

**IN THE COURT OF APPEALS 02/27/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-CA-00510 COA**

**RUTHIE BELL, INDIVIDUALLY AND ON APPELLANTS  
BEHALF OF THE HEIRS-AT-LAW OF  
ADRIAN BELL, DECEASED; MERTIS B. SANDERS,  
INDIVIDUALLY AND ON BEHALF OF THE  
HEIRS-AT-LAW OF MARCUS DEWAYNE JORDAN,  
DECEASED; LEE DOROTHY JAMES, INDIVIDUALLY  
AND ON BEHALF OF THE HEIRS-AT-LAW OF  
DEXTER ISADORE JAMES, DECEASED; LILLIE  
MAE LATHAM, INDIVIDUALLY AND ON BEHALF  
OF THE HEIRS-AT-LAW OF MARYLIZ SHONTA LATHAM,  
DECEASED.**

**v.**

**GOVERNMENT EMPLOYEES INSURANCE COMPANY APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ELZY JONATHAN SMITH, JR.

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS: ELLIS TURNAGE

ATTORNEY FOR APPELLEE: MARIAN S. ALEXANDER

NATURE OF THE CASE: CIVIL-INSURANCE COVERAGE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN

FAVOR OF THE APPELLEE

ON PETITION FOR REHEARING

EN BANC:

DIAZ, J., FOR THE COURT:

This matter is before the Court on the Appellee's petition for rehearing. The Appellee's petition is denied. The original opinion dated October 31, 1995, is hereby withdrawn, and this opinion is substituted in its place.

Ruthie Bell, Mertis B. Sanders, Lee Dorothy James, and Lillie Mae Latham (the Appellants) filed separate complaints against Government Employees Insurance Company (GEICO) seeking uninsured motorist bodily injury coverage under GEICO policy number 250-02-62. They each sued individually and on behalf of the heirs-at-law of four decedents, Adrian Bell, Marcus Dewayne Jordan, Dexter Isadore James, and Maryliz Shonta Latham, respectively. The four causes of action were consolidated by court order. On April 19, 1993, the trial judge granted a summary judgment in favor of GEICO. The Appellants perfected this appeal and allege that the trial court erred when it granted summary judgment to GEICO. Finding that Clifton Steward is a named insured under Arkansas law and that the initial permission rule provides alternative grounds for providing coverage in this case, this Court holds that the trial court erred when it granted summary judgment in favor of GEICO. We reverse and remand this cause for further proceedings consistent with this opinion.

THE FACTS

Apolis E. Bailey (Bailey) and her husband, Clifton Bailey, are residents of Forrest City, Arkansas. Apolis Bailey owned a 1983 Mercury and insured it with GEICO under an Arkansas contract of insurance, policy number 250-02-62. Bailey's son from a previous marriage, Clifton Steward (Steward), was a resident driver of the Bailey household. On May 22, 1990, Bailey completed a GEICO Auto Insurance Questionnaire regarding information about the automobiles and operators covered by GEICO's policy. After being completed by Bailey, Section B of the questionnaire indicated the following:

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## B. AUTOMOBILE/OPERATOR INFORMATION

### 1. PLEASE LIST ALL OPERATORS OF EACH VEHICLE INCLUDING THOSE WITH LEARNER'S PERMITS

Name (Last- First- Middle) Sex Date of Birth Relationship Reside Marital Percentage of use Occupation & Employer

Mon/Day/Yr to Insured with you Status Car 1 Car 2 Car 3 Including Military/Federal Grade Where Appropriate

Bailey, Apolis (52) F 11-18-37 Insured M 95 05 Employment Interviewer

Steward, Clifton L. (20) M 05-29-70 Son Yes N-M 05 95 Laborer/Student

GEICO updated Bailey's policy after receipt of this questionnaire. On May 24, 1990, GEICO issued a new "Family Automobile Policy Renewal Declarations" for the Bailey policy.

On page 1 of the declarations, Apolis E. Bailey and Clifton Bailey are listed in the section labeled "Item 1/ Named Insured/ And Address." Page 2 gave information concerning another automobile owned by the Baileys and insured by GEICO. Page 3 covered the 1983 Mercury, vehicle #2. It listed the coverages purchased by the Baileys, including the uninsured motorist coverage, and contained the statement: "Your son, Clifton, is now being rated as a principal operator of your 1983 Merc[ury]" since Clifton was described by Bailey as using the Mercury 95% of the time.

Steward attended college at Coahoma Junior College in Clarksdale, Mississippi, approximately a 1.5 hour drive from Forrest City, Arkansas. In April of 1990, Bailey allowed Steward to take the Mercury to college in order for him to bring his belongings home at the end of the spring semester. Steward also had use of the Mercury during the summer of 1990 in order to drive to and from work. When the fall semester began, Bailey allowed Steward to take the Mercury back to school. One reason Bailey gave the automobile to Steward was to enable him to visit his critically ill natural father. However, Bailey instructed Steward that he was not to allow anyone else drive the Mercury. The Appellants contend that Steward had continuous control, possession and use of the Mercury from August 1990 until September 30, 1990. During this time, Steward allowed two friends, Adrian Bell and Willie Howard, to borrow the Mercury for their own purposes.

On September 30, 1990, Adrian Bell (Bell) asked Steward to borrow the Mercury in order for him to return to his home in Mound Bayou, Mississippi. On his way to Mound Bayou, Bell took Tracey Russell to her place of employment; he did this for Steward who had previously agreed to give Ms. Russell a ride to work that day. At approximately 11:30 p.m. on September 30, 1990, Bell was returning to the Coahoma County Junior College campus with three passengers, Marcus Dewayne Jordan, Dexter Isadore James, and Maryliz Shonta Latham, when an automobile driven by Dwain Daniels crossed the center line of the highway and struck the Mercury driven by Bell. All four occupants of the 1983 Mercury were killed as a result of this head-on collision. Dwain Daniels was also killed; he was an uninsured motorist.

Bailey did not know until after the accident that Steward had allowed other people to drive the Mercury. She also did not know that Bell had borrowed the vehicle on the night of September 30, 1990, nor that Bell had three passengers with him. Bailey reported the accident to GEICO which denied any liability and obligation under the policy.

## DISCUSSION

### I. WHETHER CLIFTON STEWARD WAS A NAMED INSURED UNDER GEICO POLICY NUMBER 250-02-62.

On appeal, the Appellants argue that a named insured is an individual who is identified by name on an insurance policy, and as such, summary judgment should have been granted in their favor. GEICO responds that a named insured is really a term of art and should not be interpreted to include Clifton Steward. One court discussed who constitutes a named insured and stated that it has been described as a term "with a restrictive meaning and does not apply to any persons other than those named in the [insurance] policy." *Kohly v. Royal Indem. Co.*, 190 So. 2d 819, 821 (Fla. Dist. Ct. App. 1966). However, each state court may define or interpret such a term differently. Under the relevant Arkansas Supreme Court precedent, Clifton Steward was a named insured with authority to grant permission to Bell to use the 1983 Mercury. Accordingly, the trial court erred by granting summary judgment in favor of GEICO. A detailed discussion of the relevant Arkansas law follows. In the most recent case on the issue of who is a named insured, the Arkansas Supreme Court interpreted the term to mean "an insured who was named" on the policy. *Daniels v. Colonial Ins. Co.*, 857 S.W.2d 162, 165 (Ark. 1993). In *Daniels*, Sherri Daniels applied for and obtained automobile insurance for her husband, Melvin Ricky Daniels. *Id.* at 163. On the application, Melvin

was listed as the "owner" of the automobile, and he and Sherri were both listed as "drivers in household." *Id.* On the application, there was a section which stated: "COVERAGE REJECTION STATEMENTS--MUST BE SIGNED BY NAMED INSURED IF COVERAGE NOT PURCHASED." *Id.* When the application was made, Sherri rejected and signed as the applicant the provision that provided for "underinsured motorist" coverage. *Id.*

On the declarations page of the policy, Colonial "designated [Melvin] as the named insured." *Id.* The policy also included the following definition: "'You and your' mean the policyholder named in the Declarations and spouse if living in the same household." *Id.*

Melvin was subsequently involved in an automobile accident in which an underinsured motorist was at fault. *Id.* Melvin made a claim under his insurance with Colonial, but it denied his claim based on the fact that Sherri had expressly waived the underinsured motorist coverage. *Id.* Melvin filed a declaratory action against Colonial and on a motion for summary judgment alleged that "he was the sole named insured and had never waived underinsured motorist coverage as required by the application." *Id.* at 164. The trial court found that Sherri was an insured named in the policy who could reject such a coverage under the policy. *Id.*

On appeal, Melvin again argued that since Sherri was not the "named insured" that she could not reject the underinsured motorist coverage offered by Colonial. *Id.* The Arkansas Supreme Court affirmed the trial court and held that "it is clear that Sherri Daniels was an insured who was named" on the policy and that she could reject the underinsured motorist coverage. *Id.* The court based its holding on several facts. First, although the declarations page of the policy listed Melvin as the named insured, the application listed both Sherri and Melvin as "drivers in the household" with the "clear reason to specify drivers who would be covered." *Id.* Second, the court relied on the definitions portion of the policy which stated "[y]ou and your mean the policyholder named in the Declarations

and spouse if living in the same household." *Id.* Last, the court consulted a treatise on insurance which stated that policies will define "other persons, commonly described by class, as additional or other insureds." *Id.* at 164-65 (citing 12 George J. Couch, *Cyclopedia of Insurance Law* § 45:267, at 581-82 (2d ed. 1981)).

The court broadly interpreted the phrase "named insured" to include Sherri. Furthermore, the court stated that it had to construe the language of insurance policies in their "plain and ordinary sense," yet the application clearly stated that rejection of certain coverages required the signature of the "named insured." *Id.* at 163, 165. In its holding in *Daniels*, the Arkansas Supreme Court held that the term "named insured" should be construed broadly to mean "an insured who was named" at least in Arkansas courts.

The instant case is similar to and dictated by the holding in *Daniels* in several respects. First, it is clear from the policy that Clifton Steward is an insured who is named on the policy. He was listed as using the Mercury for his own personal use 95% of the time. Second, the definitions in the policy list as someone who is insured "relatives of (a) above [the individual named in the declarations] if residents of his household." Clifton Steward is such an insured since he lived at home with his mother, Bailey, and step-father. Furthermore, GEICO included in its determination of the policy rates that Steward was being rated as "a principal operator." *Compare Mid-Century Ins. Co v. Liljestrاند*, 620 P.2d 1064, 1066 (Colo. 1980) (defining named insured as someone who contracts for insurance and whose background and driving experience determines the premium which must be paid for the policy).

The *Daniels* court relied on the definitions section of the policy in that case to hold that Sherri Daniels was an insured who was named. The court in *Daniels* further indicated that the term of art "named insured" was not as restrictive a term as GEICO would argue. Rather, the court allowed the policy taken as a whole to define who was a named insured. In the instant case and applying the rationale of *Daniels*, Clifton Steward is a named insured under Arkansas law.

## II. INITIAL OR FIRST PERMISSION RULE

Both parties at oral argument concentrated on whether or how the initial permission rule was applicable to the instant case. The Appellants argue to this Court that the initial permission rule should be applied in the instant case, and thus, coverage exists under the insurance policy issued by GEICO. An analysis of the initial permission rule provides this Court with an alternative rationale for reaching the same conclusion that summary judgment was erroneously granted in this case. Arkansas follows the initial permission rule which has been defined by commentators to mean that once permission to use the insured vehicle has been granted, that permission extends "to any and all uses of the vehicle. . . ." 12 George J. Couch, *Couch: Cyclopedia of Insurance Law* § 45:464, at 845 (2d ed. 1981). Arkansas adopted the initial permission rule in the case of *Commercial Union Insurance Co. v. Johnson*, 745 S.W.2d 589, 594 (Ark. 1988).

In *Commercial Union Insurance Co. v. Johnson*, the wife of an insured gave a friend permission to use the family automobile, and the friend was involved in an automobile accident with the car. *Id.* at 590. The insurance company argued that the friend had deviated from the permission to use the vehicle given by the wife, and therefore, coverage should not be afforded. *Id.* The Arkansas Supreme Court held that the insurance policy would cover the damages arising from the automobile accident

and in so doing, expressly adopted the initial permission rule in Arkansas. *Id.* at 590, 594.

*Commercial Union Insurance Co. v. Johnson* left open the issue of whether the initial permission rule would apply "to the situation in which one who has permission of the named insured grants permission to another person to use the named insured's vehicle. . . ." *Id.* at 594. Since the Arkansas Supreme Court has not addressed this exact issue, this Court must evaluate the relevant precedent, *Commercial Union Insurance Co. v. Johnson*, and determine how the Arkansas courts would resolve the issue in the case *sub judice*. The court commented that the same policy considerations for adopting the initial permission rule would also apply to cases involving a second permittee such as the case before the Court today. *Id.* at 594. The court also quoted with favor language that expressed it was good public policy to protect people who are injured as a result of automobile accidents caused by uninsured motorists. *Id.* at 591 (citations omitted). Based on the express policy considerations offered by the Arkansas court as part of its rationale for adopting the initial permission rule, this Court concludes that Arkansas law would allow coverage in the instant case since Bailey gave initial permission to Steward to use the 1983 Mercury. Thus, the trial court's order granting summary judgment in favor of GEICO is reversed based on this Court's determination that the initial permission rule applies in the instant case.

#### CONCLUSION

Based on the foregoing discussion, this Court finds that the trial court erred when it granted a summary judgment in favor of GEICO, and hereby reverses and remands this cause for further proceedings consistent with this opinion.

**THE JUDGMENT OF THE BOLIVAR COUNTY CIRCUIT COURT IN FAVOR OF THE APPELLEE IS REVERSED AND REMANDED. ALL COSTS ARE TAXED TO THE APPELLEE.**

**BRIDGES, P.J., BARBER, COLEMAN, KING, AND PAYNE, JJ., CONCUR.**

**SOUTHWICK, J., DISSENTS WITH SEPARATE OPINION JOINED BY FRAISER, C.J., THOMAS, P.J., AND MCMILLIN, J.**

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SOUTHWICK, J., dissenting

I have two disagreements with the majority. The first is whether the meaning of "named insured" in this policy is even relevant, or if so, whether it can extend to Clifton Steward, who gave Adrian Bell permission to drive this vehicle. My second disagreement is that as to initial permission, the majority relies on case law and a statute dealing with liability insurance coverage, not with the kind of provision *both* parties admit is relevant here, uninsured motorist.

First, I make a general observation. Liability coverage is for claims that arise from the fault of someone whose actions are covered by the policy. Uninsured motorist coverage is for an entirely different set of claimants -- those who have rights under the policy against uninsured, at-fault motorists. The terms of each section of the policy, such as the rights and limitations applicable to the insured and those who claim through him, are different. There are similarities and overlaps as I will

discuss. Still, imprecision in the use of policy language or too automatic an application of case law applicable to liability coverage will lead to confusion.

### *I. Named insured*

I disagree with the majority that *Daniels v. Colonial Insurance Co.*, 857 S.W.2d 162 (Ark. 1993), obliterated the normal distinctions between "named insured" and any other insured named on the policy. First, however, it should be pointed out that the uninsured motorist provision does not refer to a driver having the permission of the "named insured." Instead, there is an exclusion of coverage, i.e., the vehicle is not an "insured auto," if it is being used "without the owner's permission." Since Steward was not the owner, the uninsured motorist provisions on their face do not apply. However, there is an Arkansas case that interprets statutory language to require that a policy "include in uninsured motorist coverage the persons included in liability coverage." *First Sec. Bank v. Doe*, 760 S.W.2d 863, 865 (Ark. 1988). What *Searcy* means in this context will be reviewed in the section on initial permission. I will defer the possible irrelevance of "named insured" until then.

Even accepting that "named insured" is relevant to a determination of coverage under the uninsured motorist sections of the policy, Steward was not a "named insured." The Plaintiffs would have us hold that if someone named on the policy gives permission to drive to a person who is not named, the uninsured motorist provisions cover the new driver. There may be some intuitive appeal to holding that "named insured" means "anyone named," but it wipes away the traditional definition of a standard insurance term. *Daniels* is not that revolutionary. The application for insurance in *Daniels* stated that only the "named insured" could waive certain coverages. The husband was the named insured, but it was the wife alone who prepared and signed the application for insurance. The case actually is determining that if the person signing the waiver is the spouse of the named insured, and is the one whom the insureds, named and otherwise, have chosen to complete the application for insurance, and premiums are, without objection, paid over an extended time for the insurance obtained, then the policy is effective as written. The case has more to do with agency and waiver in executing a contract and the special status of a spouse under the insurance policy, than it does with the meaning of "named insured." The case did not override any restrictions in the policy on who would receive coverage in certain circumstances, whether it was "named insured," "other insured," "members of household," etc. Nothing in the facts, analysis, or holding of *Daniels* would permit the use of it being made by the majority.

Clifton Steward was not the owner, and thus his permission is not relevant under the uninsured motorist clause. Second, even if "named insured" is the relevant consideration, Steward was not that either. Steward's permission to a friend to drive the insured car does not operate to provide coverage under the policy's omnibus uninsured motorist provision.

### *II. Initial permission*

I agree that the trial court erred in its discussion of *Commercial Union*, but its error was the understandable decision to limit the case to its holding, that the initial permission rule applied to time, place, and manner restrictions. We must decide the effect of that holding on the issue expressly reserved for another day, "the situation in which one who has permission of the named insured grants

permission to another person to use the named insured's vehicle . . . ." *Commercial Union Ins. Co. v. Johnson*, 745 S.W.2d 589, 594 (Ark. 1988).

GEICO says we cannot make an "Erie-guess," and can only rely on what Arkansas law already is. For Arkansas law GEICO relies on two, older federal court cases interpreting Arkansas law which, ironically for GEICO's argument, were *Erie*-guesses. Those cases explicitly held that if an initial permittee ignored the named insured's instructions not to allow anyone else to use the vehicle, there was no insurance coverage for a resulting claim. *Gillen v. Globe Indem. Co.*, 377 F.2d 328, 333 (8th Cir. 1967); *Dodson v. Sisco*, 134 F. Supp. 313, 317 (W.D. Ark. 1955). Both those cases predate the Arkansas Supreme Court's decision in *Commercial Union*. Even so, had they been Arkansas Supreme Court decisions, we would be compelled to follow them without clearer rejection by the *Commercial Union* decision. Neither *Gillen* nor *Dodson* relied upon applicable Arkansas precedents and indeed were merely *Erie*-guesses themselves. *Dodson*, 134 F. Supp. at 317-18; *Gillen*, 377 F.2d at 330-31. The later case even concluded by stating "we do not propose to establish the law of Arkansas on this matter." *Gillen*, 377 F.2d at 333.

There is a third case that was not in GEICO's original brief, but is emphasized on rehearing.; it is *Allstate Insurance Co. v. Mathis*, 339 S.W. 2d 132 (Ark. 1962). *Dodson* predated it. The *Gillen* court omitted *Mathis* in citing relevant precedents for whether an initial permittee could grant a second permittee authority to drive the insured vehicle, the issue GEICO argues that *Mathis* resolves. *Gillen*, 377 F.2d at 330-31. The *Gillen* court devotes all of two sentences to the case:

The sole Arkansas appellate case in this general area would seem to confirm this holding. On significantly different facts the Arkansas Supreme Court in [*Mathis*] approved an instruction which would deny omnibus coverage if the jury that found the named insured forbade the first permittee to allow the second permittee to drive the insured car.

*Gillen*, 377 F.2d at 332. We agree with *Gillen* that the case deserved at best only passing mention in deciding the issue the *Gillen* court faced. The second permittee driver in *Mathis* had not only been singled out by the owner as the person who would not be allowed to drive, but apparently had been told this by the owner. The owner nonetheless suspended the refusal and allowed him to drive the day before the accident occurred. The jury question was whether the prohibition of driving privileges to that one person had been permanently revoked by the owner's actions the day before the accident. *Mathis* may well be unaffected by *Commercial Union*. The public policy *Commercial Union* espouses is providing liability insurance coverage as broadly as possible by protecting the public from an insured's "conferring coverage or withholding it by stating after an accident has occurred whether or not the driver has his or her permission." *Commercial Union*, 745 S.W. 2d at 453-54. *Mathis* survives the policy arguments of *Commercial Union* when limited to its facts: if a specific person knows he does not have permission to drive a vehicle, and that can be proved by testimony besides that of the insured, then the problem of an owner's discretionary "memory" after an accident is not as serious. In the present case, though, there was no testimony beyond that just of the family covered by the policy regarding Steward's telling Bell he did not have permission of the owner. A passenger who was dropped off at work before the fatal accident, Tracy Russell, made no comment on the question in her affidavit. The second permittee was killed and of course could not confirm what he was told.

Whatever *Mathis* means, I do not find it controlling here.

Since there are no on-point precedents from the Arkansas Supreme Court, our duty is to determine what the Arkansas courts would likely conclude if presented with this case. The Arkansas Supreme Court in *Commercial Union* stated that the same policy concerns that caused it to reject attempted time, place, or manner limitations on an initial permittee's use, seemed present when the issue is that initial permittee's disregarding a prohibition on allowing another person to drive the car. The direction that the Arkansas court was going is evident.

There is a considerable volume of law dealing with the interpretation of omnibus clauses such as the one presented in this case. It appears, generally speaking, that three different rules have been followed. The first is the so-called strict or conversion rule to the effect that the exact use of the automobile at the time and place of the accident must have been with the express or implied permission of the employer. The second is the moderate or minor deviation rule which permits recovery when the deviation from the permission granted is of a minor nature. The third is the liberal or initial permission rule to the effect that if permission to use the automobile was initially given, recovery may be had regardless of the manner in which the automobile was thereafter used. Proponents of this rule justify it on the ground that it is good public policy to protect persons injured in automobile accidents against uninsured motorists.

*Commercial Union*, 745 S.W.2d at 591. Arkansas adopted the final of the three. A clear justification for a broad rule is simply to hold that liability clause restrictions on the breadth of permission are against public policy. Arkansas has already come close to reaching that result.

After reviewing *Commercial Union*, I conclude that if faced with this issue the Arkansas Supreme Court would hold that *liability* insurance coverage extends to a second permittee, despite a clear and reasonable prohibition by the named insured on loaning out the vehicle. There were three concurring opinions in *Commercial Union* that said the majority's language was too broad. A majority, however, was apparently satisfied with sweeping statements regarding the general issue. GEICO argues that *Commercial Union* is not an infallible guide to what would be held under the facts we face, and with that I agree. GEICO's arguments to the contrary notwithstanding, there are no controlling precedents in Arkansas, and we must make our best *Erie*-guess.

The mere finding that *Commercial Union*'s rationale applies even to prohibitions on any loaning of a vehicle does not end the question of coverage. *Commercial Union* said the "issue in this case is whether an insurer may be liable pursuant to the omnibus clause in an automobile *liability* policy. . . ." *Commercial Union*, 745 S.W.2d at 589 (emphasis added). The case cited the Arkansas Motor Vehicle Responsibility Act, to the effect that "the owner's policy of *liability* insurance shall: . . . (2) Insure the person named therein and any other person, as insured, using any vehicle or vehicles with the express permission of the named insured, against loss from the liability imposed by law for damages arising out of the . . . use of the vehicle . . . ." *Commercial Union*, 745 S.W.2d at 446 (emphasis added) (citing Ark. Code Ann. § 27-19-713(b) (Michie 1987)). The just-cited statute created a floor for liability coverage--the vehicle was in use "with the express permission of the named insured . . . ." The Arkansas court held that a "number of states have apparently felt that even

an ordinary automobile liability insurance contract is as much for the benefit of members of the public as for the benefit of the named or additional insured." *Commercial Union*, 745 S.W.2d at 591-92. In case after case discussed by the Arkansas court, the concern is the public policy need for protection under a vehicle's liability policy. *Id.* at 591-94.

The reason such public policy concerns are not dispositive here is that the driver of this vehicle was not at fault. This is not a case in which the insurance carrier under the liability provisions is attempting to deny coverage for the acts of a negligent driver of the insured vehicle, arguing that the driver did not have the named insured's permission. The Arkansas Code reads coverage into every liability policy if the vehicle was being used with the named insured's permission. We must find if there is an equivalent for uninsured motorist coverage.

Our starting point must be the language of the policy. Arkansas has not made insurance policy provisions solely the creature of statute. Parties are free to contract, and the courts will enforce insurance terms agreed upon unless overridden by statute or public policy. *Hancock v. Tri-State Ins. Co.*, 858 S.W.2d 152, 154 (Ark. Ct. App. 1993); *Searcy*, 760 S.W.2d at 866. In Arkansas as in Mississippi, uninsured motorist coverage is optional. Ark. Code Ann. § 23-89-403(a)(2) (Michie 1995); Miss. Code Ann. § 83-11-101(1) (1972). A policyholder can totally disclaim coverage. If the vehicle owner here had done so, that presumably would have been effective under Arkansas law, and GEICO would have no liability. Instead, there was uninsured motorist coverage but subject to various contract limitations. Among them was barring coverage if the "auto is being used without the owner's permission." The owner was Apolis Bailey. She did not give permission for its use. However, the same question arises as under liability coverage -- does "permission" mean the *Commercial Union* expansive definition, i.e., implied or derivative permission? If not, then recovery by these four Plaintiffs does not exist under the terms of the policy.

First it must be remembered that we are interpreting Arkansas law, and Arkansas has never addressed the question. The cases and treatises relied upon by the Arkansas court concern liability policy coverage. Liability coverage protects the world against the negligent acts of those few individuals, mainly the driver, who are inside the insured vehicle. Uninsured motorist coverage protects those few people inside the insured vehicle against the negligent acts of the world, i.e., any uninsured motorist. All those who will be protected under liability coverage can never be known until an accident occurs; those protected by uninsured motorist coverage are limited to those within the vehicle. I make these contrasts to show that the stated public policy arising under liability insurance is founded on the negligent acts of a user of the insured vehicle; it compensates a class of people, from pedestrians to bicycle riders to single occupants of passing vehicles to scores in a bus to passengers in the insured vehicle, whose only shared characteristic is that they were in the way when the negligent act occurred. That is an extremely amorphous group, in large measure unaware prior to the accident of the identity of the driver or the status of his insurance. Uninsured motorist coverage is for those within the vehicle, who at least have some means, whether exercised or not, to determine their need for protection. It is on such distinctions that public policy turns.

There is no Arkansas case that applies the initial permission "Hell or high water" rule to uninsured motorist coverage. There is another line of Arkansas cases dealing with uninsured motorist coverage that I find controlling.

The Arkansas Supreme Court held that the extent of uninsured motorist coverage at least for passengers is strictly a matter of contract between the policyholder and the insurance company. *Southern Farm Bureau Casualty Ins. Co. v. Fields*, 553 S.W.2d 278, 279 (Ark. 1977). All that the statute requires is that uninsured motorist coverage, unless rejected by the policyholder, shall protect the "persons insured thereunder." Ark. Code Ann. § 23-89-403(a)(1) (Michie 1995). The Arkansas court held this provision "does not identify the 'persons insured' under an insurance policy covering liability . . . to include any passenger or occupant. The parties are free to contract as to the 'persons insured,' *insofar as passengers are concerned.*" *Fields*, 553 S.W.2d at 279 (emphasis added).

The Arkansas court subsequently held that Section 23-89-403 "requires uninsured motorist coverage for the *user* of a vehicle insured against liability, and that is our holding here." *First Sec. Bank*, 760 S.W.2d at 866 (emphasis added). *Searcy* cites *Fields* without in anyway criticizing it. *Id.* at 864. The insurance in *Searcy* covered a tractor-trailer rig. One of the drivers who had permission of the trucking company owner to use the vehicle, parked and left the vehicle. While standing in a street directing his co-driver's backing of the vehicle to a loading dock, he was run over by one or more hit and run drivers. The uninsured motorist provision disclaimed coverage if the injured person was not the named insured or family, and was not "occupying" the vehicle. *Id.* at 864. After discussing cases from various states, the court held the "occupying" clause irrelevant, since the statute required uninsured motorist coverage for the user of a vehicle insured against liability. *Id.* at 866.

This symmetry was created by *Searcy*: if someone negligently using the vehicle would have been entitled to liability coverage for his acts, the uninsured motorist provisions provide coverage for his injuries. *Fields* explicitly held that passengers are not within the statutory definition of persons who must be insured for liability arising out of "use" of the vehicle. *Fields*, 553 S.W.2d at 279. Therefore the parties are free to contract as to passengers, and a provision barring coverage to *passengers* who were no longer occupying the vehicle was upheld. *Id.* If *Fields* was no longer good law, *Searcy* would not have cited it approvingly in invalidating a restriction that the *user* has to "occupy" the vehicle. *Searcy*, 760 S.W.2d at 864.

The pieces we have to assemble the puzzle of Arkansas's position on the issues are these: 1) due to public policy, liability insurance must cover those who are using the vehicle with the permission of the initial permittee; 2) due to statute, uninsured motorist policies must insure authorized users of the insured vehicle; 3) no statute or public policy mandates uninsured motorist coverage of passengers of an insured vehicle; 4) GEICO's uninsured motorist policy here covers those who are "occupying an insured auto," but not "an auto being used without the owner's permission." The missing puzzle piece becomes evident. Does public policy or statute operate on this contract language to redefine "without the owner's permission" into "without the owner's derivative permission"? GEICO's uninsured motorist section did not have to insure any passengers, but since the owner purchased some passenger coverage, we must answer whether the legal effect of the policy language was to insure them in this circumstance.

No statute requires the express policy language be overridden. As interpreted in *Searcy*, the only required uninsured motorist coverage is for users. Express Arkansas public policy does not require the plain language to be set aside either, as all that has been said so far is that the public policy for *liability* insurance demands the voiding of restrictions on initial permission. I have already discussed the differences in public policy between coverage under uninsured motorist provisions and that for

liability policies. The contrast between the two leading Arkansas precedents is important. *Searcy* cannot be read to say that "occupying" is read out of the uninsured motorist provisions for all purposes, but only that it cannot be applied to the driver. *Fields* held that the same "occupying" limitation remained in the policy for purposes of a passenger's right to uninsured motorist protection. Similarly, the literal meaning of "owner's permission" is not obliterated from the policy just because it cannot be applied to the user, and that meaning of the phrase remains applicable to passengers.

We are a sister state's court, applying Arkansas law as it exists. Arkansas has applied some public policy limits on what insurance policies can state. There is no pretense in *Commercial Union*. The user does not actually have the permission of the named insured, but the court kept an insurance policy from requiring it at least insofar as restrictions were on time, place, and manner. Here pretense will not do either, but there is no corresponding announced public policy. Adrian Bell did not have the permission of the owner, Apolis Bailey, to use the vehicle. The uncontroverted evidence was that no one but Clifton Steward had permission. Arkansas courts have not invalidated the relevant contract provision. The starting point under Arkansas law is that an insurance contract term will be applied as written unless it is illegal or against public policy. *Hancock*, 858 S.W.2d at 154. Without case law stating that such a provision is against public policy, I would uphold it as written.

The estates of the three passengers, who were Marcus Jordan, Dexter James, and Maryliz Latham, are not under Arkansas law entitled to uninsured motorist coverage since the owner of the vehicle did not give permission to the driver. *Commercial Union* means that they likely would have been entitled to coverage under the liability provision had Bell been at fault, but he was not. The estate of Adrian Bell, however, is entitled to make a claim on the uninsured motorist coverage. If not for *Searcy*, none of the Plaintiffs would have had uninsured motorist protection. *Searcy* makes a limited, not a universal exception to the validity of this contract term. The effect of such a distinction suggests the advisability that passengers who are riding in borrowed vehicles ask whether their driver has the owner's permission. This question will usually not be asked, nor will the equally significant question of whether there is any insurance on the vehicle at all. This unfortunate reality does not mean that Arkansas public policy must compel coverage when the driver has no permission, anymore than it would be somehow to create coverage when there is no insurance.

**FRAISER, C.J., THOMAS, P.J., AND McMILLIN, J., JOIN THIS DISSENT.**