M. AUSTIN & NORMAN E. RISJORD, *AUTOMOBILE LIABILITY INSURANCE CASES* 19 (1964)). Thereafter, the Personal Automobile Policy was enacted.

Id.

⁷ *Cooper v. State Farm Mut. Ins. Co.*, 849 F.2d 496, 499 (11th Cir. 1988) ("The

When the permission approach produced “substantial amounts of litigation”⁸ and was criticized as being too “fact-oriented,”⁹ insurance companies replaced the permissive use clause with the new entitlement exclusion clause,¹⁰ thereby following the “general trend toward expanding the scope of coverage.”¹¹ Instead of focusing on permission from the owner’s perspective,¹² the entitlement exclusion clause “shifts the inquiry from the express or implied intent of the owner to the subjective belief of the user.”¹³ Under the entitlement exclusion clause, therefore, the issue is whether the user reasonably believes she is entitled to operate the vehicle.

Reasonable belief “is broader in scope than the phrase ‘with the permission of’ and provides a more liberal effect, favorable to coverage.”¹⁴ Under the traditional permissive use clause, the user is only

permissive use clause focused on the owner’s perspective.”).

⁸ KEETON & WIDISS, *supra* note 5, at 370. Diane Richardson, Assistant Editor, *Fire Casualty & Surety Bulletin*, stated that the policy language was changed from permission to reasonable belief of entitlement in response to the substantial amount of litigation which resulted from the permission approach. Telephone interview with Diane Richardson, Assistant Editor, *Fire Casualty & Surety Bulletin* (Sept. 28, 1995).

⁹ KEETON & WIDISS, *supra* note 5, at 370. “[C]overage disputes which focus on issues which relate to permission typically involve controversies that are essentially fact-oriented, and frequently involve substantial costs to resolve coverage questions on the basis of subtle nuances.” *Id.*

¹⁰ See ISO Circular, *supra* note 4, at 2.

The former permission requirement, i.e., the use of a vehicle with permission and within the scope of that permission has been eliminated . . . [A] new exclusion has been added which provides that there is no coverage for a person using a vehicle when that person does not have a reasonable belief of being entitled to do so. This change has been made to eliminate the necessity of trying to establish a fact situation.

Id.

In the Personal Auto Policy published by the Insurance Services Office and used in whole or in part by many insurers, the permission requirement has been changed from an element of coverage to an exclusion for anyone “using a vehicle without a reasonable belief that that person is entitled to do so.”

W. Shelby McKenzie & H. Alston Johnson, *Insurance*, 54 LA. L. REV. 651, 653 (1994).

¹¹ KEETON & WIDISS, *supra* note 5, at 369.

¹² *Cooper v. State Farm Mut. Ins. Co.*, 849 F.2d 496, 499 (11th Cir. 1988) (“The permissive use clause focused on the owner’s perspective.”).

¹³ McKenzie & Johnson, *supra* note 10, at 653.

¹⁴ *Massachusetts Bay Ins. Co. v. American States Ins. Co.*, No. 12955, 1987 WL 13651, at *2 (Ohio Ct. App. June 17, 1987) (citing *Martie v. Epling*, No. 9808, at 8 (Ohio Ct. App. Feb. 4, 1981)). See also *Kenyon v. Newton*, 534 N.Y.S.2d 600, 601 (App. Div. 1988) (“This is a much broader concept than actual permission,” and the language “provides more favorable coverage.”).

covered when she has the owner's express or implied permission to operate the vehicle;¹⁵ but, under the entitlement exclusion clause, a court can analyze all the facts and circumstances upon which the driver formed a reasonable belief.¹⁶ Therefore, courts may determine the driver's belief to be reasonable even *without* the owner's permission.¹⁷

Although the purpose of expanding coverage with the entitlement language was to decrease the litigation costs which occurred under the permission approach,¹⁸ the entitlement exclusion has in fact produced substantial amounts of litigation.¹⁹ In fact, many courts have gone so far as to state that the entitlement exclusion is "clearly ambiguous."²⁰

¹⁵ *Cooper v. State Farm Mut. Ins. Co.*, 849 F.2d 496, 499 (11th Cir. 1988).

¹⁶ See *Maryland Casualty Co. v. Rynearson*, 1989 WL 100408 (Del. Super. Ct. Aug. 18, 1989) (affording coverage to the defendant because the "evidence as a whole" demonstrated that defendant was always allowed to use insured's vehicle to attend probation appointments, that defendant and the insured socialized together, and that defendant believed he would have been given permission to use the vehicle if the insured had been present at the time).

¹⁷ *Id.* See also *Royal Ins. Co. v. Messick*, 1987 WL 9613 (Del. Super. Ct. Apr. 6, 1987); *State Farm Mut. Auto. Ins. v. Progressive Casualty Ins. Co.*, No. 10748, 1988 WL 79316, at *4 (Ohio Ct. App. July 26, 1988) (stating that the entitlement exclusion "does not require permission from a named insured or even an insured"). In *Royal Insurance Co. v. Messick*, the operator of the vehicle conceded that he did not have insured's permission to operate the vehicle. However, the court held that a jury question still existed as to whether or not the operator had a reasonable belief he was entitled to operate the vehicle based on other factors such as length of relationship with insured's son and access to keys. *Royal Ins. Co.*, 1987 WL 9613, at *1.

¹⁸ See *supra* notes 8-11 and accompanying text.

¹⁹ There have been over a hundred cases attempting to interpret the entitlement exclusion. Search of Westlaw, Sept. 1, 1995. Although courts often refer to the Personal Auto Policy containing the entitlement clause as the "easy reading" or "plain language" policy, some courts disagree. In fact, one court has stated: "[I]t is more difficult to understand than the policies written before some insurance carriers decided to make them easier to read." *Allstate Ins. Co. v. United States Fidelity & Guar. Co.*, 663 F. Supp. 548, 552 (W.D. Ark. 1987).

²⁰ *Canadian Indem. Co. v. Heflin*, 727 P.2d 35, 36 (Ariz. Ct. App. 1986). For other cases holding that the entitlement exclusion is ambiguous, see *Hartford Ins. Co. v. Jackson*, 564 N.E.2d 906 (Ill. App. Ct. 1990); *American States Ins. Co. v. Adair Indus., Inc.*, 576 N.E.2d 1272 (Ind. Ct. App. 1991); *State Auto. Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801 (Ky. Ct. App. 1985); *Paychex, Inc. v. Covenant Ins. Co.*, 549 N.Y.S.2d 237 (App. Div. 1989); *Preston v. Tromm*, 1990 WL 61748 (Ohio Ct. App. Apr. 26, 1990). If a court finds an insurance clause ambiguous, it will be construed against the drafter. Therefore, the effect of a finding of ambiguity will be a result in favor of the insured. "There are literally thousands of judicial opinions resolving insurance disputes in favor of claimants on the basis that a provision of the insurance policy at issue was ambiguous and therefore should be construed against the insurer." KEETON & WIDISS, *supra* note 5, at 629.

This Note will examine judicial interpretation of the entitlement exclusion clause in light of the most commonly litigated issues regarding the change from permissive use to entitlement exclusion language. Part I illustrates the different positions courts have taken in defining “any person” in entitlement exclusion clauses. Does it apply to family members?²¹ Can it extend to the insured driving a non-insured vehicle?²² Part II provides the analysis courts use to determine “reasonable belief,”²³ examines whether permission is a factor in determining reasonable belief,²⁴ and discusses the effect permission obtained from an authorized user has on reasonable belief,²⁵ and whether a deviation from the scope of permission can negate reasonable belief.²⁶ Part III examines whether unlicensed and intoxicated drivers can have a reasonable belief of entitlement to operate a motor vehicle.²⁷ This Note concludes that the entitlement exclusion clause should be given its plain and unambiguous meaning to achieve the insurance industry’s goal of reducing litigation, thereby decreasing costs to buyers of insurance.²⁸

I. DEFINING “ANY PERSON”

A. Does “Any Person” Include Family Members?

Insurance policies generally list the persons covered by their terms and those specifically excluded from coverage separately.²⁹ Covered persons always include, at the very least, the insured and his or her family members.³⁰ Policies containing the traditional permissive use clause also cover those persons using the vehicle with the insured’s permission.³¹ On the other hand, policies containing the entitlement exclusion clause exclude coverage for “any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so.”³²

²¹ See *infra* notes 29-96 and accompanying text.

²² See *infra* notes 97-132 and accompanying text.

²³ See *infra* notes 133-41 and accompanying text.

²⁴ See *infra* notes 142-63 and accompanying text.

²⁵ See *infra* notes 164-87 and accompanying text.

²⁶ See *infra* notes 188-220 and accompanying text.

²⁷ See *infra* notes 221-72 and accompanying text.

²⁸ See *infra* notes 273-86 and accompanying text.

²⁹ KIT, *supra* note 1, at 2.

³⁰ *Id.* at 2B1. The Personal Auto Policy defines family member as “a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child.” *Id.* at 1F.

³¹ KIMBALL, *supra* note 6, at 399.

³² KIT, *supra* note 1, at 2A8.

A substantial amount of litigation has arisen in the courts with regard to whether the entitlement exclusion clause applies to family members.³³ More specifically, litigants debate whether a family member can be provided coverage in one section of the insurance policy, yet be excluded in another.³⁴

1. *Courts Not Applying the Entitlement Exclusion Clause to Family Members*

Courts in Kentucky, Illinois, New York, Ohio, and Indiana have essentially adopted a per se rule that family members are always covered persons, regardless of any reasonable belief of entitlement to operate the insured's vehicle.³⁵ For example, in *State Auto. Mutual Insurance Co. v. Ellis*,³⁶ an unlicensed fourteen-year-old drove her father's vehicle,

³³ See *infra* notes 35-96 and accompanying text. Perhaps the problem with whether the entitlement exclusion applies to family members could be solved by using language similar to the policy in *United Servs. Auto. Ass'n v. National Farmers Union Property & Casualty*, 891 P.2d 538 (N.M. 1995), which states: "No person shall be considered an insured person if that person uses a vehicle without a reasonable belief of having permission to use the vehicle." *Id.* at 539. If insurance policies placed this reasonable belief clause in the section regarding covered persons, instead of under exclusions, perhaps less litigation would arise regarding ambiguity.

³⁴ An issue which may be of interest, but which is beyond the scope of this Note, is what happens in situations where the parents are sued for negligent entrustment of a vehicle to their minor child? Even if the exclusion applies in situations where the family member does not have a reasonable belief, will coverage be provided based upon the fact that the parent has been sued as a covered person? For cases confronting this issue, see *State Farm Mut. Auto. Ins. Co. v. Peninsula Ins. Co.*, 585 A.2d 1313 (Del. Super. Ct. 1988); *Cadillac Ins. Co. v. Moore*, 541 So. 2d 670 (Fla. Dist. Ct. App. 1989); *State Auto. Mut. Ins. Co. v. United Ohio Ins. Co.*, No. 86-CA-08, 1986 WL 7738 (Ohio Ct. App. July 3, 1986); *Erd v. Snyder*, 639 N.E.2d 525 (Ohio Ct. C.P. 1994).

³⁵ See *infra* notes 36-58 and accompanying text. Some courts have held that coverage is afforded to family members because of statutory mandate. See *Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Dawkins*, 551 F. Supp. 971, 972 (D.S.C. 1982) (holding unlicensed, non-permissive user to be covered because he lived in the same household as insured) (citing S.C. CODE ANN. § 56-9-810 (Law. Co-op. 1981)). Another example is a Connecticut law which states: "[C]overage afforded under [the standard automobile liability] . . . policy shall apply to the named insured and relatives residing in his household unless such person is *specifically* excluded by endorsement." *Progressive Ins. Co. v. Monroe*, No. 505402, 1992 WL 91866 (Conn. Super. Ct. Apr. 24, 1992) (emphasis added) (citing CONN. AGENCIES REGS. § 38a-335(d) (1990)). In this case, the court found that insured's minor son did not have a reasonable belief of entitlement to operate the automobile; however, coverage was provided based on the statute.

³⁶ 700 S.W.2d 801 (Ky. Ct. App. 1985). This is the only Kentucky case to date interpreting the entitlement exclusion.

without his permission, onto a highway which resulted in an accident.³⁷ State Auto denied coverage, arguing that the daughter was excluded from the policy for driving her father's vehicle without a reasonable belief that she was entitled to do so.³⁸ The Kentucky Court of Appeals held that the policy was "ambiguous" because the daughter was clearly covered by her status as a family member, yet could at the same time be excluded for using the vehicle without a reasonable belief that she was entitled to do so.³⁹ Construing the ambiguity in favor of the insured,⁴⁰ the court held that the insured's daughter was "clearly included in the narrow class of 'family members' who are specifically afforded coverage under the policy,"⁴¹ and, despite the daughter's use without permission, ordered coverage be granted.⁴²

The Illinois Court of Appeals has also held the entitlement exclusion clause ambiguous as it applies to family members.⁴³ In *Hartford Insurance Co. v. Jackson*, insured's unlicensed son and his friend went for a joyride that resulted in the friend's death.⁴⁴ The evidence was clear that not only was the son driving his parent's vehicle without their consent, but he was also not legally entitled to drive.⁴⁵ Nevertheless, the court, stating that the exclusion was ambiguous as applied to family members, reversed the lower court's ruling in favor of the insurer, and required the insurance company to provide coverage.⁴⁶

³⁷ *Id.* at 801.

³⁸ *Id.*

³⁹ *Id.* at 802.

⁴⁰ *Id.* at 803 (citing *Wolford v. Wolford*, 662 S.W.2d 835, 838 (Ky. 1984)). "The doctrine that ambiguities in contract documents are resolved against the party responsible for the drafting is a well recognized principle of contract interpretation." KEETON & WIDISS, *supra* note 5, at 628.

⁴¹ *State Auto. Mut. Ins. Co.*, 700 S.W.2d at 802.

⁴² *Id.* It is this author's contention that *State Auto Mutual Insurance Co. v. Ellis* is a perfect example of why a substantial amount of insurance litigation in Kentucky deals with permissive users. See MICHAEL D. RISLEY & CATHERINE M. YOUNG, *AUTOMOBILE INSURANCE LAW IN KENTUCKY* § 1.7 (1995). Although insurance companies added the entitlement exclusion clause to decrease litigation, it appears that Kentucky, along with other states, is clearly disregarding the language in an effort to afford coverage in all circumstances. Could an unlicensed 14 year-old honestly have a reasonable belief that she should take her parents' vehicle onto a public highway without their permission? Clearly not, but courts are allowing such coverage under the entitlement exclusion clause.

⁴³ *Hartford Ins. Co. v. Jackson*, 564 N.E.2d 906, 912 (Ill. App. Ct. 1990).

⁴⁴ *Id.* at 908.

⁴⁵ *Id.* at 907-08.

⁴⁶ *Id.* at 913. See also *Economy Fire & Casualty Co. v. State Farm Mut. Ins. Co.*, 505 N.E.2d 1334, 1337 (Ill. App. Ct. 1987) (holding that a non-permissive user did not

An unlicensed son was also involved in *Paychex, Inc. v. Covenant Insurance Co.*⁴⁷ In this case, the son drove his father's car into a building, causing considerable damage.⁴⁸ After the building owner filed suit for property damages, the court granted summary judgment in favor of the building owner.⁴⁹ On appeal, the New York Supreme Court affirmed, stating that the entitlement exclusion clause was ambiguous in its application to family members, and that this "ambiguity should be resolved in favor of the policyholder and against the insurer."⁵⁰ Therefore, one policy covered insured's unlicensed son even though he had no reasonable belief of entitlement to operate the vehicle.⁵¹

Similarly, in *Preston v. Tromm*, the Ohio Court of Appeals held "any person" not to include family members.⁵² Thus, the insured's unlicensed son was provided coverage based on his family member status, despite the insured's express prohibition against the unlicensed son's use of the vehicle.⁵³ The court went so far as to say that "whether the [d]efendant had permission or had a reasonable belief that he was entitled to use the insured's vehicle at the time of the accident is of no consequence" so long as he is a family member under the policy.⁵⁴

Indiana has also taken the position that the entitlement exclusion clause is ambiguous as it applies to family members.⁵⁵ In *American*

have a reasonable belief that he was entitled to use the car); *Economy Fire & Casualty Co. v. Kubik*, 492 N.E.2d 504, 506 (Ill. App. Ct. 1986) (holding the entitlement exclusion clause ambiguous as applied to family members and requiring an insurance company to provide coverage to insured's 14 year-old daughter).

⁴⁷ 549 N.Y.S.2d 237 (App. Div. 1989).

⁴⁸ *Id.* at 237.

⁴⁹ *Id.*

⁵⁰ *Id.* at 238.

⁵¹ *Id.* See also *Kenyon v. Newton*, 534 N.Y.S.2d 600, 601 (App. Div. 1988) (holding that a non-permissive driver was a "covered person" under an "ambiguous" entitlement exclusion clause); *Electric v. Boutelle*, 504 N.Y.S.2d 577, 579 (App. Div. 1986) (holding that a passenger who depressed the accelerator without insured-driver's consent was not covered under this clause).

⁵² No. 9-88-31, 1990-WL 61478, at *3 (Ohio Ct. App. Apr. 26, 1988).

⁵³ *Id.* at *4.

⁵⁴ *Id.* See also *Ziegler v. Workman*, No. 93-28, 1994 WL 140755 (Ohio Ct. App. Mar. 30, 1994); *State Auto. Mut. Ins. Co. v. Hawk*, No. CA-6751, 1986 WL 3922 (Ohio Ct. App. Mar. 17, 1986). It is important to note that, although family members seem to be automatically covered, this result might be different if the family member is driving a vehicle not owned by the insured. See *Broz v. Winland*, 629 N.E.2d 395 (Ohio 1994) (applying a reasonable belief analysis where insured's daughter was driving a friend's vehicle). See *infra* notes 97-118 and accompanying text.

⁵⁵ *American States Ins. Co. v. Adair Indus., Inc.*, 576 N.E.2d 1272 (Ind. Ct. App. 1991). See also *Meridian Mut. Ins. Co. v. Cox*, 541 N.E.2d 959, 962 (Ind. Ct. App. 1989)

States Insurance Co. v. Adair Industries, Inc., the Indiana Court of Appeals stated that it is reasonable to interpret “family member” and “any person” to be “mutually exclusive” classes.⁵⁶ Construing the ambiguity in favor of the insured,⁵⁷ the court provided coverage to insured’s unlicensed brother who used the vehicle without permission.⁵⁸

2. Courts Applying the Entitlement Exclusion Clause to Family Members

Courts in Maryland, Tennessee, North Carolina, New Jersey, Georgia, Missouri, Oregon, Wisconsin, and Idaho have expressly applied the entitlement exclusion clause to family members, and application of the clause to family members can be implied in the decisions of other states.⁵⁹ The “most thorough and in-depth case on the issue”⁶⁰ of whether the entitlement exclusion clause applies to family members can be found in *General Accident Fire & Life Assurance Corp. v. Perry*.⁶¹ In this case, the court found that the insured’s son did not have a reasonable belief that he was entitled to operate the insured’s vehicle

(dealing with similar exclusionary language for any person “without a reasonable belief of having permission to use the auto,” and holding the language ambiguous as it applies to family members).

⁵⁶ *Id.* at 1274 (citing *Meridian Mut. Ins. Co. v. Cox*, 541 N.E.2d 959, 962 (Ind. Ct. App. 1989)). “The creation of different classes by distinguishing between descriptive terms can create an ambiguity in a contract provision, even though the words, by themselves, are not ambiguous.” *Id.*

⁵⁷ *Id.* (citing *Comprehensive Health Ins. Ass’n v. Dye*, 531 N.E.2d 505, 507 (Ind. Ct. App. 1988)).

⁵⁸ *Id.* *Adair Industries, Inc.* is the only Indiana case to interpret the entitlement exclusion clause. However, a similar provision was interpreted the same way in *Meridian*, 541 N.E.2d at 961 (holding a child driving parent’s car without permission covered under the family policy).

⁵⁹ The rule that the entitlement exclusion clause applies to family members can be said to have been impliedly adopted in some states based on the fact that the courts discuss reasonable belief even though the operator of the vehicle was a family member. For example, in *IMT Ins. Co. v. Roberts*, 401 N.W.2d 228 (Iowa Ct. App. 1986), insured’s son was involved in an accident while driving the family’s vehicle without permission. *Id.* at 229. The court did not find the son’s status as a family member determinative, but stated that whether the son had a reasonable belief that he was entitled to operate insured’s vehicle was a jury question. *Id.* at 230. Therefore, it can be implied that the law in Iowa is that the entitlement exclusion applies to family members.

⁶⁰ *Omaha Property & Casualty Ins. Co. v. Johnson*, 866 S.W.2d 539, 542 (Tenn. Ct. App. 1993).

⁶¹ 541 A.2d 1340 (Md. Ct. Spec. App. 1988).

because he was unlicensed and did not have his parents' permission.⁶² Because this was a case of first impression in Maryland,⁶³ the court conducted a thorough examination of cases from other jurisdictions which had interpreted the clause.⁶⁴ After considering the "facts and circumstances of the parties at the time of execution"⁶⁵ of the insurance contract, the court held that the exclusionary clause was unambiguous, concluded that family members could be excluded from coverage, and denied coverage for insured's son because he used the vehicle without a reasonable belief that he was entitled to do so.⁶⁶

Other jurisdictions have relied on *Perry* and its detailed analysis. For example, the Tennessee Court of Appeals, in *Omaha Property & Casualty Insurance Co. v. Johnson*, also held the entitlement exclusion clause unambiguous.⁶⁷ The court denied coverage for a policyholder's unlicensed son who took the car out in the middle of the night despite an express prohibition against doing so.⁶⁸ North Carolina has also been persuaded by the decision in *Perry*.⁶⁹ The Supreme Court of North Carolina in *Newell v. Nationwide Mutual Insurance Co.*, reversing a lower court decision to provide coverage,⁷⁰ held that the entitlement exclusion clause can apply to family members and denied coverage to insured's unlicensed son who was expressly prohibited from operating the vehicle.⁷¹

⁶² *Id.* at 1341.

⁶³ *Id.* at 1342.

⁶⁴ *Id.* at 1343-49.

⁶⁵ *Id.* at 1342.

⁶⁶ *Id.* at 1350. This is the only Maryland case to date interpreting the entitlement exclusion clause.

⁶⁷ 866 S.W.2d 539 (Tenn. Ct. App. 1993).

⁶⁸ *Id.* at 541. See also *Phillips v. Harding*, 1990 WL 14020 (Tenn. Ct. App. Feb. 16, 1990) (holding that "any person includes anyone who might be included under any provision of the policy" and, therefore, denying coverage to insured's son using the vehicle without a reasonable belief that he was entitled to do so); *United Servs. Auto. Ass'n v. Continental Ins. Co.*, 1985 WL 4692, at *3 (Tenn. Ct. App. Dec. 24, 1985) (holding that a "reasonable belief" existed to use the car because the insured's son gave the driver express permission).

⁶⁹ 432 S.E.2d 284 (N.C. 1993) (stating that the court was persuaded by the "well-reasoned" decision of *General Accident Fire & Life Assurance Corp. v. Perry*).

⁷⁰ *Id.* The Supreme Court of North Carolina reversed the court of appeals decision, which held insured's son entitled to coverage based on his family member status. For the appellate decision see *Newell v. Nationwide Mut. Ins. Co.*, 423 N.E.2d 525 (N.C. Ct. App. 1991).

⁷¹ *Newell v. Nationwide Mut. Ins. Co.*, 432 S.E.2d 284 (N.C. 1993). Cf. *Wilson v. State Farm Mut. Auto. Ins. Co.*, 394 S.E.2d 807 (N.C. 1990) (holding that the entitlement exclusion clause does not apply to spouses living in the household with the insured)

Although not relying on *Perry, Saint Paul Insurance Co. v. Rutgers Casualty Insurance Co.* also reversed a lower court decision giving coverage to a family member regardless of reasonable belief.⁷² In this case, the insured's unlicensed son was instructed to wash insured's car, but instead took the vehicle for a drive and collided with another vehicle.⁷³ The New Jersey Superior Court held that the exclusionary clause was "plain and unambiguous" and that the unlicensed son was not covered by virtue of his family member status.⁷⁴ Instead, the court said that a material issue of fact existed as to whether the son had a reasonable belief that he was entitled to operate his mother's vehicle.⁷⁵

Georgia courts have also taken the position that "[i]t is clear 'any person' means just that Any person include[s] the named insured or family members of the named insured."⁷⁶ In *Cincinnati Insurance Co. v. Plummer*,⁷⁷ the Georgia Court of Appeals held that an unlicensed daughter did not have a reasonable belief of entitlement after she took the family vehicle "for a 4:00 a.m. frolic and jaunt throughout the neighborhood in defiance of [her parents'] earlier express prohibition."⁷⁸ The court stated: "'[A]ny person using a vehicle without a reasonable belief that that person is entitled to do so' applies to a family member of the named insured."⁷⁹

Missouri courts have also followed this interpretation. In *Driskill v. American Family Insurance Co.*,⁸⁰ the insured's fifteen-year-old unli-

(citing N.C. GEN. STAT. § 20-279.21 (1991)).

⁷² 557 A.2d 1052 (N.J. Super. Ct. App. Div. 1989).

⁷³ *Id.* at 1053.

⁷⁴ *Id.* at 1054-55.

⁷⁵ *Id.* See also *Campbell v. New Jersey Auto. Full Ins. Underwriting Ass'n*, 637 A.2d 226, 229 (N.J. Super. Ct. App. Div. 1984) (holding that a family member needs a reasonable belief of entitlement to drive insured's car).

⁷⁶ *Georgia Farm Bureau Mut. Ins. Co. v. Fire & Casualty Ins. Co.*, 350 S.E.2d 325, 326 (Ga. Ct. App. 1986). In this case, the driver, the insured's cousin who lived in the same household with insured, was held not to have a reasonable belief that he was entitled to use insured's vehicle and was not provided coverage, regardless of his family member status.

⁷⁷ 444 S.E.2d 378 (Ga. Ct. App. 1994).

⁷⁸ *Id.* at 380, 381. Cf. *Safeway Ins. Co. v. Holmes*, 390 S.E.2d 52 (Ga. Ct. App. 1989) (holding coverage provided where insured's unlicensed daughter had express permission to drive the vehicle).

⁷⁹ *Cincinnati Ins. Co.*, 444 S.E.2d at 380; see *Omni Ins. Co. v. Harps*, 396 S.E.2d 66 (Ga. Ct. App. 1990); *Robertson v. Lumbermen's Mut. Casualty Co.*, 286 S.E.2d 305 (Ga. Ct. App. 1981), *overruled on other grounds*, *Grange Mut. Casualty Ins. Co. v. Brinkley*, 355 S.E.2d 767, 767 (Ga. Ct. App. 1987). *Robertson* appears to be the very first case reported interpreting the entitlement exclusion. Search of Westlaw, Sept. 30, 1995.

⁸⁰ 698 F. Supp. 789 (E.D. Mo. 1988).

censed son took the vehicle without permission, and allegedly lost control of the vehicle, which resulted in injuries to a young boy standing in his driveway.⁸¹ Despite the driver's family member status, the court ruled that he was excluded from coverage for operating the vehicle without a reasonable belief that he was entitled to do so.⁸²

Oregon has also refused to ignore the entitlement exclusion when family members are involved.⁸³ In *Harlan v. Valley Insurance Co.*, the Oregon Court of Appeals held that insured's daughter was subject to an exclusionary clause which denied coverage to any person using a vehicle without the reasonable belief that she is entitled to do so, despite her family member status.⁸⁴

Likewise, in *Kelly v. Threshermen's Mutual Insurance Co.*,⁸⁵ the Wisconsin Court of Appeals did not end the inquiry with whether or not the driver was a covered person.⁸⁶ The court, in granting the insurer's motion for summary judgment, stated: "Inclusion within a general grant of coverage does not necessarily take one outside the breadth of particular exclusions to coverage."⁸⁷ Therefore, the entitlement exclusion clause applied to the insured's unlicensed daughter using insured's vehicle without a reasonable belief that she was entitled to do so.⁸⁸ Finally, in *Allied Group Insurance Co. v. Allstate Insurance Co.*,⁸⁹ the Supreme Court of Idaho held the entitlement exclusion

⁸¹ *Id.* at 790.

⁸² *Id.* at 793. See also *Omaha Property & Casualty Ins. Co. v. Peterson*, 865 S.W.2d 789, 791 (Mo. Ct. App. 1993) (holding that an unrelated driver was not covered because he only had permission from insured's son, and thus did not have a reasonable belief); *Ohio Casualty Ins. Co. v. Safeco Ins. Co.*, 768 S.W.2d 602, 603 (Mo. Ct. App. 1989) (holding driver covered by policy because of implied permission to drive car).

⁸³ *Harlan v. Valley Ins. Co.*, 875 P.2d 471 (Or. Ct. App. 1994).

⁸⁴ *Id.* at 473. This is the only Oregon case to date interpreting the entitlement exclusion.

⁸⁵ No. 92-2570, 1993 WL 98770 (Wis. Ct. App. Apr. 6, 1993).

⁸⁶ *Id.* at *1.

⁸⁷ *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Kelly*, 389 N.W.2d 838 (Wis. Ct. App. 1986)). In *State Farm Mut. Auto. Ins. Co. v. Kelly*, the court interpreting a similar policy, stated: "From a reading of the . . . policy, it is obvious that the definition of 'insured person' includes relatives." Thus, Kelly is presumably covered. It is equally obvious, however, that coverage is denied if a presumably insured person "uses a vehicle without having a sufficient reason to believe that use is with permission." *Id.* at 840. See also *Estate of Ge Yang v. General Casualty Co.*, No. 93-2835, 1994 WL 269281, at *1 (Wis. Ct. App. June 21, 1994) ("An insurance contract is construed from the standpoint of what an ordinary person would believe the contract to mean. An ordinary person would believe the term 'any person' is all inclusive.").

⁸⁸ *State Farm Mut. Auto. Ins. Co.*, 389 N.W.2d at 840.

⁸⁹ 852 P.2d 485 (Idaho 1993).

clause unambiguous and applied it to family members, basing its decision on a determination of whether the child had permission to use the vehicle.⁹⁰

3. *Alternative Positions*

The Louisiana Courts of Appeals are in a state of conflict with regard to whether the entitlement exclusion applies to family members. The First Circuit has taken the position that the exclusion does not apply to family members, and the Second Circuit has taken the position it does apply to family members.

In *United Services Automobile Ass'n v. Dunn*,⁹¹ the court held the entitlement exclusion clause ambiguous and provided coverage for family members who used insured's vehicle without permission because the policy covered family members under one clause, but excluded them under the entitlement exclusion clause.⁹² The court stated that the "insurer cannot extend coverage in one clause of the policy and then exclude coverage of the same person in another clause of the policy."⁹³

On the other hand, in *State Farm Mutual Automobile Insurance Co. v. Casualty Reciprocal Exchange*,⁹⁴ the court took the position that the entitlement exclusion clause may exclude family members if they do not have at least a reasonable belief of permission.⁹⁵ Based on this analysis, the court held that the clause barred coverage when insured's fourteen-year-old grandson wrecked the car he had taken without permission.⁹⁶ It is unclear how the Louisiana Supreme Court would resolve this difference.

⁹⁰ *Id.* at 487. Interpretation of this case has caused some confusion because it specifically notes that the entitlement exclusion clause "clearly excludes family members who are driving the vehicle without a reasonable belief of permission." *Id.* However, the court held the exclusion unenforceable because it violated an Idaho statute requiring the insurance policy to provide coverage to any person using the insured's vehicle with the express or implied permission of the insured. *Id.* In addition, some confusion arises from the fact that this court appears to refer to reasonable belief and express and implied permission as two distinct classes, when in fact, one encompasses the other.

⁹¹ 598 So. 2d 1169 (La. Ct. App. 1992).

⁹² *Id.* at 1169.

⁹³ *Id.*

⁹⁴ 600 So. 2d 106 (La. Ct. App. 1992).

⁹⁵ *Id.* at 108-09.

⁹⁶ *Id.* at 107.

B. Does "Any Person" Include the Insured Driving a Non-owned Vehicle?

Under policies that included the traditional permissive use clause, coverage was provided to the insured and to persons using the vehicle with the permission of the named insured.⁹⁷ Therefore, because the focus was on the insured, the named insured was always provided coverage regardless of which vehicle he drove.⁹⁸

Under the entitlement exclusion clause, however, coverage is excluded for "any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so."⁹⁹ Therefore, when courts are confronted with an entitlement exclusion clause, the issue of whether the phrase "any person" can apply to the named insured may arise.

For example, in *Lightning Rod Mutual Insurance Co. v. Ray*,¹⁰⁰ an employee took his employer's vehicle without a reasonable belief that he was entitled to do so.¹⁰¹ The employee drove the vehicle down a rough road, lost control and plunged 200 feet down a cliff, killing his passenger.¹⁰² Nationwide Insurance, the employer's insurance provider, claimed it was not required to provide coverage because the employee was not authorized to use the vehicle.¹⁰³ The employee's own vehicle was covered under a policy with Lightning Rod.¹⁰⁴ Therefore, the court was faced with the issue of whether Lightning Rod was required to provide coverage while its insured was operating a vehicle not owned by the insured.¹⁰⁵ The Ohio Court of Appeals held that the employee was not covered under either insurance policy because he did not have a reasonable belief of entitlement to operate his employer's vehicle.¹⁰⁶

Another case considering whether the insured can be excluded from coverage for using a non-owned vehicle without a reasonable belief that he was entitled to do so is *Canadian Insurance Co. v. Ehrlich*.¹⁰⁷ In this case, the insured's son took his father's truck, which was not covered under the family's policy, without his father's permission, and collided

⁹⁷ KIMBALL, *supra* note 6, at 399.

⁹⁸ LONG, *supra* note 3, § 3.03[2].

⁹⁹ KIT, *supra* note 1, at 2A8.

¹⁰⁰ No. 91-L-073, 1992 WL 192457 (Ohio Ct. App. June 30, 1992).

¹⁰¹ *Id.* at *1.

¹⁰² *Id.*

¹⁰³ *Id.* at *5.

¹⁰⁴ *Id.* at *2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 280 Cal. Rptr. 141 (Ct. App. 1991).

with a tree, killing one passenger and injuring two others.¹⁰⁸ The issue presented to the court was whether an insured, while driving a non-covered vehicle without a reasonable belief that he was entitled to do so, can nevertheless be provided coverage.¹⁰⁹ The California Court of Appeals affirmed the trial court's grant of summary judgment in favor of the insurer, stating that although the son was a covered person, he was excluded since he used the non-owned vehicle without a reasonable belief that he was entitled to do so.¹¹⁰

A contrary view was expressed in *Safeco Insurance Co. v. Diaz*,¹¹¹ where the Minnesota Court of Appeals held that the "exclusionary clause which denies liability coverage to the named insured [for using a vehicle without permission] conflicts with [the No-Fault Act] and is void."¹¹² In *Diaz*, Safeco's insured operated his brother's vehicle without a reasonable belief that he was entitled to do so.¹¹³ When he was involved in an accident his insurance company, Safeco, brought a declaratory judgment action, stating that the driver fell within the entitlement exclusion.¹¹⁴ The trial court granted Safeco's motion for summary judgment on the ground that Safeco was not required to provide coverage for its insured while he operated a non-owned vehicle without a reasonable belief that he was entitled to do so.¹¹⁵

The Court of Appeals of Minnesota reversed the trial court's grant of summary judgment for several reasons.¹¹⁶ First, the court said a genuine issue of material fact existed as to whether the insured had a reasonable belief of entitlement to operate the vehicle.¹¹⁷ Second, and more importantly, the court stated that "this exclusionary clause which denies

¹⁰⁸ *Id.* at 142.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 146.

¹¹¹ 385 N.W.2d 845 (Minn. Ct. App. 1986).

¹¹² *Id.* at 849. Approximately half the states have "mandated [by statute] that some form of no-fault coverage be included in automobile or motor vehicle insurance policies." KEETON & WIDISS, *supra* note 5, at 412. The idea behind these statutes is "that an injured party should be reimbursed without regard to his fault." ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 658 (1987).

¹¹³ 385 N.W.2d at 846. The insured had his own car, but his brother had left town and he "just wanted to drive his [brother's] car" even though he knew he was not to use it without permission. *Id.*

¹¹⁴ *Id.* at 845-46.

¹¹⁵ *Id.* at 846.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 848.

liability coverage to the named insured conflicts with the purposes of the Minnesota No-Fault Act . . . and is void."¹¹⁸

C. *Any Person Means Any Person — Including Family Members, Insureds, or Third Parties*

Inconsistent interpretations of the entitlement exclusion, particularly the issue of who is "any person," demonstrates the difficulty courts have had in interpreting the clause. It is this author's contention that the entitlement exclusion clause is unambiguous with regard to the "any person" language and can be simplified by using the following two prong analysis:

1) whether the driver at issue is a covered person under the terms of the policy;

2) whether an exclusion applies.

Although this may appear to be a common sense approach, it is not the approach followed by some courts.¹¹⁹ For example, in *State Auto v. Ellis*,¹²⁰ the court found the fact that the insured's daughter was a family member determinative of the issue of coverage.¹²¹ However, ending the inquiry there ignores the terms of the insurance policy.¹²² An

¹¹⁸ *Id.* at 849 (citing MINN. STAT. § 65B.41-71 (1984 & Supp. 1985)). *See also* Horace Mann Ins. Co. v. Westenfield, No. C5-92-792, 1993 WL 3853, at *1-3 (Minn. Ct. App. Mar. 16, 1993) (Relying on *Diaz*, the court stated that applying the entitlement exclusion to the named insured under the policy was contrary to Minnesota's No-Fault Act where the insured, a passenger in a non-owned vehicle, grabbed the steering wheel, thereby causing an accident. The injured parties filed claims with the insured's automobile and homeowner's insurance companies, but the insurance company denied coverage for using a vehicle without a reasonable belief of entitlement to do so.), *rev'd*, 496 N.W.2d 410, 410 (Minn. 1993) (stating that the lower court had "confused and therefore misapplied principles of No-Fault first-party coverage").

¹¹⁹ *Cf. supra* notes 35-58 and accompanying text (stopping the inquiry with the issue of whether one was a family member).

¹²⁰ 700 S.W.2d 801 (Ky. Ct. App. 1985).

¹²¹ *Id.* at 802-03. *See also* Hartford Ins. Co. v. Jackson, 564 N.E.2d 906, 912 (Ill. App. Ct. 1990) (finding "any person" ambiguous); American States Ins. Co. v. Adair Industries, Inc., 576 N.E.2d 1272, 1274-75 (Ind. Ct. App. 1991) (stating that the terms "family member" and "any person" were separate, distinct, and mutually exclusive); Paychex, Inc. v. Covenant Ins. Co., 549 N.Y.S.2d 237 (App. Div. 1989) (stating that a "family member" was still a "covered person" even without a reasonable belief of permission to drive the vehicle); Preston v. Tromm, No. 9-88-31, 1990 WL 61748, at *4 (Ohio Ct. App. Apr. 26, 1990) (stating that since the driver was a family member, whether or not he had permission to drive was of no consequence).

¹²² *See* Harlan v. Valley Ins. Co., 875 P.2d 471, 473 (Or. Ct. App. 1994). The Personal Auto Policy covers "[y]ou or any 'family member.'" KIT, *supra* note 1, at 2B1.

insurance policy, like any other contract "must be read as a whole."¹²³ "[R]efusal to consider the exclusions as 'terms of the insurance policy' leads to [an] absurd result."¹²⁴ As stated by one judge, "I do not believe that even if [the insured's unlicensed's son] were found to be a resident that he would thereby *automatically* always have consent, express or implied, of the owner, his father, to operate a vehicle. This would indeed be an extremely dangerous precedent to set."¹²⁵

Problems also arise in those courts which go on to the second prong to analyze the entitlement exclusion clause and determine who is "any person." For example, it has long been the rule that "[i]f the words of a policy can reasonably be given their plain, ordinary, and popular meaning, the provisions should be applied as written, and the parties should be bound by the agreement they made."¹²⁶ The issue thus turns on the plain meaning of "any person"? Is it truly ambiguous?

What is the "plain, ordinary, and popular meaning"¹²⁷ of "any"? *Webster's New World Dictionary* defines "any" as "one, no matter which . . . or what kind . . . without limit . . . every."¹²⁸ Next, what is a "person"? *Webster's New World Dictionary* defines "person" as "a human being . . . individual man, woman or child."¹²⁹ When taken together, "any person" means "every man, woman or child without limit."

To put this in context, what would one suppose the phrase "any person" means to the average listener if an announcer broadcast over the radio "any person who comes to the station right now will win a thousand dollars?" In that situation, the listener would perceive the phrase "any person" to mean "every man, woman or child without limit." Yet, in the interpretation of insurance policies this phrase somehow becomes ambiguous to some courts.¹³⁰ It is this author's contention, and the position stated by some courts,¹³¹ that the phrase "any person" means

Yet, coverage is not provided for "any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so." *Id.* at 2A8.

¹²³ *Id.* (citing *Hoffman Constr. Co. v. Fred S. James & Co.*, 836 P.2d 703 (Or. 1992)).

¹²⁴ *Id.*

¹²⁵ *Newell v. Nationwide Mut. Ins. Co.*, 403 S.E.2d 525, 530 (N.C. Ct. App. 1991) (Lewis, J., dissenting), *rev'd*, 432 S.E.2d 284 (N.C. 1993). The North Carolina Supreme Court followed this dissenting opinion in reversing the appellate decision.

¹²⁶ *Hartford Ins. Co. v. Jackson*, 564 N.E.2d 906, 909 (Ill. App. Ct. 1991) (citing *Dora Township v. Indiana Ins. Co.*, 400 N.E.2d 921 (Ill. 1980)).

¹²⁷ *Id.* (citing *Dora Township*, 400 N.E.2d at 921).

¹²⁸ WEBSTER'S NEW WORLD DICTIONARY 62 (3d college ed. 1988).

¹²⁹ *Id.* at 1008.

¹³⁰ See *supra* notes 35-58 and accompanying text.

¹³¹ See *supra* notes 59-96 and accompanying text.

any person, including family members, insureds or third parties. If the insurance company had intended otherwise, the policy would state "any person but the persons listed above," or "any person but family members."¹³²

II. WHAT IS REASONABLE BELIEF?

A. *Judicial Determination of Reasonable Belief*

In some cases, it is clear that the driver of the vehicle could not possibly have had a reasonable belief that she was entitled to use the particular vehicle at issue. For example, in one case, a man "hit [one of the owners] in the jaw and took the [car],"¹³³ and in another case, a driver "pled guilty to theft" of the insured vehicle.¹³⁴ However, the majority of cases are not so clear. As a result, in *General Accident Fire & Life Assurance Corp. v. Perry*,¹³⁵ the court developed the following two-pronged test for analyzing reasonable belief: (1) whether the driver had a subjective belief that she was entitled to use the car, and (2) whether this belief was reasonable.¹³⁶

¹³² Most policies state that "[t]his exclusion does not apply to a family member using your covered auto." See, e.g., *Safeco Ins. Co. of Am. v. Davis*, 721 P.2d 550, 551 (Wash. Ct. App. 1986).

¹³³ *Lee v. General Accident Ins. Co.*, 738 P.2d 516, 517 (N.M. 1987). See also *Economy Fire & Casualty Co. v. State Farm Mut. Ins. Co.*, 505 N.E.2d 1334 (Ill. App. Ct. 1987) (holding that when an angry and intoxicated driver knocked the insured down and took the keys from her pocket, the driver did not have a reasonable belief of entitlement to operate insured's vehicle).

¹³⁴ *McCraney v. Fire & Casualty Ins. Co.*, 357 S.E.2d 327, 328 (Ga. Ct. App. 1987). See also *Campbell v. New Jersey Auto. Full Ins. Underwriting Ass'n*, 637 A.2d 226 (N.J. Super. Ct. App. Div. 1994) (applying the entitlement exclusion to a driver who had stolen insured's vehicle). But see *Buckeye Union Ins. Co. v. Carrell*, 602 N.E.2d 305, 307 (Ohio Ct. App. 1991) (entitlement exclusion did not apply when the vehicle was stolen). In this case, the insured used car lot's employee went with the driver and the driver's friend so that they could test drive an automobile from insured's used car lot. *Id.* at 306. The two men stole the vehicle by assaulting the insured used car lot's employee and "shov[ing] him into the trunk." *Id.* The used car lot's employee sought employer's coverage with Buckeye. *Id.* Buckeye denied coverage under the entitlement exclusion clause since the vehicle had been stolen. *Id.* at 307. Yet, the court stated that since the driver had the initial permission of insured to operate the vehicle, the entitlement exclusion clause did not apply. *Id.*

¹³⁵ 541 A.2d 1340 (Md. Ct. Spec. App. 1988).

¹³⁶ *Id.* at 1350. See *Nationwide Mut. Ins. Co. v. Southern Trust Co.*, 330 S.E.2d 443, 445 (Ga. App. Ct. 1985), where the Georgia Court developed the following objective test to determine reasonable belief:

First, it must be positively established that the driver actually believed that she was entitled to use the vehicle.¹³⁷ If this is not established, then the conclusion must be that the driver had no reasonable belief.¹³⁸ If it is established that the driver actually believed that she was entitled to use the vehicle, then the court examines whether this actual belief was “reasonable.”¹³⁹ In analyzing the reasonableness of a driver’s belief, many factors are important, including:

- (1) Whether the driver had express permission to use the vehicle;
- (2) whether the driver’s use of the vehicle exceeded the permission granted;
- (3) whether the driver was “legally” entitled to drive under the laws of the applicable state;
- (4) whether the driver had any ownership or possessory right to the vehicle;
- (5) whether there was some form of relationship between the driver and the insured, or one authorized to act on behalf of the insured, that would have caused the driver to believe [she] was entitled to drive the vehicle.¹⁴⁰

Other factors may be important as well, such as “the borrower’s age, personality, and social milieu, and the effect of such attendant influences on his judgment and mind as may be credibly discerned from the proofs.’”¹⁴¹

The use of the term “reasonable belief” in the exclusionary clause provides an objective standard From the language of the clause it is clear that coverage is excluded if the driver (a) knew he was not entitled to drive the vehicle, or (b) if he claimed he believed he was entitled to drive the vehicle, but was without reasonable grounds for such belief or claim.

See also Atlantic Mut. Ins. Co. v. Ayer Elec., Inc., Nos. C-920406, C-920788, C-920825, 1993 WL 538997, at *5 (Ohio Ct. App. Dec. 29, 1993) (“[B]oth subjective and objective factors, including the driver’s actual belief and the reasonableness of that belief based upon the surrounding circumstances as shown by the evidence” must be taken into consideration (citing Blount v. Kennard, 612 N.E.2d 1268 (Ohio Ct. App. 1992); Bush v. Baldwin, No. 9-89-62, 1991 WL 117249 (Ohio Ct. App. June 20, 1990); Bowen v. Price, No. 83AP-541, 1984 WL 5906 (Ohio Ct. App. Sept. 20, 1984))); United Servs. Auto. Ass’n v. Continental Ins. Co., 1985 WL 4692, at *4 (Tenn. Ct. App. 1985).

¹³⁷ *See United Servs. Auto. Ass’n*, 1985 WL 4692, at *4.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Perry*, 541 A.2d at 1350.

¹⁴¹ *State Farm Mut. Auto. Ins. Co. v. Moore*, 544 A.2d 1017, 1022 (Pa. Super. Ct. 1988) (Montemuro, J., concurring in part and dissenting in part) (quoting *Miller v. United*

B. *Permission as a Factor in Determining Reasonable Belief*

Under the permissive use clause, the focus was on whether or not the owner of the vehicle had expressly or impliedly given the driver permission to operate the vehicle.¹⁴² Since the entitlement clause has replaced the permissive use clause,¹⁴³ the issue arises as to whether permission is still relevant in an entitlement exclusion clause analysis.

Some courts ignore the reasonable belief language entirely and focus solely on whether the user of the vehicle had the express or implied permission of the owner.¹⁴⁴ On the other hand, some courts have stated that express or implied permission from the owner is no longer relevant, and instead focus on the reasonable belief of the user.¹⁴⁵ Other courts state that permission is relevant, but not conclusive, in determining the existence of reasonable belief.¹⁴⁶

*Ohio Casualty Insurance Co. v. Safeco Insurance Co.*¹⁴⁷ is among the cases where the court focused solely on permission, ignoring the reasonable belief language entirely. In this case, the Missouri Court of Appeals, in interpreting the entitlement exclusion clause, stated: “[T]he crucial issue is whether [the driver] had permission to use the [vehicle].”¹⁴⁸ Likewise, in *Canadian Indemnity Co. v. Heflin*,¹⁴⁹ the

States Fidelity & Guar. Co., 28 Pa. D. & C.3d 389 (1983)).

¹⁴² *Cooper v. State Farm Mut. Ins. Co.*, 849 F.2d 496, 499 (11th Cir. 1988) (“The permissive use clauses focused on the owner’s perspective.”).

¹⁴³ See *supra* notes 8-11 and accompanying text.

¹⁴⁴ See *infra* notes 147-52 and accompanying text.

¹⁴⁵ See *infra* notes 153-59 and accompanying text. See also *Fisher v. United States Fidelity & Guar. Co.*, 586 A.2d 783, 791 (Md. Ct. Spec. App. 1991) (comparing the entitlement exclusion clause with the permissive use clause and stating that the driver’s permission to drive the vehicle is irrelevant under the entitlement exclusion clause, and instead focusing solely on whether the driver had a reasonable belief that he was entitled to operate the vehicle).

¹⁴⁶ See *infra* notes 160-63.

¹⁴⁷ 768 S.W.2d 602 (Mo. Ct. App. 1989).

¹⁴⁸ *Id.* at 603. In this case, employee had taken employer’s van, without his permission, for a “pleasure excursion,” began drinking alcohol, slept in the van, began drinking again the next day, and continued to drive which ended in a five car collision. *Id.* The Missouri Court of Appeals, focusing solely on permission, found that the driver had implied permission at the time of the accident based on driver’s prior use of the automobile. *Id.* at 604. A “reasonable belief” analysis was not performed. See also *Canadian Ins. Co. v. Ehrlich*, 280 Cal. Rptr. 141 (Ct. App. 1991) (stating that “entitled” means basically the same thing as “permit,” therefore, for an operator of a vehicle to have a reasonable belief of entitlement to operate a vehicle, she must have legal title or permission from the owner).

¹⁴⁹ 727 P.2d 35 (Ariz. Ct. App. 1986).

Arizona Court of Appeals stated that the entitlement exclusion clause's focus was on whether or not the driver of the vehicle had the permission of the apparent owner, and that other facts in determining reasonable belief were irrelevant.¹⁵⁰ In *Guarantee Insurance Co. v. Dunn*,¹⁵¹ the Ohio Court of Appeals stated: "[T]he test is whether [the driver] actually and reasonably believed that he had the owner's consent."¹⁵²

On the other hand, some courts focus solely on the reasonable belief of the operator, regardless of permission. As stated in *Bowen v. Price*:¹⁵³ "Even if plaintiff were without express or implied permission to use the . . . [vehicle] at the time of the accident, coverage would still be afforded . . . unless it is proved that plaintiff did not have a reasonable belief that she was entitled to use the vehicle at that time."¹⁵⁴

An illustration of the view that permission is no longer controlling can be found in *United States Fire Insurance Co. v. United Service Automobile Ass'n*,¹⁵⁵ where the passenger grabbed the steering wheel of the vehicle, causing it to leave the road.¹⁵⁶ Insurer argued that the passenger did not have permission to grab the steering wheel and was therefore not covered.¹⁵⁷ However, the court stated that the issue was reasonable belief, not permission.¹⁵⁸ Because the insurer did not successfully disprove the driver's reasonable belief that such an event might occur, the court allowed coverage.¹⁵⁹

Although some courts have taken the position that as long as the driver has the reasonable belief that she is entitled to use the vehicle and that express and implied permission are irrelevant, the majority of courts still view permission as an important factor in determining reasonable

¹⁵⁰ *Id.* at 36-37. In this case, which was apparently a case of first impression in Arizona, the insurance company had filed a declaratory judgment action requesting that the trial court determine that an underaged, unlicensed driver fell within the policy exclusion for using the vehicle without a reasonable belief that he was entitled to do so. *Id.* at 35. The court did not take other factors, such as lack of a license and the fact the driver was underaged, into consideration in determining reasonable belief. In fact, the court found this clause "ambiguous" and focused solely on whether the apparent owner of the vehicle had consented to driver's use of the vehicle. The court, therefore, found that the policy covered the driver. *Id.*

¹⁵¹ No. 13843, 1989 WL 16893 (Ohio Ct. App. Mar. 1, 1989).

¹⁵² *Id.* at *2.

¹⁵³ No. 83AP-451, 1984 WL 5906 (Ohio Ct. App. Sept. 20, 1984).

¹⁵⁴ *Id.* at *4.

¹⁵⁵ 772 S.W.2d 218 (Tex. Ct. App. 1989).

¹⁵⁶ *Id.* at 220.

¹⁵⁷ *Id.* at 223.

¹⁵⁸ *Id.* at 223-24.

¹⁵⁹ *Id.* at 224.

belief.¹⁶⁰ As stated in *General Accident Fire & Life Assurance Corp. v. Perry*,¹⁶¹ one of the factors in determining whether a driver's belief was reasonable is "whether the driver had express permission to use the vehicle."¹⁶² For example, in *Perry*, the court took into consideration the fact that insured's unlicensed son testified that he did not have permission to use insured's vehicle on the night in question, in denying coverage.¹⁶³

C. Can Second Permittees Have a Reasonable Belief Even Without the Owner's Express or Implied Permission?

Under the traditional permissive use clause, most courts have held that "[o]rdinarily, one permittee does not have authority to select another permittee without specific authorization from the named insured."¹⁶⁴ This general rule logically follows from the fact that the permissive use clause focuses on whether the insured owner gave the driver permission to use the automobile.¹⁶⁵ However, under the entitlement exclusion clause, the issue of whether a second permittee is entitled to use insured's vehicle is not as clear. Due to the fact that the entitlement exclusion clause focuses on the belief of the user, the user could reasonably believe she was entitled to use the automobile, even without express permission from the insured.¹⁶⁶

For example, the Louisiana Court of Appeals in *Building Specialties, Inc. v. State Farm Mutual Automobile Insurance Co.*¹⁶⁷ stated:

¹⁶⁰ See, e.g., *Omaha Property & Casualty Ins. Co. v. Johnson*, 866 S.W.2d 539 (Tenn. Ct. App. 1993); *United Servs. Auto. Ass'n v. Continental Ins. Co.*, 1985 WL 4692 (Tenn. Ct. App. Dec. 24, 1985); *Cincinnati Ins. Co. v. Plummer*, 444 S.E.2d 378 (Ga. Ct. App. 1994); *Driskill v. American Family Ins. Co.*, 698 F. Supp. 789 (E.D. Mo. 1988); *Allied Group Ins. Co. v. Allstate Ins. Co.*, 852 P.2d 485 (Idaho 1993); *State Farm Mut. Auto. Ins. Co. v. Casualty Reciprocal Exch.*, 600 So. 2d 106 (La. Ct. App. 1992); *Canadian Ins. Co. v. Ehrlich*, 280 Cal. Rptr. 141 (Ct. App. 1991). These are just a few of the examples which illustrate that in determining whether driver had a reasonable belief, courts take into consideration whether the driver had permission to operate the vehicle.

¹⁶¹ 541 A.2d 1340 (Md. Ct. Spec. App. 1988).

¹⁶² *Id.* at 1350.

¹⁶³ *Id.* at 1341.

¹⁶⁴ *Bailey v. General Ins. Co.*, 144 S.E.2d 898, 900 (N.C. 1965).

¹⁶⁵ *Cooper v. State Farm Mut. Ins. Co.*, 849 F.2d 496, 499 (11th Cir. 1988) ("The permissive use clause focused on the owner's perspective.")

¹⁶⁶ *State Farm Mut. Auto. Ins. v. Progressive Casualty Ins. Co.*, 1988 WL 79316, at *4 (Ohio Ct. App. July 26, 1988) (stating that the entitlement exclusion "does not require permission from a named insured or even an insured").

¹⁶⁷ 440 S.W.2d 984, 988 (La. Ct. App. 1983).

The contract language "reasonable belief" provided a subjective standard regarding a determination of permission. Coverage is provided under this language as long as the permittee reasonably believed that he had the owner's permission, whether or not the person granting permission had actual authority to transmit such permission.¹⁶⁸

Similarly, in *Cooper v. State Farm Mutual Automobile Insurance Co.*,¹⁶⁹ the court held: "[I]t is not unreasonable for a second permittee . . . to assume that a first permittee . . . has authority to delegate the permission to drive when the first permittee has possession of the car and apparent authority with respect to it."¹⁷⁰ Likewise, in *Canadian Indemnity Co. v. Heflin*,¹⁷¹ the Arizona Court of Appeals held that a second permittee had a reasonable belief that he was entitled to drive the vehicle, because he had obtained permission from the original permittee.¹⁷²

Although a second permittee could have a reasonable belief of entitlement to use the vehicle after having obtained permission from the authorized permittee, cases are treated differently if the second permittee knew the insured owner prohibited others from operating the vehicle. For example, in *Dairyland Insurance Co. v. General Accident Insurance Co.*,¹⁷³ the second permittee, a friend of the insured's daughter, knew of the insured's prohibition against the friend's operating the vehicle. Nevertheless, the owner's daughter gave her friend permission to operate the vehicle, and the two were involved in a collision.¹⁷⁴ Based upon evidence that the insured's instructions were such that no one was to operate the vehicle but the daughter, the Supreme Court of Alabama held that the second permittee came within the exclusion by using the vehicle without a reasonable belief that he was entitled to do so.¹⁷⁵

Similarly, in *Omaha Property & Casualty Insurance Co. v. Peterson*,¹⁷⁶ the Missouri Court of Appeals held that the second permittee's belief that she was entitled to use the vehicle was unreasonable because she knew insured would not approve of an unlicensed person's use of the

¹⁶⁸ *Id.*

¹⁶⁹ 849 F.2d 496, 499 (11th Cir. 1988).

¹⁷⁰ *Id.*

¹⁷¹ 727 P.2d 35 (Ariz. Ct. App. 1986).

¹⁷² *Id.* at 36.

¹⁷³ 435 So. 2d 1263 (Ala. 1983).

¹⁷⁴ *Id.* at 1264.

¹⁷⁵ *Id.*

¹⁷⁶ 865 S.W.2d 789 (Mo. Ct. App. 1993).

vehicle.¹⁷⁷ Therefore, the court ruled that, under these conditions, an authorized permittee's consent "could not create a reasonable belief of entitlement."¹⁷⁸ Likewise, in *Nationwide Mutual Insurance Co. v. Baer*,¹⁷⁹ a North Carolina Court of Appeals held that an unlicensed driver who had been instructed by the owner of the vehicle not to drive it falls within the category of someone using a vehicle without a reasonable belief of entitlement to do so.¹⁸⁰

An extreme example of how the entitlement exclusion clause analysis focuses solely on the user can be found in *United Services Automobile Ass'n v. Continental Insurance Co.*,¹⁸¹ where the court allowed coverage even though the second permittee did not have permission from the insured-owner or the authorized user. In this case, the owner's son had taken insured's vehicle to college with the instructions that no one else was to operate the vehicle.¹⁸² Without the son's knowledge, his friend drove the insured's vehicle to a pub to drink beer.¹⁸³ After leaving the pub, the son's friend drove to another friend's apartment to drink more beer.¹⁸⁴ On the way home, the friend struck a telephone pole and injured a passenger in the vehicle.¹⁸⁵ The court found that the son's friend had a reasonable belief of entitlement to operate insured's vehicle despite the facts that he did not have permission and that he was intoxicated.¹⁸⁶ The finding of reasonable belief was based upon the fact that "it was an accepted practice at the University to allow friends to drive your automobile."¹⁸⁷

¹⁷⁷ *Id.* at 790.

¹⁷⁸ *Id.* at 791. Authorized permittee told second permittee, "Be careful, don't let my mother see [you]." *Id.* at 790.

¹⁷⁹ 439 S.E.2d 202 (N.C. Ct. App. 1994).

¹⁸⁰ *Id.* at 205.

¹⁸¹ 1985 WL 4692 (Tenn. Ct. App. Dec. 24, 1985).

¹⁸² *Id.* at *5.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *5-6.

¹⁸⁷ *Id.* at *5. *But see* *Bush v. Baldwin*, No. 9-89-62, 1991 WL 117249 (Ohio Ct. App. June 20, 1991), where insured gave her daughter a car to take to Ohio University, instructing her not to allow others to use the vehicle. *Id.* at *1. Without the daughter's knowledge, her intoxicated friend took the insured's vehicle and was involved in an accident. *Id.* In this case, the court did not speak of any custom to allow friends to use insured's automobile at the university, nor was the fact that insured's daughter and driver were friends controlling. *Id.* at *3. The court held that driver did not have a reasonable belief of entitlement to operate insured's vehicle. *Id.* at *4.

D. Can Deviation From the Scope of Permission Negate a Driver's Reasonable Belief?

In automobile insurance policies that use the entitlement exclusion clause, a question arises when a driver had the initial reasonable belief that she was entitled to use the vehicle for a specific purpose, then deviates from that purpose. Does a deviation from the scope of that entitlement in effect nullify the reasonable belief?

Under the traditional permissive use clause, deviation from the scope of entitlement was analyzed solely by the extent the driver deviated from the original scope of permission given by the owner.¹⁸⁸ In fact, some permissive use clauses made specific reference to the scope of permission granted.¹⁸⁹ By contrast, the entitlement exclusion clause shifts the focus to the user's belief.¹⁹⁰ The issue thus becomes whether the user of the automobile reasonably believed that he was entitled to use the vehicle in such a manner as to deviate from the scope. Therefore, under the entitlement exclusion clause, the extent of the permission granted by the owner to the user is but one factor in determining the user's reasonable belief.¹⁹¹

In analyzing the deviation from scope issue, some courts find the deviation alone sufficient to exclude the driver from coverage. For example, in *Roberts v. United States Fidelity & Guaranty Co.*,¹⁹² the Florida Court of Appeals held that when a driver, who had been authorized to use the vehicle to the extent necessary to repair it, made a trip to the beach, he went beyond the scope of the purpose for which he

¹⁸⁸ See *Moritz v. St. Paul Fire & Marine Ins. Co.*, 739 P.2d 731, 734 (Wash. Ct. App. 1987) (setting out the three approaches to interpreting the permissive use clause, all of which focus on the deviation in the context of the extent of permission given by the owner).

¹⁸⁹ See *United Pac. Ins. Co. v. Larsen*, 723 P.2d 8 (Wash. Ct. App. 1986). In this case, the court stated that United Pacific had used the standard omnibus clause language in the past, but decided to change to the entitlement exclusion clause. Therefore, the court concluded that due to the insurance company's past policy language, it was "apparent they knew how to limit coverage to the scope of permission granted." *Id.* at 10.

¹⁹⁰ *McKenzie & Johnson*, *supra* note 10, at 653.

¹⁹¹ *American Select Ins. Co. v. Bates*, No. 1381, 1987 WL 28946, at *2 (Ohio Ct. App. Dec. 17, 1987). See also *Bowen v. Price*, No. 83AP-541, 1984 WL 5906, at *4 (Ohio Ct. App. Sept. 20, 1984) (stating that the scope of permission is not the only factor to consider; other factors include the nature of the use and driver's age and education). But see *Cincinnati Ins. Co. v. Babcock*, No. L-87-035, 1988 WL 39730, *3 (Ohio Ct. App. Apr. 29, 1988) (focusing solely on the extent of permission given by the owner of the vehicle).

¹⁹² 498 So. 2d 1037 (Fla. Dist. Ct. App. 1986).

was given the vehicle, and "did not have a 'reasonable belief' that he was entitled to drive [the] vehicle to the beach."¹⁹³ Likewise, in *Johnson v. Blue Ridge Insurance Co.*,¹⁹⁴ the Georgia Court of Appeals held that a second permittee "exceeded the scope of permission given by [the insured] . . . thus excluding coverage for the incident" when she borrowed insured's vehicle to search for a job, and thereafter allowed a twelve-year-old to drive the car.¹⁹⁵ In *Lightning Rod Mutual Insurance Co. v. Ray*,¹⁹⁶ where an employee took a camp vehicle to get gasoline, yet went ten miles past the gas station to "Hell's Hollow" and drove the vehicle off of a cliff,¹⁹⁷ the Ohio Court of Appeals held that "his detour negated any possibility he might have been entitled to use the vehicle"¹⁹⁸

However, in other cases courts seem to take the position that unless specific restrictions are placed on the driver, coverage is afforded regardless of a general deviation.¹⁹⁹ For example, in *Massachusetts Bay Insurance Co. v. American States Insurance Co.*,²⁰⁰ the insured's girlfriend had borrowed the insured's truck on different occasions to run errands in the neighborhood.²⁰¹ On the day of the accident, she borrowed the insured's truck for the purpose of running errands and said "she would be right back."²⁰² However, driver went "to a party and then to a bar [twenty-five] miles from her stated destination."²⁰³ Although the driver exceeded the scope of her entitlement to use the vehicle, one Ohio Court of Appeals affirmed the trial court's decision that the driver had a reasonable belief that she was entitled to operate the insured's vehicle, based on the fact that the insured did not set any limits on his girlfriend's use of the vehicle that particular night.²⁰⁴

By the same token, if specific limits are set, the driver will be excluded if he deviates from those limits.²⁰⁵ An example is *Donegal*

¹⁹³ *Id.* at 1039.

¹⁹⁴ 376 S.E.2d 703 (Ga. Ct. App. 1988).

¹⁹⁵ *Id.* at 704.

¹⁹⁶ No. 91-L-073, 1992 WL 192457 (Ohio Ct. App. June 30, 1992).

¹⁹⁷ *Id.* at *1.

¹⁹⁸ *Id.* at *6.

¹⁹⁹ See *infra* notes 200-04.

²⁰⁰ No. 12955, 1987 WL 13651 (Ohio Ct. App. June 17, 1987).

²⁰¹ *Id.* at *1.

²⁰² *Id.* at *3.

²⁰³ *Id.* at *1.

²⁰⁴ *Id.* at *3.

²⁰⁵ See *infra* notes 206-14. But see *United Services Auto. Ass'n v. Lail*, 385 S.E.2d 424 (Ga. Ct. App. 1989) where the insured placed express restrictions on the driver

Mutual Insurance Co. v. Eycler,²⁰⁶ where the insured's brother was only allowed to operate the insured's vehicle for the purpose of going to work. The brother could not operate the vehicle past midnight, and he could not drive the vehicle under the influence of alcohol.²⁰⁷ Nevertheless, the insured's brother took the vehicle and was consuming alcohol on the way to a friend's house at 2:00 a.m. when he was involved in an accident.²⁰⁸ The Superior Court of Pennsylvania held that the insured's brother fell into the exclusion of someone using the vehicle without a reasonable belief that he was entitled to do so, and thus was denied coverage.²⁰⁹

In *American Select Insurance Co. v. Bates*,²¹⁰ the insured's son-in-law asked permission to take the insured's vehicle to purchase a car part. The insured specifically told him to "bring the car right back."²¹¹ Thereafter, the insured's son-in-law drove the car from the insured's residence forty-five miles to Columbus, Ohio and was involved in an accident.²¹² The Ohio Court of Appeals stated that "the extent of permission granted to the user is one of the factors to be considered in determining the reasonableness of his belief"²¹³ and found that the insured's son-in-law's "departure was so complete that a reasonable person could not believe his use was still permissive."²¹⁴

E. Reasonable Belief Encompasses a Variety of Factors, Including Permission

As stated previously, the entitlement exclusion clause replaced the traditional omnibus clause language in response to the substantial amount of litigation occurring under the permission approach.²¹⁵ Therefore, it is clear that permission is no longer the crucial factor in determining

regarding the exact time and route to drive the vehicle. *Id.* at 425. When the accident happened on a different route, insurer denied coverage under the entitlement exclusion clause. *Id.* Although specific instructions were given to the driver, the court held that deviation from exact route did not exclude driver from coverage. *Id.* at 425-26.

²⁰⁶ 519 A.2d 1005 (Pa. Super. Ct. 1987).

²⁰⁷ *Id.* at 1009.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1010.

²¹⁰ No. 1381, 1987 WL 28946 (Ohio Ct. App. Dec. 17, 1987).

²¹¹ *Id.* at *1.

²¹² *Id.*

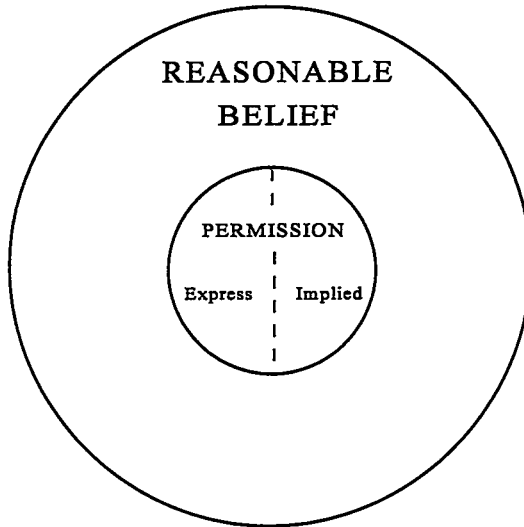
²¹³ *Id.* at *2.

²¹⁴ *Id.* at *3.

²¹⁵ See *supra* notes 8-11 and accompanying text.

coverage.²¹⁶ It may be a factor in determining coverage,²¹⁷ but to focus on permission alone is to blatantly ignore the terms of the insurance policy.

The following diagram demonstrates concisely why focusing on permission alone is an incorrect analysis:



As one can see, reasonable belief is broader in scope than permission,²¹⁸ and in fact completely encompasses the permission approach. More specifically, under the permission approach, coverage exists only with the express or implied permission of the owner.²¹⁹ However, under a reasonable belief analysis, one can have a reasonable belief of entitlement to operate insured's vehicle if the user has the express or implied permission of the owner *and* in situations where other factors indicate that a reasonable belief exists even without the owner's permission.²²⁰

²¹⁶ See W. Shelby McKenzie & H. Alston Johnson, *Insurance Law* 47 LA. L. REV. 511, 515 (1987) (noting that the Personal Auto Policy, which was drafted by the Insurance Services Office, "has removed any permission requirement from the definition of insured and instead has inserted an exclusion").

²¹⁷ See *supra* note 140 and accompanying text.

²¹⁸ See *supra* note 14 and accompanying text.

²¹⁹ See *supra* note 7 and accompanying text.

²²⁰ See *supra* notes 133-220 and accompanying text.

III. CAN UNLICENSED AND INTOXICATED DRIVERS HAVE A REASONABLE BELIEF?

A. *Unlicensed Drivers*

Because there are statutory mandates in every jurisdiction that one must be licensed to operate a motor vehicle,²²¹ it would seem to be logical that an unlicensed driver is not entitled to operate a motor vehicle, irrespective of any reasonable belief that she is entitled to do so. However, some courts have found the entitlement exclusion clause to be ambiguous as it applies to unlicensed drivers. As the court in *State Farm Mutual Automobile Insurance Co. v. Moore*²²² explained:

A provision of a contract of insurance is ambiguous if . . . reasonably intelligent persons would differ regarding its meaning . . . That is, for a person to reasonably believe that he is entitled to use a car a person must have the owner's permission and a valid driver's license. However, the clause could also be interpreted to mean that a person can reasonably believe he is entitled to use a car once he has obtained the owner's permission.²²³

Some courts state that unlicensed drivers are not entitled to operate a motor vehicle regardless of any reasonable belief of entitlement to do so. For example, the Georgia Court of Appeals stated in *Safeway Insurance Co. v. Jones* that the entitlement exclusion focuses on the "state of mind of the person using the vehicle,"²²⁴ and that "an unlicensed driver . . . could not have 'reasonably' believed that he was entitled to drive the insured vehicle or any other vehicle, regardless of whether he had . . . permission to do so."²²⁵ In *Rogers v. Travelers Indemnity Co.*,²²⁶ the court granted summary judgment for the insurer stating that

²²¹ See, e.g., KY. REV. STAT. ANN. § 186.410 (Baldwin 1994); OHIO REV. CODE ANN. § 4507.02 (Anderson 1995); ILL. ANN. STAT. ch. 625, para. 5/6-101 (Smith-Hurd 1990).

²²² 544 A.2d 1017, 1019 (Pa. Super. Ct. 1988). In this case, the court found the word "entitled" ambiguous and gave coverage to unlicensed driver who had been given permission to operate insured's vehicle by insured's daughter.

²²³ *Id.*

²²⁴ *Safeway Ins. Co. v. Jones*, 415 S.E.2d 19, 20 (Ga. Ct. App. 1992) (citing *Georgia Farm v. Fire & Casualty Ins. Co.*, 350 S.E.2d 325 (Ga. Ct. App. 1986)).

²²⁵ *Id.* at 19, 20. See also *Miller v. Southern Heritage Ins. Co.*, 450 S.E.2d 432, 435 (Ga. Ct. App. 1994) (stating that a driver with a learner's permit could not have had a reasonable belief "[a]s a matter of law").

²²⁶ 413 S.E.2d 254 (Ga. Ct. App. 1991).

an unlicensed driver could not have reasonably ascertained that he was entitled to operate said vehicle since a learner's permit does not permit one to drive any vehicle on public highways without the supervision of a licensed adult.²²⁷

However, regardless of the fact that one is required to have an operator's license to legally operate a motor vehicle, the majority of jurisdictions appear to focus on the user's reasonable belief of entitlement to operate a particular motor vehicle, and not whether the user was licensed to drive. For example, in *Aetna Casualty & Surety Co. v. Nationwide Mutual Insurance Co.*,²²⁸ the court defined the issue of whether an unlicensed driver could have a reasonable belief of entitlement to operate a motor vehicle as follows:

The question under the policy is not one of legality — whether the operator had legal permission of the owner, or legal permission from the state in the form of a valid driver's license; rather, it is a question of fact — did the operator have a reasonable belief that, at the time of the accident, he was entitled to drive the vehicle?²²⁹

Therefore, in most courts, the fact that the driver is unlicensed will not by itself negate any possibility that the unlicensed driver may have a reasonable belief that he is entitled to operate the vehicle. In fact, there are many other factors that courts consider in analyzing an unlicensed driver's reasonable belief.²³⁰ As discussed in Part I,²³¹ if the unlicensed driver is a family member, he may be covered by his family member status, regardless of the fact that he is unlicensed.²³² Another

²²⁷ *Id.* at 255.

²²⁸ 392 S.E.2d 377 (N.C. 1990).

²²⁹ *Id.*

²³⁰ See *Fisher v. United States Fidelity & Guar. Co.*, 586 A.2d 783, 791 (Md. Ct. Spec. App. 1991) (stating that whether the driver of the vehicle is licensed is irrelevant under the entitlement clause; the sole focus is whether the driver had a reasonable belief that he was entitled to operate the vehicle); *Blount v. Kennard*, 612 N.E.2d 1268, 1270 (Ohio Ct. App. 1992) (“In determining whether . . . [driver] had a ‘reasonable belief’ under the policy language in this case, the trial court had to consider subjective and objective factors, including the extent of permission granted.”).

²³¹ See *infra* notes 36-58 and accompanying text.

²³² See *Hartford Ins. Co. v. Jackson*, 564 N.E.2d 906 (Ill. App. Ct. 1991) (providing coverage to an unlicensed son because of his family member status); *American States Ins. v. Adair Indus., Inc.*, 576 N.E.2d 1272 (Ind. Ct. App. 1991) (providing coverage to insured's unlicensed brother because of his family member status); *State Auto. Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801 (Ky. Ct. App. 1985) (providing coverage to an unlicensed fourteen year old daughter because of her family member status); *Psychex, Inc. v.*

factor which carries a significant amount of weight in the majority of jurisdictions is whether the unlicensed driver had express permission from the insured to operate the vehicle. For example, in *Cincinnati Casualty Co. v. Rickard*,²³³ the Ohio Court of Appeals held that the unlicensed driver was reasonable in believing she was entitled to operate the vehicle based on express permission from the insured, "subject to whatever penalty the law might impose if she was discovered to be driving under [a suspended license]."²³⁴ Similarly, in *Canadian Indemnity Co. v. Heflin*, the Arizona Court of Appeals held that an unlicensed driver with insured's permission to drive the car was not subject to the exclusion for using the vehicle without a reasonable belief he was entitled to do so.²³⁵

Another case where the unlicensed driver had express permission from the insured to operate the vehicle is *Safeway Insurance Co. v. Holmes*.²³⁶ In that case, the Georgia Court of Appeals stated that the statute prohibiting a fifteen-year-old from driving without a licensed adult in the car "relates to the manner of defendant Holmes' use of the vehicle and does not abrogate the fact that she had received permission for the use of the [car] from an apparently appropriate source."²³⁷

Yet, courts may be a little more reluctant to provide coverage to an unlicensed driver if the permission were not granted expressly by the insured, but from an authorized user. In *Cooper v. State Farm Automobile Insurance Co.*,²³⁸ a fourteen-year-old unlicensed driver obtained permission from insured's son to operate a vehicle. The court held that "under North Carolina law one need not necessarily show he had a legal right to drive to establish a reasonable belief of entitlement."²³⁹ The issue of reasonable belief was held to be a factual question for the jury.²⁴⁰ Likewise, in *Broz v. Winland*,²⁴¹ the Supreme Court of Ohio held the issue of whether an unlicensed driver with permission from a permittee, not the insured, could have a reasonable belief of entitlement to use the

Covenant Ins. Co., 549 N.Y.S.2d 237 (App. Div. 1989) (providing coverage to an unlicensed son because of his family member status); *Preston v. Tromm*, No. 9-88-31, 1990 WL 61748 (Ohio Ct. App. Apr. 28, 1990) (providing coverage to an unlicensed son because of his family member status).

²³³ No. CA-726, 1990 WL 166480 (Ohio Ct. App. Oct. 25, 1990).

²³⁴ *Id.* at *3.

²³⁵ 727 P.2d 35 (Ariz. Ct. App. 1986).

²³⁶ 390 S.E.2d 52 (Ga. Ct. App. 1989).

²³⁷ *Id.* at 54-55.

²³⁸ 849 F.2d 496 (11th Cir. 1988).

²³⁹ *Id.* at 498.

²⁴⁰ *Id.*

²⁴¹ 629 N.E.2d 395 (Ohio 1994).

vehicle to be a jury question.²⁴² On the other hand, where an unlicensed driver is expressly prohibited by a named insured from operating his motor vehicle, this will be a significant factor in denying coverage.²⁴³

B. Intoxicated Drivers

Every state has passed laws forbidding the operation of a motor vehicle while intoxicated.²⁴⁴ Therefore, it could be logically inferred that an intoxicated driver could not be entitled to operate any motor vehicle regardless of any reasonable belief. However, most courts have not adopted a per se rule that an intoxicated driver can never have a reasonable belief that she is entitled to operate a motor vehicle.

In *Plowman v. Aetna Casualty & Surety Co.*,²⁴⁵ an employee, at the direction of his employer, drove to his nephew's house in a vehicle owned by the insured-employer to inquire about a job.²⁴⁶ Employee-driver was drinking beer upon arrival at his nephew's house, and continued to drink for four more hours.²⁴⁷ About forty minutes after employee driver left his nephew's house, he was involved in a fatal car accident.²⁴⁸ The trial court granted summary judgment in favor of the insurance company, stating that the employee driver fell within the exclusion of the insurance policy because he operated the insured's motor vehicle without a reasonable belief that he was entitled to do so.²⁴⁹ Upon appeal, the Supreme Court of Alabama reversed, stating that whether the driver had a reasonable belief was a jury question, because it was "unclear from the record whether he [driver] had been specifically instructed at any time . . . not to drink while driving."²⁵⁰

Although the *Plowman* court believed it to be unclear whether the intoxicated driver in that case had a reasonable belief that he was entitled

²⁴² *Id.* at 398-99.

²⁴³ *See, e.g.*, *Cincinnati Ins. Co. v. Plummer*, 444 S.E.2d 378, 381 (Ga. Ct. App. 1994); *Newell v. Nationwide Mut. Ins. Co.*, 432 S.E.2d 284, 286 (N.C. 1993); *Omaha Prop. & Cas. Ins. Co. v. Johnson*, 866 S.W.2d 539 (Tenn. Ct. App. 1993), where in each case the court denied coverage to insured's unlicensed child who had been expressly prohibited to operate the insured's vehicle.

²⁴⁴ *See, e.g.*, KY. REV. STAT. ANN. § 189A.010 (Baldwin 1991); OHIO REV. CODE ANN. § 4511.19 (Anderson 1994); N.Y. VEH. & TRAFFIC LAW § 1192 (McKinney 1992).

²⁴⁵ 623 So. 2d 1103 (Ala. 1993).

²⁴⁶ *Id.* at 1104.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1105.

to use the motor vehicle, in some cases it is very clear that the intoxicated driver could not have had such a reasonable belief. For example, in *Buckeye Union Insurance Co. v. Lawrence*,²⁵¹ an intoxicated driver forced an authorized user out of the driver's seat and drove the insured's vehicle ninety-five miles per hour with a "[twelve] pack beneath his legs."²⁵² Unsurprisingly, this action ended in an accident. The court, in denying coverage, stated: "The subject [of reasonable belief] most probably was no part of his mental processes at that time."²⁵³ Similarly, in *Allstate Insurance Co. v. United States Fidelity & Guaranty Co.*,²⁵⁴ the driver took a vehicle owned by his friend's father in the middle of the night and consumed "three, four or five beers."²⁵⁵ Based on these facts, the court "wonder[ed] if [the driver] had 'any belief' at all at the time."²⁵⁶

In *Samples v. Southern Guaranty Insurance Co.*,²⁵⁷ driver was at the insured's home drinking alcohol, "bec[ame] highly intoxicated," and apparently passed out.²⁵⁸ The next morning, without the insured's knowledge, he "drove away in [a friend's] car rather than his own."²⁵⁹ This incident ended in a collision, as well as a charge of driving under the influence and theft.²⁶⁰ Based upon these circumstances, the court held that the driver could not have had a reasonable belief that he was entitled to use the insured's vehicle.²⁶¹

Unfortunately, most cases do not present factual situations which are clear to the court, and thus intoxication plays only a minor role in determining whether reasonable belief exists. In fact, it seems to be the majority rule that the intoxication of the driver is only one factor to be

²⁵¹ 590 N.E.2d 406 (Ohio Ct. App. 1990).

²⁵² *Id.* at 408.

²⁵³ *Id.* at 409.

²⁵⁴ 663 F. Supp. 548 (W.D. Ark. 1987).

²⁵⁵ *Id.* at 551. Apparently, the driver and his friends had been drinking throughout the course of the evening, but the driver only admitted drinking three to five beers. The judge in this case noted that this estimate "is more liberal than most. Most witnesses, under the circumstances, never seem to drink more than two beers." *Id.* at 551 n.1.

²⁵⁶ *Id.* at 554. *But see* *United Servs. Auto. Ass'n v. Continental Ins. Co.*, 1985 WL 4692 (Tenn. Ct. App.) (finding that driver had a reasonable belief that he was entitled to operate insured's vehicle despite the fact that the driver took the vehicle of his friend's father and consumed several beers).

²⁵⁷ 398 S.E.2d 220 (Ga. Ct. App. 1990).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 221.

taken into consideration by the courts in determining whether the driver has a reasonable belief of entitlement to operate a vehicle.²⁶²

C. Illegal Activity is Not Reasonable

Since an operator's license is required to operate a motor vehicle in every state, and since it is against the law in every state to operate a motor vehicle while intoxicated, it is this author's contention that the majority rule, that unlicensed and intoxicated drivers may have a reasonable belief of entitlement to operate an automobile, is illogical. As the dissent of *State Farm v. Moore*²⁶³ stated, with regard to unlicensed drivers:

[To think himself] 'entitled' . . . simply by virtue of being handed the keys, that conclusion involves more wishful thinking than reasonableness. Such judgment as it demonstrates is neither sound nor rational since it endows the . . . owner of an automobile with the authority to permit an activity, driving without a license, [or driving while intoxicated], which the state clearly and specifically forbids.²⁶⁴

This argument holds equally true for intoxicated drivers.

As illogical as it may seem, courts apparently have justified this on the ground that even if the unlicensed or intoxicated driver were denied insurance, they would not be deterred from the consequences of their acts.²⁶⁵ In fact, it has been said that if unlicensed or intoxicated drivers were susceptible to deterrence to begin with, "they would be unlikely to illegally take the wheel"²⁶⁶ since "such drivers are financially irresponsible virtually by definition."²⁶⁷

However, there are major flaws in this argument. Under this rationale, even thieves should be provided coverage since, if they were susceptible to deterrence, they would not "illegally take the wheel."²⁶⁸ Moreover,

²⁶² See *supra* notes 245-50 and accompanying text.

²⁶³ 544 A.2d 1017 (Pa. Super Ct. 1988).

²⁶⁴ *Id.* at 1022 (Montemuro, J., concurring in part and dissenting in part).

²⁶⁵ See *Principal Casualty Ins. Co. v. Progressive Casualty Ins. Co.*, 838 P.2d 1306, 1309 (Ariz. Ct. App. 1992).

²⁶⁶ *Id.* Although in this case the insurance policy in question contained the traditional omnibus clause, it is relevant due to the fact that it seems to give a rationale behind this theory.

²⁶⁷ *Id.* at 1309.

²⁶⁸ *Id.* at 1308.

providing coverage to unreasonable drivers may have been justifiable under the traditional permissive use clause, focusing on whether the owner gave the driver permission,²⁶⁹ but it is not justifiable under the entitlement exclusion clause. The entitlement exclusion clause excludes coverage for “any person . . . [u]sing the vehicle without a reasonable belief that that person is entitled to do so.”²⁷⁰ For such belief to be reasonable, this “implies the exercise of sound judgment.”²⁷¹ The issue thus becomes whether a driver can be said to be exercising “sound judgment”²⁷² while breaking the law. Framed in this way, it seems obvious that the definition of “sound judgment” should not include the decision to break the law.

CONCLUSION

Perhaps the following illustration will help to clarify how courts have dealt with the entitlement exclusion:

Picture the court inviting a representative of the insurance companies for a long walk down a winding road. “Follow me, I will not lead you astray,” the court says. The court leads the representative down this winding road, passing many signs along the way illustrating all the changes the permissive clause has went through.

The first sign they pass is on a very narrow road and is labeled “permission.” The insurance company turns to the court and says “Don’t you want me to stop here? Isn’t it important that the owner give the user permission to use the vehicle?” The court replies, “No, we’ve tried that approach for years, and it has only led to confusion and needless litigation causing insurance rates to rise! Moreover, it is too narrow.” The insurance company, respectful of the wisdom of the court, continues to follow its lead.

After many miles of signs illustrating the changes in the permissive use clause, the court finally stops at a sign on a broad road labeled “reasonable belief of entitlement.” The insurance company turns to the court and says, “Exactly! I’ve figured it out! If we focus on the mind of the user and not the owner, this will allow broad coverage and put an end to this litigation.” The court smiles and disappears.

²⁶⁹ See *supra* notes 6-17 and accompanying text.

²⁷⁰ See *KIT*, *supra* note 1, at 2A8.

²⁷¹ *State Farm Mut. Auto. Ins. Co. v. Moore*, 544 A.2d 1017, 1022 (Pa. Super. Ct. 1988) (Montemuro, J., concurring in part and dissenting in part).

²⁷² *Id.*

On the walk home, the insurance company is astounded to find there are still many judges standing at all of the signs he had previously passed. Some were standing at the "reasonable belief of entitlement" sign itself looking confused and bewildered, and some walked right past the sign. Nevertheless, the insurance company trusted the court's wisdom and changed the policy language. Yet, still the insurance company wondered if the walk had been all for naught, and whether perhaps, it was a "dead end."

Maybe the walk has not been "all for naught" and the road representing this change is, therefore, not a "dead end." But have the insurance companies been led astray? Indeed. This entitlement exclusion clause was added as an affirmative step on the part of insurance companies for the specific purpose of broadening coverage to eliminate the problems courts encountered under the previous permissive use language.²⁷³ However, as the story illustrates, although the insurance companies added this language to follow the courts' lead, they have been led astray because there are still many judges who are either confused by this language and use rules of construction to stretch the policy language beyond "reasonable belief," or are ignoring it entirely by focusing solely on permission.

As with any contract interpretation issue, there are many rules of construction which provide the courts with tools for interpreting insurance contracts.²⁷⁴ Although courts will cite to the general rule of construction that "[a]n insurance policy, like any other contract, must be interpreted according to its plain language and express terms,"²⁷⁵ they will use other rules of construction to reach whatever outcome they feel is just under the circumstances. For example, courts tend to look at the reasonable expectations of the insured with regard to the terms of the

²⁷³ See *supra* notes 8-11 and accompanying text.

²⁷⁴ "The provisions of an insurance contract are subject to the same rules of interpretation and construction as are other contract terms." *American States Ins. Co. v. Adair Indus., Inc.* 576 N.E.2d 1272,1273 (Ind. Ct. App. 1991) (citing *Sharp v. Indiana Union Mut. Ins. Co.*, 526 N.E.2d 237, 239 (Ind. Ct. App. 1988)).

²⁷⁵ See *Georgia Farm Bureau Mut. Ins. Co. v. Fire & Casualty Ins. Co.*, 350 S.E.2d 325, 326 (Ga. Ct. App. 1986) (citing *Grange Mut. Casualty Co. v. King*, 331 S.E.2d 41 (Ga. Ct. App. 1985)); see also *Economy Fire & Casualty Co. v. Kubik*, 492 N.E.2d 504, 506 (Ill. App. Ct. 1986) (citing *Zipf v. Allstate Ins. Co.*, 369 N.E.2d 252 (Ill. App. Ct. 1977)) ("Where the terms of a policy are clear and unambiguous, its plain meaning will be given effect.").

insurance policy.²⁷⁶ Yet these *reasonable* expectations are expanded beyond any possible actual *reasonable* belief.²⁷⁷

In addition, it appears that courts are analyzing the insured's reasonable expectations at the time of the accident, not at the time of the execution of the insurance contract. Of course, at the time of the accident, the insured's expectations are clearly different. For example, at the time of execution, an insured would not reasonably expect coverage if her unlicensed son took insured's vehicle in the middle of the night, consumed alcoholic beverages, and was involved in an automobile accident. Yet, at the time of the accident, the insured may expect coverage.

It is this author's position, and the position stated by some courts, that if the doctrine of reasonable expectations must come into play, courts "should examine the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution."²⁷⁸

As many courts have stated:

A court cannot and should not do violence to the plain terms of a[n] [insurance] contract by artificially creating ambiguity where none exists. In situations in which a reasonable interpretation favors the insurer and any other interpretation would be strained and tenuous, no compulsion exists to torture or twist the language of the contract.²⁷⁹

²⁷⁶ "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Preston v. Tromm*, No. 9-88-31, 1990 WL 61748, at *3 (Ohio Ct. App. Apr. 26, 1990).

²⁷⁷ For example, in *United States Auto. Ass'n v. Continental Ins. Co.*, 1985 WL 4692, *5-6 (Tenn. Ct. App. Dec. 24, 1985), the court allowed coverage despite the facts driver, insured's son's friend, took the automobile without permission and was intoxicated. In *Ohio Casualty Ins. Co. v. Safeco Ins. Co.*, 768 S.W.2d 602, 604 (Mo. Ct. App. 1989), the court allowed coverage despite the fact the employee driver had taken the employer's van without permission on a two day drinking spree which ended in a five car collision. Could the insured reasonable expect coverage in these situations? If the doctrine of reasonable expectations must come into play, reasonable expectations should be limited in scope to what the true expectations were under the terms of the policy, not to encompass any possible circumstance the insured could have contemplated.

²⁷⁸ *General Accident Fire & Life Assurance Corp. v. Perry*, 541 A.2d 1340, 1342 (Md. Ct. Spec. App. 1988) (citing *Pacific Indem. v. Interstate Fire & Casualty*, 488 A.2d 486 (Md. Ct. Spec. App. 1985)).

²⁷⁹ *Sequoia Ins. Co. v. Miller*, 202 Cal. Rptr. 866, 871 (Cal. Ct. App. 1984) (citing *Fresno Economy Import Used Cars, Inc. v. United States Fidelity & Guaranty Co.*, 142 Cal. Rptr. 681 (Ct. App. 1977)). This case involved a transfer of title issue wherein the new owner claimed coverage should be provided to him as a permissive user under seller's policy. The court held that the new owner was excluded from coverage under the

To add to this torture and twisting of the policy language, some courts are ignoring the policy language entirely.²⁸⁰ As illustrated in the above story, in the long winding walk the insurance industry has been through with the permissive use clause, some courts are presuming that the rule is still that of permission.

Yet, as Justice Oliver Wendell Holmes said, “[t]his is not a matter of polite presumptions; we must look the facts in the face.”²⁸¹ The facts which courts must look to in analyzing the entitlement exclusion clause are as follows: First, the entitlement exclusion was added in response to the litigation, to broaden coverage and thereby reduce litigation, and should be read as such.²⁸² Second, the language is plain and unambiguous. “Any person” means just that — any person.²⁸³ Third, reasonable belief is broad and encompasses both express and implied permission, along with other circumstances, but does not encompass every possible circumstance that courts can contemplate.²⁸⁴ Finally, to be entitled to operate a motor vehicle under the policy, one must be in compliance with applicable motor laws.²⁸⁵

These “facts do not cease to exist because they are ignored.”²⁸⁶ Recognizing them will serve to benefit society as a whole. Coverage can be broadened and litigation reduced, and society as a whole will benefit from being able to receive reasonable insurance premiums. When substantial litigation occurs over the interpretation of insurance policy provisions, the costs of such litigation are unfortunately passed on to the purchasers of insurance by increasing the cost of premiums. Keeping litigation costs down allows insurance companies to pass the savings along to the public.

Therefore, although it is unfortunate that in some situations coverage will not be provided if the driver falls within the entitlement exclusion, the costs will be outweighed by the benefits to society as a whole.

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entitlement exclusion clause in seller’s policy. *Id.* at 872.

²⁸⁰ See *supra* notes 36-58 and accompanying text (explaining how courts are ignoring the entitlement exclusion as it applies to family members); *supra* notes 147-52 (showing how courts are focusing on permission and ignoring the reasonable belief language).

²⁸¹ *Frank v. Mangum*, 237 U.S. 309, 347 (1915).

²⁸² See *supra* notes 10-20 and accompanying text.

²⁸³ See *Georgia Farm Bureau Mut. Ins. Co. v. Fire & Casualty Ins. Co.*, 350 S.E.2d 325, 326 (Ga. Ct. App. 1986); *supra* notes 60-90, 119-32 and accompanying text.

²⁸⁴ See *supra* notes 221-27 and accompanying text.

²⁸⁵ See *supra* notes 263-72 and accompanying text.

²⁸⁶ Aldous Huxley, *A Note on Dogma*, in *PROPER STUDIES* 192, 205 (1927).