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INSURANCE: EXCLUSIONARY

ENDORSEMENTS: *BOHRN v. STATE FARM MUTUAL AUTO. INS. CO.* (CAL. 1964)

On January 1, 1961, Billy Bohrn, while driving his father's car on an errand to the grocery store, struck and injured a pedestrian. Billy was alone in the car, but he had his parents' permission to use it. Billy's father had a policy with State Farm Mutual Automobile Insurance Co., containing an endorsement excluding coverage to the son except when accompanied by the named insured or the named insured's spouse. The son had another policy with Farmers Insurance Exchange on his own car as an assigned risk. The pedestrian sued both the father and the son. They in turn instituted an action for declaratory judgment against State Farm, demanding that State Farm defend them and acknowledge financial responsibility to the limits of their policy.

State Farm denied coverage because of the endorsement and alleged that if any responsibility did attach, Farmers would be primarily liable, and State Farm would be liable only in the event of an excess. However, the trial court held that the exclusionary endorsement was against public policy and therefore null and void. State Farm was found to be primarily liable and Farmers liable for the excess. State Farm appealed, asserting that an insurance company has the right to insure and select its own risks and to decline exposure to known dangerous risks.¹ The court held that any such limitation must conform to the law, and if this limitation is contrary to public policy, it is void. The court noted that State Farm's standard policy conformed to Vehicle Code Section 16451,² defining additional insureds as "any person driving with the permission of the insured." However, the question of whether the insurance company could limit, by appropriate restrictive endorsements, coverage to permissive users was answered in the negative.

The court's decision to hold the exclusionary endorsement null and void was based primarily on *Wildman v. Government Employees*³ which set forth the following rule of public policy: "For an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the named insured,

¹ *Bohrn v. State Farm Mutual Auto. Ins. Co.*, 226 A.C.A. 611, 38 Cal. Rptr. 77 (1964). The record disclosed that Billy had been involved in a number of automobile accidents.

² CAL. VEH. CODE § 16451; formerly CAL. VEH. CODE § 415 (1935).

³ *Wildman v. Gov't Employees' Ins. Co.*, 48 Cal. 2d 31, 307 P.2d 359 (1957).

is driving with the permission and consent of the named insured, is a violation of the public policy of this state as set forth in Sections 402 and 415 of the Vehicle Code." The court said that such laws must be considered a part of every policy of liability insurance, even though the policy itself does not specifically make such laws a part thereof.

The legislature modified Vehicle Code Section 415 twice after the *Wildman* case, but the court refused to accept either of these modifications as evidencing an intent to change *Wildman*. The 1957 amendment to Section 415 had the effect of making it dependent on Vehicle Code Section 414.⁴ This change could have been interpreted as evidencing a legislative intent to limit the application of Section 415 only to those policies certified by an insurance carrier to the Department of Motor Vehicles under Section 414. However, in *Interinsurance Exch. v. Ohio Casualty Ins. Co.*,⁵ the court rejected such an interpretation because it would have limited the application of *Wildman* to the small (less than 1% of the total) number of liability policies which are certified annually to the Department of Motor Vehicles. It went on further to say that there was no sufficiently cogent and convincing evidence for the court to attribute to the legislature the intent to overturn a sound rule of public policy.

Another minor change in Section 415 occurred when it was recodified in 1959. Subparagraphs (a), (b) and (c) were recodified separately as Sections 16450, 16451, and 16452 respectively. The opening words were changed from "*Such*" to "*An*." Judging from the court's handling of the 1957 modification, it is clear that these minor changes similarly were not sufficient to overturn the *Wildman* case.

State Farm also contended that the exclusionary ban only applied to groups or classes of permissive drivers and not to named individuals. It supported its argument on a sentence from *Interinsurance Exch. v. Ohio Cas. Ins. Co.*:⁶ "Any provision in a policy which purported to exclude certain classes of permissive users from coverage was declared to be contrary to this public policy and, therefore, void." But the court rejected this contention as contrary to the liberal construction the California Supreme Court places upon the entire automobile financial responsibility law.⁷ The court simi-

⁴ CAL. VEH. CODE § 414 (1935).

⁵ *Interinsurance Exch. v. Ohio Cas. Ins. Co.*, 58 Cal. 2d 142, 373 P.2d 640, 23 Cal. Rptr. 592 (1962).

⁶ *Id.* at 150, 373 P.2d at 644, 23 Cal. Rptr. at 596.

⁷ *Continental Cas. Co. v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 424, 296 P.2d 801, 808 (1956). Court used liberal construction to give "monetary protection to

larly rejected the other contentions of State Farm which would have made the exclusion effective.

Thus, the limitation that Billy must be accompanied by one of his parents when he operated the car resulted in a void exclusion. The fact that Farmers insured Billy as an assigned risk at a higher premium did not constitute unjust enrichment to Farmers when State Farm was made primarily liable, because the two policies were of standard form as to "other coverage," and the court followed the rule that the excess provision of the policy of the driver should be given effect.⁸ This renders the insurer of the owner of the vehicle primarily liable for the whole loss, within the limits of its policy.

Following *Wildman*, the courts nullified the following attempted exclusions: garage exclusion;⁹ customer exclusion;¹⁰ excluding other than the named insured;¹¹ drivers over 60 years old;¹² and the military personnel exclusion.¹³

EFFECT OF INSURANCE CODE SECTION 11580.1

This section was not applied in *Bohrn* because it became effective after the policy was issued to Mr. Bohr, and it was not given retroactive effect. If the present law had been applicable, Billy would have been excluded from coverage. Insurance Code Section 11580.1(e)¹⁴ specifically authorizes insurance policies bearing endorsements which exclude a natural person or persons designated by name. Section 11580.1(f) specifically authorizes insurance policies excluding coverage to a user of the described automobile other than named insured, provided such user has other valid and collectible insurance. If there is no such other valid and collectible

that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others."

⁸ *American Auto. Ins. Co. v. Republic Indem. Co.*, 52 Cal. 2d 507, 341 P.2d 675 (1959).

⁹ *Exchange Cas. & Sur. Co. v. Scott*, 56 Cal. 2d 613, 364 P.2d 833, 15 Cal. Rptr. 897 (1961).

¹⁰ *American Auto. Ins. Co. v. Republic Indem. Co.*, 52 Cal. 2d 507, 341 P.2d 675 (1959).

¹¹ *Bonfils v. Pacific Auto. Ins. Co.*, 165 Cal. App. 2d 152, 331 P.2d 766 (1958).

¹² *Cassin v. Financial Indem. Co.*, 160 Cal. App. 2d 631, 325 P.2d 228 (1958).

¹³ *Wheeling v. Financial Indem. Co.*, 210 Cal. App. 2d 36, 19 Cal. Rptr. 879 (1962).

¹⁴ CAL. INS. CODE § 11580.1(e): Notwithstanding the foregoing subdivisions, the insurer and any named insured may, by the terms of such policy or by a separate writing, agree that coverage under the policy shall not apply while said motor vehicles are being used by a natural person or persons designated by name. Such agreement by any named insured shall be binding upon every insured to whom such policy applies.

insurance, the coverage afforded a person other than the named insured may be limited to the financial responsibility requirements specified in Section 16059 of the Vehicle Code. Thus, a permissive user may be afforded only \$10,000 for all damages arising out of bodily injury sustained by one person and \$20,000 for two or more persons in any one accident, whereas a named insured under the policy has higher limits available for his own protection. Vehicle Code Section 16450 was also amended at this time to provide that any requirement set forth in Chapters 2, 3 and 4 of Division 7 of the Vehicle Code (relating to motor vehicle liability policies) would apply only to those policies which were certified as proof of ability to respond in damages, as provided in Vehicle Code Section 16431.

As a result of this legislation the law is restored to a status which is similar, although not identical, to that which existed prior to the *Wildman* case. From the date of the *Wildman* decision until September 20, 1963, all exclusionary endorsements are illegal and completely unenforceable. This legislative change was not made retroactive, therefore, it can not revitalize an unenforceable exclusion of a policy issued before September 20, 1963, even though the loss involved occurred after the effective date of the enactments. This is in accordance with the general rule that an illegal contract is not validated by later statutory changes.¹⁵

While these changes have not yet been tested in the courts, there is no reason to doubt that they will not be given effect. Certainly they represent cogent and convincing evidence of legislative intent to abrogate the rule of public policy in *Wildman*.

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¹⁵ *Interinsurance Exch. v. Ohio Cas. Ins. Co.*, 58 Cal. 2d 142, 373 P.2d 640, 23 Cal. Rptr. 592 (1962).