INSURANCE LAW

When Is an Auto 'Furnished Or Available for Regular Use'?

By **Norman H. Dachs** And **Jonathan A. Dachs**

Some of the most significant, but least understood, provisions in automobile insurance policies are those that deal with non-owned autos and the requirement that such vehicles not be "furnished or available for the regular use of" the named insured or relative residing in the insured's household. Whether, as in most cases, the term appears in the context of an exception to the grant of coverage for non-owned autos,[1] or, as in other cases, it appears in the context of an exclusion from coverage,[2] in determining whether a vehicle other than the insured vehicle was "furnished or available for regular use," "there is no hard and fast rule by which to resolve the question, each case being dependent on its own facts and circumstances." *Simon v. Lumbermens Mutual Cas.*, 107 Misc.2d 816 (Sup. Ct., Nassau Co. 1981). See also, *New York Central Mut. Fire Ins. v. Jennings*, 195 AD2d 541 (2d Dept. 1993); *Egle v. USAA*, 158 AD2d 661 (2d Dept. 1990).

The purpose of a provision affording coverage for a non-owned vehicle not for the regular use of an insured is "to provide protection to the insured for the occasional or infrequent use of a vehicle not owned by him or her and is not intended as a substitute for insurance on vehicles furnished for the insured's regular use." *Elrac v. GE Capital Ins.*, 57 AD3d 833, 835 (2d Dept. 2008).[3] The exception or exclusion from coverage for an insured or resident relative when using a non-owned automobile that was furnished or available for regular use was designed to protect the company from being subjected 'to greatly added risk without the payment of additional premiums (*Sperling v. Great Am. Indem.*, 7 NY2d 442, 448, quoting *Vern v. Merchants Mut. Cas.*, 21 Misc.2d 51, 52)." *Elrac v. GE Capital Ins.*, supra.

Generally speaking, "the term 'regular use' suggests a principal use, as distinguished from a casual or incidental one." *Simon v. Lumbermens Mutual Cas.*, supra. Factors to be considered include the general availability of the vehicle and the frequency of its use. See *Hartman v. State Farm Ins.*, 280 AD2d 840 (3d Dept. 2001); *Brown v. Keefe*, 255 AD2d 971 (4th Dept. 1998); *Frank v. State-Wide Ins.*, 151 AD2d 458 (2d Dept. 1989); *Liberty Mut. Ins. v. Sentry Ins.*, 130 AD2d 629 (2d Dept. 1987), modified, 135 AD2d 508 (2d Dept. 1987); *New York Central Mut. Fire Ins. v. Jennings*, supra; *McMahon v. Boston Old Colony Ins.*, 67 AD2d 757, 758 (3d Dept. 1979).

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Not Available for Regular Use

Thus, in *Hollander v. Nationwide Mut. Ins.*, 60 AD2d 380 (4th Dept. 1978), the court rejected the insurer's contention that the plaintiff's sister's car was furnished for her regular use, where the evidence established that the plaintiff had used that car only three times in the three-month period prior to the accident. In the words of the court, "such use could only be considered occasional and thus would not fall within the exclusionary clause."

In *New York Central Mut. Ins. v. Jennings*, supra, the testimony of both the driver of the vehicle and his father at their depositions indicated that the son used the vehicle approximately five times over a period of approximately six weeks, and that on each of those occasions, it was necessary for him to obtain the permission of his father before he was given the keys to the vehicle. Based upon those facts, the court held that the vehicle was not furnished or available for the son's regular use, and, therefore, that the exclusion did not apply.

In *Newman v. New York Central Mutual Fire Ins.*, 8 AD3d 1059 (4th Dept. 2004), the vehicle's owner asked his friend to store his vehicle temporarily, but indefinitely, in his garage while she relocated to Kentucky to care for her ill father. The friend agreed to do so and to keep the vehicle clean, filled with gas, and well-maintained. Although the owner expressed her gratitude by granting the friend permission to drive the vehicle whenever he wished to do so, providing transportation to the friend, who had his own vehicle(s) was not a primary or significant purpose of the arrangement, and the owner did not contemplate the regular use of the vehicle by the friend.

The friend drove the vehicle twice over a two-month period. Based upon this evidence, the court concluded that the vehicle was not furnished or available for the regular use of the friend, and, thus, the exclusion was inapplicable. See also, *Brown v. Keefe*, supra ("The record establishes that Michael Keefe drove the vehicle only once, on the day of the accident. That is insufficient to establish that Michael Keefe had 'regular use' of the vehicle").

Available for Regular Use

In several cases in which the vehicle in question was held to be "furnished or made available for regular use," the courts focused not only on the number of uses, but also upon the conditions of use, such as whether restrictions were placed on the vehicle's use.

In *Federal Ins. v. Allstate Ins.*, 111 AD2d 146 (2d Dept. 1985), for example, the court took note of the fact that the driver had the owners' permission to use either of their vehicles "when- » Page 8

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Exclusion

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ver he wished, with absolutely no estrictions placed on his use of ither vehicle." Moreover, during he five-month period prior to the ccident, he operated one of the ehicles "many times, anywhere rom ten to ten hundred," and he lid not request, nor require, spe- ial authorization to operate the ehicle on the date of the accident. Jnder those circumstances, the ourt held that "clearly, the vehi- le was available for [his] regular ise and was regularly operated y him." Thus, his policy did not rovide protection for his use of he vehicle.

In *Egle v. USAA*, supra, the ecord demonstrated that the sub- ect vehicle was available to the river "for as long a period as he wished with no restrictions placed n his use." Moreover, it was clear hat he "put the automobile to regu- lar use during the time it was in his possession." Under those facts, the court granted USAA a declaration of non- coverage.

In *Liverzani v. Amica Mutual Ins.*, 214 AD2d 542 (2d Dept. 1995), the court specifically observed that the driver not only regularly used a company vehicle for business and incidental personal purposes, and kept the vehicle either at his home or at his office, and drove it 60-70 percent of the time, but also had his own set of keys to the vehicle, and did not need anyone's permission to use it for business or personal purposes. Based upon those facts, the court concluded that the exclusion based on his "regular use" of the vehicle applied to defeat coverage.

See also, *Simon v. Lumbermens Mut. Cas.*, supra (driver had "exclusive use of the vehicle for a six-week period, used it twice daily and without any restrictions having been placed on the use of the car—record established that owner gave driver use of the car so she could use it 'regularly'"); *Konstantinou v. Phoenix Ins.*, 74 AD3d 1850 (4th Dept. 2010) (unrestricted access and used several times); *Elrac v. G.E. Capital Ins.*, supra (vehicle used on a daily basis for 55 days).

Decisions by Other Courts

Many courts around the country dealing with this issue have focused on the dictionary definition of "regular"—i.e., usual, customary, frequent, steady, constant, ordinary, systematic—as opposed to casual, infrequent or sporadic.

In *Amica Mutual Ins. v. Franklin*, 147 F.3d 238 (2d Cir. 1998), the U.S. Court of Appeals for the Second Circuit, construing an exclusion from coverage for the ownership, maintenance or use of...[a]ny vehicle, "other than your covered auto, which is...furnished or available for the regular use of any family member," took note of "a host of indicia of 'regular use' including: (1) blanket permission to use the car rather than having to ask permission for each use; (2) availability of a set of keys to the car; (3) continuous, steady, methodical use as opposed to occasional use or special use; (4) the nature of the use (e.g., use for all purposes rather than solely business use); and (5) that the insured would reasonably have expected to pay an extra premium to cover the use of the car."[4] Thus, the court held that the exclusion was applicable where Franklin had his own set of keys, used the car daily for all purposes (to travel to school, to run errands, to go back and forth to various places), and did not have to ask permission to use the car, and there was no indication that his use of the car would end within weeks or even months.

In *Knack v. Phillips*, 134 Ill. App.3d 117, 479 N.E.2d 1191 (1985), the driver was 18 years old and lived with her mother in New York. At the time, she was a student at Judson College in Elgin (Illinois). Following the Easter weekend, her friend loaned her his vehicle. She had the car for a week or two before the accident, but not on weekends. She used it to go back and forth to work, but not every day, as she sometimes car-pooled, and she used it on occasion for personal errands. There was no formal arrangement as to how long she would continue to use the car during the week. After noting that "In the few analogous Illinois decisions where the 'regular use' clause has been at issue, an automobile was found available for regular use where the user was given the car to use 'as he saw fit' while the owner was in the Army [citation omitted], and where the user was furnished the car to get back and forth to work 'for as long as he needed it' [citation omitted]," the court held that the facts that the duration of the driver's permission to use the vehicle was never precisely agreed upon, that her use was limited to during the week and not on weekends, and the driver and the owner "did not regard her permission to use the automobile as anything more than a temporary, casual use of the automobile" were "particularly determinative" in favor of the conclusion that the vehicle was not furnished for her regular use.

In *Juzefski v. The Western Cas. & Sur.*, 173 Cal. App.2d 118, 342 P.2d 928 (1959), the evidence disclosed that the insured's son owned a Chevrolet that he drove to and from school and work and most of the time for social occasions. He used his father's Packard on special occasions to take his girlfriend out in the evening. During some weeks he would use the Packard once; during others it might be three times, while in still others he would not use it at all; "...there was no set time or no set principle involved in the use of the car." He did not have any standing arrangement with his father for the use of the Packard; it was necessary to obtain his father's permission each time he drove it. On the basis of this evidence, the court held that the Packard was not furnished for the regular use to the son. As explained by the court, "The use here described is obviously not regular. It was rather a casual and occasional use for which special permission had to be secured each time the car was driven."

In *Hartford Ins. Group v. Winkler*, 89 Nev. 131, 508 P.2d 8 (1973), the insured testified that her daughter, with whom she had been living for about three months, seldom used her car. The daughter, on the other

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hand, testified that she used the car often when she was living with her parents (in Arizona) before she left for summer school in Utah. There was only one key for the car. If she used the car other than about town in her parent's neighborhood, she had to first obtain their permission. There was no testimony at all about her use of the vehicle during the month of June, when she and her mother attended summer school in Utah. The accident took place on their first trip home from school.

The court observed that "...Evidence as to the past history of the use of the automobile is of assistance in determining whether there was such an arrangement, but it is the condition which obtained at the time of the accident which governs, and evidence of the past use of the automobile must be related to this date." The court then went on to note that "[t]he single fact that [the daughter] did not have a key to the automobile and was required to obtain permission to use the automobile is in itself sufficient to support a finding that the automobile was not available for regular use [citation omitted]."

As the court further explained, citing and quoting a New Jersey case, *American Casualty v. Lattanzio*, 188 A.2d 637, 641 (N.J. App. 1963), "...A requirement that specific authorization be obtained as a prerequisite to the use of the vehicle would sustain a finding that it was not 'furnished' for his regular use. Likewise, evidence that the insured was without access to the vehicle or the keys required to operate it, would constitute strong evidence to the same effect. Assuming that the vehicle was furnished to him, it would remain to be determined whether it was furnished for his regular use. If the use for which the vehicle was furnished was an irregular, infrequent or casual one, it would not come within the exclusionary clause and hence would be covered by the policy." Accordingly, the court concluded that "it cannot be said as a matter of law that [the daughter] was not driving a non-owned vehicle at the time of the accident and thus was barred from recovery."

Conclusion

As can be seen, whether a car has been furnished or made available for regular use is determined by the particular facts and circumstances of each case—all of which should be investigated and considered—in order to determine whether coverage exists under the owner's policy for such use.

1. In numerous policies, coverage is specifically extended to the use of a non-owned auto by the insured or resident relative provided that such use is with the owner's permission and for the purpose the owner intended. "Nonowned auto" is generally defined as "an auto that is not owned by or registered to the [named insureds] or a resident of your household, and is not furnished or available to [the named insureds] or any resident of your household for regular use." See, e.g., *Elrac v. GE Capital Ins.*, 57 AD3d 833 (2d Dept. 2008).

2. Many other policies contain specific exclusions from coverage for any "non-owned" "auto" or "vehicle" where such "auto" or "vehicle" was "furnished or available" for "a" or "any" family member's "regular use." See, e.g., *Liverzani v. Amica Mut. Ins.*, 214 AD2d 542 (2d Dept. 1995).

3. See also, *Newman v. New York Central Mutual Fire Ins.*, 8 AD3d 1059 (4th Dept. 2004); *Liberty Mut. Ins. v. Allstate Ins.*, 237 AD2d 260 (2d Dept. 1997); *Egle v. United Servs. Auto. Assn.*, 158 AD2d 661 (2d Dept. 1990); *Liberty Mut. Ins. v. Sentry Ins.*, 130 AD2d 629, 630 (2d Dept. 1987), modified 135 AD2d 508 (2d Dept. 1987); *Federal Ins. v. Allstate Ins.*, 111 AD2d 146 (2d Dept. 1985).

4. See generally, *Nationwide Mut. Ins. v. Shoemaker*, 965 F.Supp. 700, 706 (E.D. Pa. 1997) (two important indicia of regular use: (1) blanket permission to use the car rather than having to request permission each time; and (2) an available set of keys"); 12A Couch Encyclopedia of Insurance Law §45.1074 (2d rev. ed. 1981).