BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

Randy J. Maniloff
maniloffr@whiteandwilliams.com

Thank you for the tremendous enthusiasm that has been shown for the 2nd edition of **"General Liability Insurance Coverage – Key Issues in Every State."** The book is off to a fantastic start. Jeff and I extend our heartfelt thanks to the *Binding Authority* community for your support. Our editor at Oxford University Press has promised to provide plenty of copies of "Key Issues" to be used as prizes for *Binding Authority* contests. Look for these soon.

February 17, 2012

*Lin*surance Coverage: The Issue That Everyone Is Talking About

"Use of an Auto" Exclusion the Most Popular Issue of the Year

I own a car. And there is little doubt in my mind about when I'm using it. I get in. Put my drink in the cup holder. Turn around and marvel at the number of Cheerios in the car seat. Turn the key. Put on the radio. And, voila, off I go.

But, apparently, the question whether an auto is being *used* is not always so simple. Introduce insurance and things that seem simple have a way of becoming anything but.

It reminds me of this great quote from an old Pennsylvania Supreme Court case that asked "What is an 'accident?'":

What is an accident? Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court. *Brenneman v. St. Paul Fire & Marine Ins. Co.*, 192 A.2d 745, 747 (Pa. 1963).

[Incidentally, a half a century later, this quote has never been more true when it comes to whether faulty workmanship is an "accident."]

This description, about what is an accident, can be applied just the same to whether liability arises out of the "use of an auto." Everyone knows what it means to *use an auto*, until the issue comes up in court.

The issue often arises in the context of claims under general liability and homeowners policies where there is a car or other motor vehicle involved. These policies often have exclusions for liability arising out of the "use of an auto." And for an obvious reason. General liability and homeowners policies are not automobile policies. If you want coverage for liability arising out of the use of an auto, look for the auto policy in the insurance folder. Of course, then the issue of what it means to be *using an auto* comes up there too.

A case involving "use of an auto" has never been the subject of an issue of *Binding Authority*. That's because such cases are fact- and jurisdiction-specific and therefore do not lend themselves to providing general lessons that have wide applicability – which is the overarching objective of *Binding Authority*.

Lately I have been seeing an enormous number of cases addressing whether liability arises out of the "use of an auto." This issue of *Binding Authority* will depart from the usual model of highlighting just one case and instead describe many recent cases – in just the past few months -- where courts were required to determine whether liability arose out of the use of an auto. And, as you'll see, they don't involve people simply getting behind the wheel and pulling out of their driveway.

The point of listing these cases is not to set forth any general "test" to determine whether liability arises out of the use of an auto. It is just the opposite – no such universal test exists. Instead, courts are all over the place in how they address the issue and the factors and tests that they use to get there. The cases are very fact and jurisdiction specific and must be addressed one by one – making predictability very difficult.

I'll start with my favorite one of late and then go from there -- looking at the very recent ones -- in no particular order. And, keep in mind that, except for the first one, all of these cases were issued within just the past two months – and there are so many more that were issued in this period. [I use the term "use of an auto" here in a generic sense – variations of this term may exist in the individual cases.]

***Lancer Ins. Co. v. Garcia Holiday Tours*, Supreme Court of Texas, July 1, 2011** (Exposure of bus passengers to bus driver's tuberculosis did not constitute use of an auto under bus company's automobile policy).

***Colon v. Liberty Mutual Ins. Co.*, New Jersey Superior Court, App. Div., Jan. 20, 2012** (automobile driver that bit police officer on the arm during a traffic stop did not qualify as use of an auto for purposes of a homeowners policy) (extra tidbit -- upon being stopped driver gave her name to the officer as Beyonce Knowles).

***Sunshine State Ins. Co. v. Jones*, Florida Court of Appeal, Jan. 18, 2012** (grabbing the steering wheel to annoy your girlfriend, while she is driving, did not qualify as use of an auto for purposes of a homeowners policy).

***Hays v. Georgia Farm Bureau Mut. Ins. Co.*, Georgia Court of Appeals, Feb. 14, 2012** (using a pick-up truck and a pulley system, in attempting to lift a portable toilet onto the top of a deer stand, qualified as use of an auto for purposes of a homeowners policy).

***Roque v. Allstate Ins. Co.*, Colorado Court of Appeals, Jan. 19, 2012** (exiting your car and hitting another motorist with a golf club did not qualify as use of an auto for purposes of a UM policy).

***National Casualty Co. v. Western World Ins. Co.*, 5th Circuit Court of Appeals, Feb. 3, 2012** (injury to an individual, while being placed into an ambulance, qualified as use of an auto for purposes of an automobile policy).

***Colony Ins. Co. v. Comprehensive Rehabilitation Centers*, Eastern District of Michigan, December 21, 2011** (automobile passenger that opened the rear door of a van and jumped out, while it was travelling greater than 50 mph, qualified as use of an auto for purposes of a CGL policy).

***New London County Mutual Ins. Co. v. Nantes*, Supreme Court of Connecticut, Feb. 21, 2012** (official release date) (individuals that suffered neurological injuries, on account of exposure to carbon monoxide from a car that was left running overnight in a garage, qualified as use of an auto for purposes of a homeowners policy).

These cases, and so many more, demonstrate that what qualifies as "use of an auto" is complex, very fact intensive, jurisdiction specific and difficult to predict.

Please let me know if you have any questions.

Randy

White and Williams LLP

Randy J. Maniloff
1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395
Direct 215.864.6311 | Fax 215.789.7608
maniloffr@whiteandwilliams.com | whiteandwilliams.com