# Liability Coverage in Missouri Personal Auto Policies

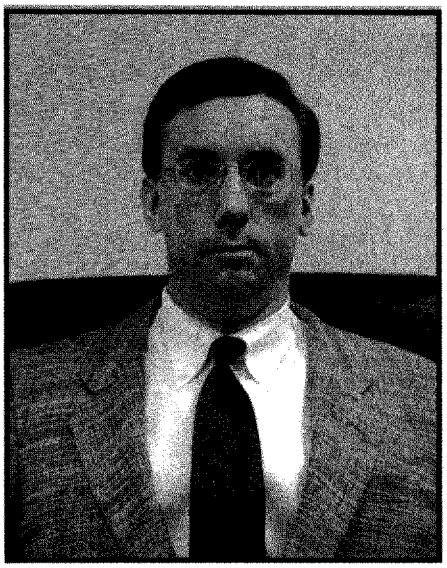
**There is an inexorable march toward finding at least minimum auto liability coverage for every vehicle in Missouri. This article examines recent cases that have advanced that trend.**

Courts recently have closely examined liability coverage in personal automobile policies. It is too easy to say that the law in this area is evolving. It is more accurate to say that the courts have steadily created a presumption of liability coverage for autos up to the minimum limits set by the legislature. The only exclusions the courts have permitted to remain in an insurance policy are either those explicitly set forth by the legislature or those already firmly entrenched in public policy.

An auto policy will typically have six different coverages, or "parts": liability for bodily injury or property damage to others (the "liability" part); damage to the car under the collision and comprehensive parts; medical payments coverage; and uninsured and underinsured motorist coverage. There will also be a "part" of general provisions that apply to the whole policy. This article is only concerned with the liability part.

The liability part of the policy will typically contain the following sections: what is covered, definitions of some terms in the policy, exclusions to the policy, provisions relating to the limits of liability, and provisions relating to which insurer pays what if more than one insurance company is involved.

As a general rule, courts will enforce an insurance policy as written unless the terms of the policy are ambiguous, in which case courts will interpret the policy



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in favor of the insured.[2] Assuming the policy is not ambiguous, how are the courts now interpreting the liability part of the policy?

## I. Who Is an Insured?

The first issue is whether a person is even an insured under an insurance policy. Even though the person claiming they are covered under a policy has the burden of proof to establish that coverage,[3] Missouri courts have generously granted coverage to most people.

An insurance policy will identify someone (or occasionally two people) as the "named insured." Generally, policies will also include as an insured a relative of the named insured living in the same household. "Household" is rarely defined, while "relative" is usually defined as related to the insured by blood, marriage or adoption. The courts have decided that "household" means the "curtilage"; in other words, though a household might not necessarily consist of one building, those additional buildings must be at least attached or enclosed by the same fence.[4] For example, if the insured lives in a castle, the buildings all must be enclosed by the same stone wall.[5]

The real issue, though, is whether an individual can be insured under several policies by living in several different homes. In insurance law, a person is not limited to one residence.[6] Normally, some time must have elapsed while the relative claiming to be an insured has resided in the household, but it does not have to be much, and there does not have to be an intention to remain. The courts have noted that a person merely has to be an integrated part of the household in order to be a resident, which is a question of fact.[7] Especially for a young driver involved in an accident, it is important to determine if that driver lives in two homes, and if consequently there is coverage available from each parent.

## II. Exclusions and Limits Under the MVFRL[8]

The Motor Vehicle Financial Responsibility Law (referred to here and elsewhere as the MVFRL), enacted in its

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[2] *Farmers Ins. Co. Inc. v. Pierrousakos*, 255 F.3d 639, 642 (8th Cir. 2001).

[3] *Shelter General Ins. Co. v. Siegler*, 945 S.W.2d 24, 25 (Mo. App. E.D. 1997).

[4] *Liberty Mut. Ins. Co. v. Havner*, 103 S.W.3d 829 (Mo. App. W.D. 2003).

[5] *Id.* at 833.

[6] *Watt by Watt v. Mittelstadt*, 690 S.W.2d 807 (Mo. App. W.D. 1985).

[7] *Pruitt v. Farmers Ins. Co., Inc.*, 950 S.W.2d 659 (Mo. App. S.D. 1997).

[8] *See* Beth C. Boggs, *Public Policy v. Policy Exclusions*, 57 J. Mo. Bar 16 (2001), that discussed some of the issues and cases in this article. The case summaries in that article will not be repeated here.

present form in 1986, has had its biggest impact on exclusions in the policy, but may have affected the available limits as well.

## III. The Statute

The financial responsibility law for automobiles, presently located in § 303 of the Missouri Revised Statutes, has been around in various incarnations in Missouri since 1945. Prior to 1986, the law was known as the Safety Responsibility Law; the 1986 amendments also caused a name change, to the Motor Vehicle Financial Responsibility Law. Fundamentally, the law requires a driver to maintain some type of security for paying off a claim if they hit someone with their car, be it through insurance, a bond, etc. This has been described as a "compulsory" insurance law, as opposed to the Safety Responsibility Law, which "was not a compulsory insurance law."[9] This part of the article will focus on § 303.190, which sets forth the requirements an insurance policy must have to satisfy this law.

Section 303.190 distinguishes between an "owner's" policy and an "operator's" policy; however, as a practical matter, the requirements are the same, and most auto policies are a hybrid of the two. The policy must contain the following:

1. In an owner's policy, include as an insured any operator using the vehicle with the express or implied permission of the owner ("permissive use").

2. In an owner's policy, insure for liability arising out of the ownership, maintenance, or use of the vehicle.

3. Have limits of liability per accident of $25,000 per person, $50,000 for two or more persons, and $10,000 for property damage.[10]

4. May contain the following exclusions:

a. The named person exclusion; i.e., the carrier can add an endorsement excluding specific people from coverage.[11]

b. Liability pursuant to workers' compensation law.

c. Injury to an employee other than a domestic (expanded by the courts to include injury to fellow employees).[12]

d. Damage to property under the control of the insured.

5. Any coverage given above the limits of $25,000/50,000/10,000 required by the statute are not subject to the provisions of the statute.

## IV. Halpin

The first important decision to take a hard look at this statute was *Halpin v. American Family Mutual Insurance Co.*[13] Rebecca Halpin had an automobile accident, injuring her two children. American Family, the family's insurance company, refused to pay for any injury to the children on behalf of Rebecca. The company cited the "household exclusion," a common provision in auto policies that excludes liability coverage when a relative of the insured who resides in the same household as the insured is injured by an insured.

Ultimately, the Supreme Court of Missouri found that because the household exclusion was not included in the list of exclusions allowed in the MVFRL, the exclusion was not valid up to the limits set forth in the MVFRL. Therefore, there was $25,000 in coverage available for each of the two children.

The real issue is how the Court arrived at that conclusion. There are two alternatives: first, that the Court simply looked at the exclusions listed in the statute, noted that the household exclusion was missing, and therefore found the exclusion invalid up to the MVFRL limits; or second, that after making this initial analysis, the Court determined whether public policy as expressed outside the MVFRL would support the validity of the exclusion. By simply looking at the language of *Halpin*, there is support for both approaches. The Court does make clear that parties can advance "public policy arguments regarding provisions of insurance contracts."[14] But whether that public policy can evolve from a source outside the MVFRL is muddled by the subsequent statement by that Court that in order to change an unambiguous exclusion in an insurance policy, "exceptions based on public policy must *usually* find support in necessary *implication* from statutory provisions" (emphasis added).[15] It would seem that the Court is saying that it sure would help to look at the statute, but other arguments will not be foreclosed.

But the first approach – simply looking to the statute – is the Eastern District Court of Appeals' interpretation of *Halpin* as expressed in *Distler v. Reuther Jeep Eagle*.[16] The *Distler* court examined a "car business" exclusion in a State Farm policy, a standard exclusion that excludes liability while the car is repaired or serviced by someone in the car business. This exclusion exists because the car business' liability coverage should cover this situation. However, the *Distler* court thought the issue simple:

> Missouri public policy, as set out in the MVFRL and interpreted in *Halpin*, seeks to protect injured parties by mandating that insured motor vehicle owners have minimum coverage except in certain statutorily defined situations . . . . The "car business" exclusion in the State Farm policy restricts the class of permissive users who are covered and, for this reason, is partially invalidated by the MVFRL.[17]

The court made clear that because the car

[9] *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 479, 481 (Mo. banc 1992).
[10] An amount, incidentally, that has not changed in 25 years.
[11] This was an amendment added in 1999.
[12] *Baker v. DePew*, 860 S.W.2d 318 (Mo. banc 1993).
[13] 823 S.W.2d 479 (Mo. banc 1992).
[14] *Id.* at 482.
[15] *Id.* at 483.
[16] 14 S.W.3d 179 (Mo. App. E.D. 2000).
[17] *Id.* at 183.

*"As a general rule, courts will enforce an insurance policy as written unless the terms of the policy are ambiguous, in which case courts will interpret the policy in favor of the insured."*

business exclusion is not an exclusion allowed by the statute, it is not valid up to the minimum limits established by the MVFRL.[18]

The difficulty is that courts have approved exclusions in auto policies that are not listed in the MVFRL. The classic example is the "intentional acts" exclusion, which provides that there is no coverage for the intentional acts of the insured. This is clearly not an exception listed in the MVFRL. Just as clearly, it is the public policy of Missouri (and everywhere else, for that matter) that intentional acts cannot be covered by an insurance policy. [19] In addition, the exclusion for coverage on a car that is owned by the insured or available for their regular use and not included on the insurance policy was upheld; apparently, the courts will continue to require that you can not insure all your vehicles by purchasing a policy on just one car.[20] These two exclusions not listed in the MVFRL are (and likely will continue to be) valid.

## V. Business Exclusions

In a standard policy,[21] there are three fundamental exclusions that the courts in Missouri have not examined closely under the MVFRL.

The first, for those insured under a nuclear energy liability policy, has apparently never been the subject of a reported case in any federal or state court. It provides that if an individual is already insured under a liability policy held, for example, by a nuclear generating plant, there is no coverage. Based on *Distler*, discussed above, it is unlikely the courts would enforce this exclusion.

The second, though, is much more important: when a car is operated, in some manner or another, in a business that puts it on the road a great deal, whether it be a taxicab, farm equipment, or a delivery vehicle, such as for pizza. The motivation behind the exclusion is clear: Operating a vehicle in these circumstances greatly increases the exposure to the insurance company, and it therefore wants an opportunity to assess that exposure and issue the appropriate premium. It is precisely for that reason, though, that it is unlikely a court would uphold such an exclusion, as it presents too great a risk that these cars will not be insured. There certainly is no requirement that the employer of these drivers maintain insurance on the vehicles.

The final exclusion is for commercial vehicles while used by a business. This does not apply to private passenger vehicles (though if one drove a company car, the exclusion for a non-owned car available for regular use would apply to the driver's insurance policy on their own vehicle). The courts have not examined this exclusion since the passage of the MVFRL.[22] As the MVFRL includes any vehicle designed to be used on a highway, the business should have the insurance on the vehicle required by the MVFRL. Inevitably, because commercial liability policies typically have sufficient limits for the routine case, a court will likely examine this exclusion in the context of a vehicle with no insurance or a case involving a catastrophic injury.

### Does the MVFRL allow the stacking of liability policies?

"Stacking" insurance policies means the limits of multiple policies are added together; this is routinely done with the uninsured motorist part of automobile policies. Policy language prohibits this stacking; but courts will, in certain circumstances, such as uninsured motorist coverage, refuse to enforce the anti-stacking language on public policy grounds. Most attorneys in Missouri, when faced with the issue of whether liability policies can be stacked, instinctively answer no. This is based on *First National Insurance Company of America v. Clark*,[23] in which the Court determined whether two $100,000 liability policies issued by the same company could be stacked together to give a total limit of $200,000. Both policies were owned by the same driver on two different cars he owned. The Court, with little discussion, stated that the MVFRL was satisfied if one owner's policy was in place on the car in the accident. Interestingly, the Court did have an extended discussion on the difference between uninsured motorist coverage (which, of course, does have stacking of policies due to *Cameron Mutual Insurance Co. v. Madden*)[24] and liability coverage. The distinction for the Court was that uninsured motorist coverage applies to people, while liability

[18] Interestingly, this same exclusion was found valid under the MVFRL earlier by the Eastern District in *State Farm Mut. Auto. Ins. Co. v. Liberty Mutual Ins. Co.*, 883 S.W.2d 530 (Mo. App. E.D. 1994).

[19] *James v. Paul*, 49 S.W.3d 678, 688 (Mo. banc 2001).

[20] *Sisk v. American Family Mut. Ins. Co.*, 860 S.W.2d 34 (Mo. App. E.D. 1993).

[21] I am considering this "standard" policy to be the one issued by the Insurance Services Office, a policy which has been copyrighted by them and one I have been careful not to quote directly. Though the wording is different, almost all auto policies have the same basic exclusions.

[22] *Farmers and Merchants Ins. Co. v. Smith*, 742 S.W.2d 217 (Mo. App. W.D. 1987), upheld the exclusion under pre-MVFRL law.

[23] 899 S.W.2d 520 (Mo. banc 1995).

[24] 533 S.W.2d 538 (Mo. banc 1976).

[25] 972 S.W.2d 595 (Mo. App. W.D. 1998).

coverage applies to particularly described cars; therefore, stacking for liability coverage, unlike uninsured motorist coverage, would not be allowed. Confusingly, the *Clark* Court went on to state that most auto policies are a hybrid of owner's and operator's policies, therefore belying their distinction.

At any rate, the Western District Court of Appeals reinforced this distinction in *American Standard Insurance Company of Wisconsin v. May*.[25] In that case, the plaintiffs attempted to have the limits of a policy apply twice: once to the tortfeasor, and once to the owner of the car on a "negligent entrustment" theory. The court, citing *Clark*, stated that the MVFRL only required the car to be insured once, and therefore enforced the provision that applied the limits to each occurrence.

But the Supreme Court of Missouri may have changed this rule in *American Standard Insurance Company v. Hargrave*.[26] Ms. Hargrave was driving her father's vehicle with his permission when she had an accident, injuring her two children. The policy on the vehicle – issued by State Farm – paid the minimum limits pursuant to *Halpin*. Her own policy with a different carrier – American Standard – refused to pay, stating that the *Halpin* limits had been satisfied.

Let's suppose she had injured someone else. Normally, because her own insurance – American Standard – was with a different carrier, her policy would operate as an excess policy to the State Farm policy that insured the car. American Standard would then pay any damages that remained after State Farm exhausted the limits of its policy. American Standard argued that, as an excess carrier, *Halpin* should not apply, as State Farm had already paid the limits required by the MVFRL. Based on *Clark*, this would seem to make sense, as the "one policy in place" rule had been satisfied.

The *Hargrave* Court, though, stated that both policies were subject to *Halpin*, and required the American Standard policy to operate as an excess policy up to the minimum MVFRL limits. What is interesting is that the *Hargrave* Court came to this conclusion by specifically overruling *Shelter Mutual Insurance Co. v. Haney*.[27] In *Haney*, the Southern District Court of Appeals decided that *Halpin* applied to only one policy. Though *Haney* was decided before *Clark*, and never mentioned stacking, it effectively stopped the stacking of liability coverage. But the *Haney* decision, like *Clark*, dealt with policies from one carrier. If the *Hargrave* Court had simply stated that it based its ruling on the fact that there were two different carriers (a relatively unusual situation) and, therefore, one carrier was excess, the effect of the decision would be limited. In *Hargrave*, though, the Court stated its decision was not based on the excess nature of the policy:

> What the MVFRL requires is that each valid owner's or operator's policy provide the minimum liability limits specified . . . . As argued by American Standard, the excess insurance issue is irrelevant to the core issue of this case; the application of [the MVFRL] when multiple liability policies are in place and each contains a household exclusion clause.[28]

Therefore, if the only issue is applying the MVFRL to each policy available to a tortfeasor, would each one stack? Even if they are issued by the same carrier? Has *Clark* been effectively overruled by *Hargrave*, at least up to the minimum limits of the MVFRL, therefore allowing the stacking of each additional policy in the amount of $25,000 after the initial policy's limits are paid?

## VI. Who Pays What? Multiple Insurers and Multiple Limits

What if there are multiple policies, or multiple insurers, that cover a driver involved in an accident? The insurance companies have written their policies in order to achieve the following result: If there are multiple policies with one insurer, then the policy with the highest limit is used, and the rest are ignored. As discussed above, stacking of liability policies is prohibited by the policy. If there are different insurance companies, the highest limit from each carrier is added together and they either share "pro rata" (the amount the claimant receives is paid by the insurance companies in proportion to the amount of each company's limit), or the carrier that insures the vehicle involved in the accident is the primary carrier (it pays all it has available first) and the other carriers are excess carriers (they pay whatever is left after the primary carrier has paid its limits).

Have the insurance companies succeeded in their quest for clarity and certainty? Beyond the discussion of stacking above, generally, the insurance companies have succeeded. The typical fight in this area is between the insurance carriers as to whether they share pro rata, or operate as primary and excess carriers. To understand the case law in this area, it is necessary to understand there are three types of clauses that an insurance policy contains to coordinate with other policies: a pro rata clause, an excess clause, and an "escape" clause.

The pro rata clause, of course, states the policies will share pro rata, while the excess clause states that the policy with the excess clause shall be excess to other valid policies. An escape clause, often found in rental contracts, provides that if the driver has a valid insurance policy that provides liability insurance, then the owner of the vehicle has no coverage. The courts have found this type of provision valid.[29]

Not surprisingly, different policies will have different clauses as to how the policy

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[26] 34 S.W.3d 88 (Mo. banc 2000).
[27] 824 S.W.2d 949 (Mo. App. S.D. 1992).
[28] 34 S.W.3d at 92.
[29] *Irvin v. Rhodes*, 929 S.W.2d 829 (Mo. App. W.D. 1996).
[30] *Rader v. Johnson*, 910 S.W.2d 280 (Mo. App. W.D. 1995).
[31] 14 S.W.3d 179 (Mo. App. E.D. 2000).
[32] 929 S.W.2d 829 (Mo. App. W.D. 1996).

is to be treated. When comparing clauses between two policies, the courts have come up with the following results:

| Company 1 | Company 2 | Result |
|---|---|---|
| pro rata | pro rata | pro rata |
| excess | excess | pro rata[30] |
| pro rata | excess | Company 1 primary, Company 2 excess[31] |
| pro rata or excess | escape | Company 1 primary, Company 2 no coverage[32] |

## VII. Cancellation

The courts are extremely strict in requiring the insurance company to follow all the cancellation requirements of a policy, whether those requirements are reasonable or not, even if the insured is trying to cancel a policy.[33] There are statutory requirements for proper cancellation as well.[34] What is clear is that any deviation from either policy or statutory requirements will not be tolerated.

For example, in *Blair v. Perry County Mutual Insurance Co.*,[35] an anticipatory notice of cancellation was sent to an insured who was on a quarterly payment plan. Though this was a commercial liability policy, the Supreme Court of Missouri's statements in this case are indicative of the Court's attitude toward the construction of insurance policies. Finding an anticipatory cancellation could render the policy terms "absurd and unreasonable,"[36] the Court held an insurance company must wait for an insured not to pay on the due date, then send out a notice of cancellation, then wait the required 10 days.[37] Because almost all auto policies have similar wording for their non-payment cancellation notices, it would seem, at a minimum, every policy would have an additional 10 days of coverage past the due date whether the insured pays or not.

But even when the policy requirements are followed, an insurer can still, through its actions, waive those requirements. In *Hennessey v. Dairyland Insurance Co.*,[38] the insurance company accepted late payment on a continuing policy without informing the insured of the effect of accepting that late payment. Simply because the insurance company failed to inform the insured of what would happen if it took her check – after already telling her that her policy would be cancelled if she did not get the payment in on time – any ability on the part of the insurer to deny coverage was waived by that insurer. This simply reiterates that the courts will require insurers not only to do everything correctly, but keep their insureds well-informed of what the insurer is doing.

## VIII. Reservation of Rights

Because the duty to defend an insured by an insurance company is broader than a duty to pay on behalf of that insured, the insurance carrier will not infrequently defend a lawsuit with coverage issues under a reservation of rights.[39] A "reservation of rights" simply informs the insured that, though the insurance company will provide a lawyer and defend the lawsuit, it might not pay a judgment entered against the defendant. If the carrier does reserve its rights, that puts the carrier in a position of potential peril.

Once the carrier elects to defend under the reservation of rights, an insured is free to enter into a "537.065" agreement with the plaintiff. A § 537.065 agreement, so named from the section of the Missouri statute that permits such an agreement, allows a defendant to agree to a settlement with a plaintiff, but allows the plaintiff to only collect from any applicable insurance policies, as opposed to the personal assets of the defendant. As a practical matter, this fixes the damages and allows the plaintiff to proceed in some type of garnishment action to resolve the coverage issues.[40] The courts have required the amount of the settlement to be "reasonable."[41]

Though there is some thought that a formal demand must be made to withdraw the reservation of rights before the § 537.065 agreement is entered into, there is nothing in the statute or caselaw that suggests such a demand is required. The only barrier that prevents an insured from entering into the § 537.065 agreement is the provision in the insurance policy that prohibits the insured from impairing the ability of the insurance company to control the lawsuit, which the courts have said is waived once the reservation of rights letter is sent.[42] In fact, once an insurance company sends a reservation of rights

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[33] *Blanks v. Farmers Ins. Co. Inc.*, 97 S.W.3d 1 (Mo. App. E.D. 2002).

[34] Section 379.110, RSMo 2000, *et seq.*

[35] 118 S.W.3d 605 (Mo. banc 2003).

[36] *Id.* at 609.

[37] For auto policies, the insurer must notify the Department of Revenue 10 days before cancellation. Section 303.210, RSMo 2002. There is no statutorily-required period for notice to insureds, though this 10-day provision in a policy for notification of cancellation from non-payment of premium could be characterized as universal. Interestingly, in *Wilson v. Traders Ins. Co.*, 98 S.W.3d 608 (Mo. App. S.D. 2003), the court used § 303.210 to require the insurance company to provide the minimum statutory limits when the policy was cancelled on January 30, the notice to the Department of Revenue was given on February 2, and the accident was on February 7.

[38] 904 S.W.2d 73 (Mo. App. E.D. 1995).

[39] The duty to defend arises solely out of the allegations in the petition, and if any of the allegations of the petition could invoke policy coverage, then the insurer is obligated to defend the insured. *American Family Mut. Ins. Co. v. Tickle*, 99 S.W.3d 25, 28 (Mo. App. E.D. 2003).

[40] Whether by Rule 90 or through a statutory garnishment action under § 379.200, RSMo 2002. It should be noted the Supreme Court of Missouri recently ruled either remedy is available. *Johnston v. Sweany*, 68 S.W.3d 398 (Mo. banc 2002).

[41] *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810 (Mo. banc 1997).

[42] *Ballmer v. Ballmer*, 923 S.W.2d 365, 369 (Mo. App. W.D. 1996).

[43] 55 S.W.3d 366 (Mo. App. W.D. 2001).

letter, it is difficult to envision a circumstance in which the insured's counsel would not recommend to the insured that it would be advantageous to enter into a § 537.065 agreement with the plaintiff. Such an agreement is also more often than not beneficial to the plaintiff as well.

This is readily demonstrated by *Norris v. Nationwide Mutual Insurance Co.*[43] The judgment in the original trial was $6,000; the court of appeals remanded the case back to the trial court in order to give the defendant a choice of accepting a $28,000 additur or receiving a new trial. The defendant's carrier had sent a reservation of rights letter to the defendant. The counsel hired by the carrier inexplicably elected to accept the additur, which the carrier did not agree to pay. Understandably irritated, the defendant hired his own counsel and entered into a § 537.065 agreement with the plaintiff for $300,000.

The appellate court said such an agreement was acceptable. Whether the amount of the settlement was made in good faith was within the discretion of the trial court, which was not abused here. Moreover, as the coverage issue involved a question of fact, this would be treated as any other court tried case. Substantial evidence supported the decision by the trial court that there was coverage under the policy.

## IX. Conclusion

There is an inexorable march towards finding at least minimum auto liability coverage for every vehicle in Missouri; if an insurance company denies coverage, or restricts the limits of available policies in any way, the practitioner should investigate this denial fully to ascertain if that denial is consistent with the current trend in the law.