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TEMPORARY SUBSTITUTE CLAUSE IN AUTOMOBILE LIABILITY INSURANCE

The ordinary automobile liability insurance policy contains a provision extending insurance protection to the operation of an automobile temporarily substituted for the described automobile. This provision has given rise to litigation to determine its construction.

In the recent Minnesota case of *Gabrelcik v. National Indem. Co.*,[1] the insured, owner of a one-automobile taxicab business, substituted an automobile for her disabled vehicle. While the substitute automobile was being used as a taxicab, an accident occurred which resulted in personal injury to a passenger.[2] An employee was driving at the time of the accident.[3] The substitute automobile was owned by the insured's husband's used-car business. The insured brought this declaratory judgment action against the insurer to determine whether the temporary substitute provision of the insured's policy afforded protection during her operation of this particular temporary substitute automobile.[4] Under the temporary substitute automobile provision, the policy provided coverage to the insured for the operation of

> "an automobile not owned by the named insured or his spouse if a resident of the same household, while temporarily used as a substitute for the described automobile when withdrawn

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[1]131 N.W.2d 534 (Minn. 1964).

[2]Donna Sarazin was the passenger in the taxicab. For reasons not apparent from the record, she and her husband were joined as defendants but they filed no responsive pleading seeking affirmative relief. At the time the principal case was decided, they had instituted an action against the insured, but a decision had not been rendered.

[3]The driver of the taxicab at the time of the accident was Harold Carlson, who was regularly employed by the insured as a driver. Brief for Respondent, p. 3, Gabrelcik v. National Idem. Co., 131 N.W.2d 534 (Minn. 1964).

[4]As a condition to obtaining a municipal license to operate a vehicle for hire, the insured had filed a copy of the policy with the city. It has been held in some states that a statute requiring that a copy of an insurance policy be filed as a condition to obtaining a permit to operate a vehicle for hire strikes down any provision in the policy limiting coverage to the operation of the described vehicle and a substitute therefor and extends policy coverage when any vehicle is operated under the permit. E.g., Employers Ins. Co. v. Johnston, 238 Ala. 26, 189 So. 58 (1939); Fidelity & Cas. Co. v. Jacks, 231 Ala. 394, 165 So. 242 (1936); American Fid. & Cas. Co. v. Pennsylvania Cas. Co., 258 S.W.2d 5 (Ky. 1953); Hipp v. Prudential Cas. & Sur. Co., 60 S.D. 300, 244 N.W. 346 (1932); Johnson Transfer & Freight Lines v. American Nat. Fire Ins. Co., 168 Tenn. 514, 79 S.W.2d 587 (1935). The court in the Gabrelcik case did not reach this result, but indicated, by dicta, that they might have so held if the suit had been brought by the injured passenger rather than by the insured. Gabrelcik v. National Indem. Co., supra note 1, at 536.

from normal use because of its breakdown, repair, servicing, loss or destruction."[5]

In finding for the insured, the trial court held the husband's used-car business was a separate legal entity and that the ownership of the substitute vehicle by the business did not come within the meaning of the provision excluding coverage when a substitute vehicle is owned by the spouse of the named insured. In rejecting the plaintiff's contention that borrowing the vehicle represented a commercial transaction between the husband as a used-car dealer and the wife as the operator of a taxicab business, the Supreme Court of Minnesota, in a four-three decision, reversed.[6] The court held that coverage was not afforded by the policy because the substitute automobile was owned by the husband, even though registered in the name of his business, and thus was specifically excluded by the temporary substitute provision.

In construing the temporary substitute provision, courts generally look to its purpose, which is for the benefit of the insured.[7] Courts also recognize that necessity requires that certain limitations be imposed to provide a degree of definiteness as to qualifying automobiles and to enable the insurer to establish premiums which are not prohibitive.[8]

The temporary substitute provision has given rise to five general problems: (1) Who is entitled to make a substitution? (2) What is "temporary"? (3) what is "substitution"? (4) What is meant by "Withdrawn from normal use due to breakdown, servicing, repair, loss, or destruction"? (5) What is meant by "not owned by the named insured"?

(1) *Who is entitled to make a substitution?* The temporary substitute provision does not expressly state who may make a temporary substitution for the described automobile. The leading case of *Harte v. Peerless Ins. Co.*,[9] held that a substitution can be made only by the named insured or someone he has authorized.[10] The court said:

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[5]Gabrelcik v. National Indem. Co., supra note 1, at 535.

[6]The majority found the temporary substitute provision to be unambiguous, requiring no construction. The minority found the provision ambiguous in that the insurer issued a policy, designed to cover an individual family situation, to cover a commercial risk. After noting the ambiguity, the minority construed the policy liberally, in favor of the insured.

[7]Lloyds America v. Ferguson, 116 F.2d 920 (5th Cir. 1941); Central Nat. Ins. Co. v. Sisneros, 173 F. Supp. 757 (D.N.M. 1959); Allstate Ins. Co. v. Roberts, 155 Cal. App. 2d 755, 320 P.2d 90 (Dist. Ct. App. 1958).

[8]Ibid.

[9]123 Vt. 120, 183 A.2d 223 (1962).

[10]The same result was reached in the only other cases which have considered this point. Grundeen v. United States Fid. & Guar. Co., 238 F.2d 750 (8th Cir. 1956);

> "The provision [temporary substitute] is not to be unreasonably extended to materially increase the risk contemplated by the insured. Neither is it to be narrowly applied against the insured for the clause was designed for his protection."[11]

Courts agree as to who may make a substitution, but there is a split between the only two cases considering the question of whether the permission of the owner of the substitute vehicle is required when a substitution is made. In *Davidson v. Fireman's Fund Indem. Co.*,[12] the court held the permission of the owner of the substitute is necessary when a substitution is made by either the named insured or one acting with his permission. The opposite result was reached in the recent case of *Densmore v. Hartford Acc. & Indem. Co.*[13] There the named insured's automobile had been destroyed in an accident. He stole an automobile and had an accident while driving it. The court held the stolen car was a temporary substitute because the requirement of the provision is that the substitute automobile not be owned by the named insured, and if it was stolen, it was not owned by him.

(2) *What is "temporary"?* The temporary substitute provision expressly shows the intent of the insurer to cover only automobiles which are temporarily substituted for the described vehicle. "Temporary" is defined as "that which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration."[14] Courts generally adhere to this definition, and they indicate that "temporary" is an antonym of, or in contradistinction to, permanent.[15]

Davidson v. Fireman's Fund Indem. Co., 5 N.Y.2d 838, 155 N.E.2d 405, 181 N.Y.S.2d 510 (1958). The reasoning in these cases is not clear, but appears to be that the courts believe the provision was for the protection of the insured and did not want to extend it to parties operating without the insured's authority.

[11]Harte v. Peerless Ins. Co., supra note 9, at 226.

[12]5 N.Y.2d 838, 155 N.E.2d 405, 181 N.Y.S.2d 510 (1958).

[13]221 F. Supp. 652 (W.D. Pa. 1963).

[14]Black Law Dictionary (4th ed. 1951).

[15]De Marco v. Lumbermens Mut. Cas. Co., 153 So. 2d 594 (La. 1963) (A car was left at the insured's home when the owner entered the service. The insured used it occasionally while the owner was away. While driving the automobile because his was inoperative, the insured had an accident. The court held the car to be a "temporary" substitute.) Little v. Safeguard Ins. Co., 137 So. 2d 415 (La. 1962) (For more than a year the insured occasionally used a lady friend's automobile even though his was not withdrawn from use. The insured's automobile was actually withdrawn from use when he had an accident while driving the lady friend's automobile. The court found it to be a "temporary" substitute.) Fleckenstein v. Citizens' Mut. Auto. Ins. Co., 326 Mich. 591, 40 N.W.2d 733 (1950) (Insured's son left his automobile at home when he went into the army. The insured used it for several weeks because the described vehicle was being repaired. The court said the insured use of the son's automobile was not permanent, so it must have been tem-

American Employers' Insurance Co. v. Maryland Cas. Co.,[16] clearly indicates the word "temporary" does not designate a fixed period of time. The insured bought the described automobile in August, 1950. The automobile was not in running condition, and it was placed in a garage for repairs. The insured occasionally used a borrowed automobile during this time. The insured's automobile was still being repaired on June 4, 1951, when he had an accident while driving the borrowed automobile. The insurer refused coverage, claiming the borrowed automobile was no longer a "temporary" substitute. The court held that the substitution was not permanent, so it must have been temporary, and thus coverage existed.

(3) *What is "substitution"?* The rule is that a temporary substitute automobile must actually be used for the same purpose as,[17] and in a reasonably similar manner to,[18] the described automobile. Coverage under the provision, therefore, has been held not to include: a son's automobile while the son is driving his father, the insured, to work because the father's automobile would not start;[19] a brother's automobile used to run an errand for his insured brother whose automobile was under repair;[20] or an automobile being driven on a forty-mile trip as an alleged substitute for a truck whose use, due to its deteriorated condition, was limited to a particular highway construction project.[21]

Apparently, the substitute vehicle must be similar in type to the one for which it is substituted. This is the conclusion to be drawn from the case of *Mittelsteadt v. Bovee*,[22] where it was held that a two-cylinder motorcycle, borrowed by the insured while his automobile was being repaired, was not a temporary substitute "automobile."

(4) *What is meant by "withdrawn from normal use due to break-*

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porary.) Hunnicutt. v. Shelby Mut. Ins. Co., 255 N.C. 515, 122 S.E.2d 74 (1961) (The insured and his mother traded automobiles. The insured occasionally used the automobile he formerly owned. When he had an accident, he was driving his mother's automobile because his was being repaired. The court found the mother's automobile to be a "temporary" substitute.)

[16]218 F.2d 335 (4th Cir. 1954) .

[17]Little v. Safeguard Ins. Co., 137 So. 2d 415 (La. 1962).

[18]Western Cas. & Sur. Co. v. Norman, 197 F.2d 67 (5th Cir. 1952).

[19]Southern v. Lumbermens Mut. Cas. Co., 234 F. Supp. 876 (W.D. Va. 1964) (The son's automobile was not actually being used in place of the father's described automobile. The court stated that the son's automobile would have been a temporary substitute if the *father* had been driving it under the same circumstances.)

[20]Tanner v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., 226 F.2d 498 (6th Cir. 1955) (brother's automobile was not actually used in place of the described automobile).

[21]Western Cas. & Sur. Co. v. Norman, supra note 17.

[22]9 Wis. 2d 44, 100 N.W.2d 376 (1960).

down, servicing, repair, loss, or destruction"? Although the courts agree that the described automobile must be withdrawn from "normal use" to qualify for coverage under the temporary substitute provision,[23] there is a division in the cases as to what constitutes "normal use." The decisions of a federal court applying New York law,[24] and of the courts of California,[25] Oklahoma,[26] and Tennessee,[27] indicate that "normal use" does not mean "all normal use." The courts reason that since the provision does not contain the word "all," it would not be proper for them to read the provision as if the word were included.[28] The federal court also stated that to require the described automobile to be withdrawn from "all normal use" would be unreasonable.[29] The courts of Louisiana,[30] Michigan,[31] and Texas,[32] however, have held that the described automobile must be withdrawn

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[23]Hartford Acc. & Indem. Co. v. Western Fire Ins. Co., 196 F. Supp. 419 (E.D. Ky. 1961) (The insured drove his new Buick to his father's home and borrowed his father's truck to pay a social call which required driving over rough roads. The court held that the Buick was not withdrawn from normal use.) State Farm Mut. Auto. Ins. Co. v. Bass, 192 Tenn. 558, 241 S.W.2d 568 (1951) (The insured borrowed a substitute vehicle which was more suitable for a particular purpose and in better repair than his. The court held that coverage was not extended because the described vehicle was not withdrawn from normal use.)

[24]Allstate Ins. Co. v. Aetna Cas. & Sur. Co., 326 F.2d 871 (2d Cir. 1964) (Insured had an accident while driving a borrowed automobile. Her car had been driven to and from a repair gararge the day of the accident. The court held coverage was extended.)

[25]Allstate Ins. Co. v. Roberts, 156 Cal. App. 2d 755, 320 P.2d 90 (Dist. Ct. App. 1958) (Insured's automobile was not running properly so he borrowed another. Coverage was extended even though insured's automobile was not withdrawn from all normal use.)

[26]Mid-Continent Cas. Co. v. West, 351 P.2d 398 (Okla. 1959) (Insured borrowed his father's automobile for a trip and left the described automobile, which was in an unsafe condition, with the father to use if he needed it.)

[27]Canal Ins. Co. v. Paul, 51 Tenn. App. 446, 369 S.W.2d 393 (1962) (The described automobile was left with the owner of the substitute in case he needed the use of it.)

[28]Supra notes 23-26.

[29]Allstate Ins. Co. v. Aetna Cas. & Sur. Co., supra note 23.

[30]Fullilove v. U.S. Cas. Co., 240 La. 859, 125 So. 2d 389 (1961) (Insured borrowed an automobile to use in place of his for a long trip. His automobile had badly worn tires but was used on the day of the accident by his wife to go to and from work. The court held that coverage would not be extended since the described automobile was not withdrawn from all normal use.)

[31]Erickson v. Genisot, 322 Mich. 303, 33 N.W.2d 803 (1948) (The insured borrowed an automobile for a 50-mile trip because his truck was in poor condition. The truck was used locally. The court held coverage was not extended.)

[32]Service Mut. Ins. Co. v. Chambers, 289 S.W.2d 949 (Tex. Civ. App. 1956) (Insured's truck had a broken winch, but was otherwise in operating condition and was used on the day insured had an accident in a substitute truck. The court held coverage was not extended because the described vehicle was not withdrawn from normal use.)

from "all normal use" before a substitution will give rise to extended coverage. They reason that to hold otherwise would allow the insured to use a substitute automobile while a member of his family or someone with his permission used the described automobile. This would double the insurer's risk without an appropriate increase in premium.[33]

The described automobile must be withdrawn from normal use for one of the reasons enumerated in the temporary substitute provision before coverage will be extended to include a substitute automobile. Dispute has arisen over the meaning of some of the enumerated reasons. It has been held that there is no coverage for the insured while driving: an automobile substituted for a described automobile which has been repossessed;[34] a substitute for a described automobile which was merely low on gasoline;[35] or a substitute for a described automobile upon which heavy snow chains remained.[36]

Controversy has also arisen as to whether ownership of a described automobile is a prerequisite to the operation of the substitute provision. The answer has been in the affirmative when the described automobile has been voluntarily sold,[37] and in the negative when the described automobile has been sold for junk after its total destruction in an accident.[38] The reasoning in the total destruction cases is that the described automobile has been withdrawn from normal use because of its destruction, and the sale was involuntary.[39]

(5) *What is meant by "not owned by the named insured"?* By express provision and interpretation thereof, it is established that the insurer does not intend the temporary substitute provision to provide protection for the named insured while driving an automobile he owns, even though it is a substitute for the described automobile which is withdrawn from normal use.[40]

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[33]Supra notes 29-31.

[34]Travelers Indem. Co. v. American Cas. Co., 226 F. Supp. 354 (S.D.W. Va. 1964).

[35]Ransom v. Fidelity & Cas. Co., 250 N.C. 60, 108 S.E.2d 22 (1959).

[36]Iowa Mut. Ins. Co. v. Addy, 132 Colo. 202, 286 P.2d 622 (1955).

[37]Daugaard v. Hawkeye Security Ins. Co., 239 F.2d 351 (8th Cir. 1956) (insured sold the described automobile and ordered a new one); Lincombe v. State Farm Mut. Auto. Ins. Co., 166 So. 2d 920 (La. Ct. App. 1964) (insured turned her automobile over to a dealer who had ordered a new one for her).

[38]McKee v. Exchange Ins. Ass'n, 270 Ala. 518, 120 So. 2d 690 (1960); Freeport Motor Cas. Co. v. Tharp, 338 Ill. App. 593, 88 N.E.2d 499 (1949).

[39]Ibid.

[40]Government Employees Ins. Co. v. Thomas, 357 S.W.2d 548 (Ky. 1962) (Insured gave possession of one of his two automobiles to a prospective buyer under a verbal purchase agreement. When the automobile the insured retained became disabled he retook possession of the other automobile and had an accident while driving it. The court found that the named insured owned the automobile he was driving and

Generally "named insured" is defined as the person so listed and his spouse, if a resident of the same household.[41] Insurers apparently assumed that this definition would exclude coverage when an automobile owned by a spouse, residing in the same household, was used as a substitute. However, the insurers' assumption was erroneous. In *Baxley v. State Farm Mut. Auto. Liab. Ins. Co.*[42] the court reasoned that when a husband and wife live in the same household, the definition of the "named insured" in the policy has the effect of making the named insured two people rather than one. The court then applied the reasoning of *Farley v. American Auto. Ins. Co.*,[43] and held that since the wife's automobile was not owned by husband *and* wife, it was not owned by the named insured, and therefore coverage existed.

Apparently in recognition of these holdings, most of the policies issued today contain a temporary substitute provision with a slight modification.[44] The provision reads: "not owned by the named insured or his spouse if a resident of the same household. . . ."[45] The change was apparently made to express conclusively the intent of the insurer

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thus it did not qualify as a temporary substitute within the policy.); American Fid. & Cas. Co. v. Pennsylvania Cas. Co., 258 S.W.2d 5 (Ky. 1953) (similar facts as above case); Utilities Ins. Co. v. Wilson, 207 Okla. 574, 251 P.2d 175 (1952) (The insured owned two trucks and bought an insurance policy for only one. While driving the uninsured truck he was involved in an accident. The court held that coverage was not extended by the temporary substitute clause which required that the substitute not be owned by the named insured.)

[41]E.g., Farmers Ins. Exch. v. Wendler, 84 Idaho 114, 368 P.2d 933 (1962); Caldwell v. Hartford Acc. & Indem. Co., 248 Miss. 767, 160 So. 2d 209 (1964); Baxley v. State Farm Mut. Auto. Liab. Ins. Co., 241 S.C. 332, 128 S.E.2d 165 (1962).

[42]241 S.C. 332, 128 S.E.2d 165 (1962). The recent case of Caldwell v. Hartford Acc. & Indem. Co., 248 Miss. 767, 160 So. 2d 209 (1964), relied on the Baxley case to reach the same result.

[43]137 W. Va. 455, 72 S.E.2d 520 (1954) (The insurer issued a policy to Farley and Wallace for liability protection as to a 1950 Ford truck used in their business partnership. The truck became disabled so a 1948 Ford truck owned by Wallace was substituted for it. Farley had an accident while driving the substitute truck. The temporary substitute provision indicated that a substitute vehicle must not be owned by the named insured. The insurer denied coverage because the substitute truck was owned by Wallace who was a named insured. The court held that Farley and Wallace are the named insured and it would be untrue and illogical to say a truck owned by one of them is owned by the named insured, so coverage was extended. It is interesting to note that if Wallace had been driving the substitute truck, which he owned, coverage, under this reasoning, would also have extended since Farley and Wallace, and not Wallace alone, are the named insured.)

[44]Samples v. Georgia Mut. Ins. Co., 110 Ga. App. 297, 138 S.E.2d 463 (1964); Hunnicutt v. Shelby Mut. Ins. Co., 255 N.C. 515, 122 S.E.2d 74 (1961).

[45]Samples v. Georgia Mut. Ins. Co., 110 Ga. App. 297, 138 S.E.2d 463, 464 (1964).