Opinion No. 59-142

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BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. R. F. Apodaca Superintendent of Insurance State Corporation Commission Santa Fe, New Mexico

*{*216}* I have your letter in which you inquire as to whether or not it is legal for an insurance company to issue a policy to cover potential liability in the "transportation of fellow employees" on a share of a rider basis.

The answer is that provision for such coverage in automobile liability policies is legal.

This answer is predicated upon the fact that transportation of fellow employees to and from work may create several relationships depending upon the particular facts of each case. In many instances, indeed in most, where expenses are shared by the riders, or where compensation is made to the person furnishing the car, either in cash, or by rotating the use of automobiles, or in some other manner, the riders become "passengers" instead of "guests" insofar as the operation of the guest statute is concerned. See 10 ALR 2d 1351 for an exhaustive annotation as to what constitutes payment so as to take the rider out of the operation of the guest statute. The New Mexico guest statute is found in Section 64-21-1, N.M.S.A., 1953 Comp. In these circumstances, the liability coverage would make the issuing company liable to respond in damages to *{*217}* the riders caused by **ordinary negligence** of the owner or operator in the operation of the vehicle. To avoid this result, automobile liability policies have since earliest times contained an exclusion clause excluding this use. An excellent statement of this exclusion in automobile liability policies is found in 5A Am. Jur. 29-30, **Automobile Insurance,** Section 29, where it is said:

"From a comparatively early time, automobile liability and property insurance policies have contained provisions exempting the insurer from liability, or terminating the policy, **if the insured automobile is used for the carrying of passengers for hire or compensation.** While there are variations among policies in the language in which the exclusion clause is phrased, **all standard types now in common use are expressly directed against the carrying of passengers for compensation or for a consideration.** Such provisions are valid. Such a restriction of use is held to violate no rules of public policy, on the theory that insurance companies have the right to insert in their policies reasonable conditions as to use." (Emphasis supplied)

In 30 ALR 2d 274, the annotation, after first setting out the language immediately above quoted, concludes:

"This exclusion has evoked great criticism, particularly when insurance companies, during the war years, attempted to apply it to the various 'sharing-the-expense'

agreements then in common use; and partly for this and partly for other reasons, the insurance companies, in more recent years, have attempted to liberalize such policy limitations by shifting the emphasis on the business factor possibly involved in the transportation of other persons in the insured vehicle."

The annotation concludes that the shifting of emphasis to the business aspect is, in more recent policies, accomplished by making the policy inapplicable while the insured automobile is used as a "public or livery conveyance".

Regarding the construction of this latter exclusionary clause, the annotator in 30 ALR 2d 273, says at page 275, Section 2:

"Despite the relative dearth of authority -- due to the relative newness of the clause -- there is one general rule which may be deduced with a fair degree of certainty from the cases dealing with the construction and effect of the exclusion clause. This rule has to do with the question involved in all cases dealing with the construction and effect of the exclusion clause, namely, whether or not the exact use to which the motor vehicle was put came within the purview of the exclusion

clause. While it is evident that in answering this question each case must be examined in the light of the particular facts involved and the exact terms employed in the policy to exclude liability, the test generally applied by the courts, either expressly or by necessary implication, seems to be **whether or not the insured vehicle has been held out to the general public for carrying passengers for hire,** and at the time of the accident was actually so used." (Emphasis supplied)

It would seem, therefore, that policies carrying this latter type of exclusion would not exclude the ordinary share expense arrangement in transportation of fellow employees in the absence of any additional facts.

The practical effect of endorsing a policy to extend coverage to fellow employees traveling under a share expense basis would be to nullify the exclusionary *{*218}* clause at least to this class of persons.

I might point out that there are many "share-expense" riders who are not fellow employees and as to such persons, the exclusionary clause might, depending on the particular facts, make the insurance policy inapplicable to them.

I might also point out that in many situations the exclusionary clause does not take "share-expense" riders out of the protection of the policy and this is particularly true where the exclusion is directed against the use of an automobile as a "public or livery conveyance". In such a case, the purchasing policyholder would receive little, if any, value or benefit from an endorsement bringing "share-expense" riders within the coverage of the policy. These are considerations going to reasonableness or unreasonableness of the rates and not to the legality of the endorsement.

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