WILHELM

RECHTSANWÄLTE

*Christian Drave, Rechtsanwalt, Wilhelm Rechtsanwälte, Düsseldorf, www.wilhelm-rae.de*

# The policy holder's obligation to safeguard claims and to assist according to sec. 86 para. 2 Insurance Contract Act – overview and characteristics

## 1. INTRODUCTION

Policy holders have to observe legal obligations to keep insurance cover. They should consider legal obligations already with the conclusion of the insurance contract and provide for special agreements in the insurance contract if necessary.

There are legal obligations which apply for the indemnity insurance after the occurrence of the insured event.

## 2. THE OBLIGATION REGULATION OF SEC. 86 PARA. 2 INSURANCE CONTRACT ACT – AN OVERVIEW

In case of an insured event in the indemnity insurance, the insurer will pay the indemnification payment to the policy holder according to the regulations in the insurance contract. In many cases, a third party caused the damage to the policy holder. The third party may be obliged to provide damage compensation towards the damaged policy holder according to contractual or legal regulations. In so far as the insurer compensates the policy holder's damage by the insurance indemnification, the claim for compensation of the policy holder against the third party is assigned to the insurer, accord. to sec. 86 para. 1 sentence 1 Insurance Contract Act. The assignment of the claim allows the insurer to subrogate against the liable third party. The law secures the insurer's interest in the recourse by the regulations in sec. 86 para. 2 Insurance Contract Act about the policy holder's obligations.

### 2.1 Background of the regulation in sec. 86 para. 2 Insurance Contract Act

Sec. 86 para. 2 Insurance Contract Act determines:

*„The policy holder shall safeguard his claim for damages or a right serving to safeguard this claim in accordance with the applicable form and time requirements, and shall assist the insurer wherever necessary in asserting them. If the policyholder intentionally breaches this obligation, the insurer shall not be obligated to effect payment insofar as he cannot, as a result, claim compensation for it from a third party. In the event of a grossly negligent breach of the obligation, the insurer shall be entitled to reduce the benefits payable commensurate with the severity of the policyholder's fault; the burden of proof that there was no gross negligence is on the policyholder."*

Sec. 86 Insurance Contract Act applies for all types of indemnity insurances. The property insurance ranks among the indemnity insurance as well as for example the legal expenses insurance and the liability insurance, in so far as the injuring party is liability insured and itself has a claim for damages against a third party.[1]

The obligations of sec. 86 para. 2 Insurance Contract Act refer to the policy holder's damage claims as well as to rights aiming at securing these claims, as for example liens.

According to sec. 67 para. 1 s. 3 Insurance Contract Act (previous version), the policy holder was not entitled to waive a claim for damages against third parties (actively). Otherwise, the insurer was released from payment, in so far as he could have demanded indemnification. The reform legislator assumed that the prohibition to waive a claim for damages does not sufficiently preserve the insurer's interest in recourse.[2] Sec. 86 para. 2 Insurance Contract Act therefore regulates, beyond the prohibition to waive a claim for damages, the obligation to safeguard claims and to cooperate.

### 2.1.1 Waiver prohibition

Sec. 86 para. 2 s.1 Insurance Contract Act does not explicitly regulate the prohibition to waive a claim for damages. The obligation to safeguard the claim for damages includes the prohibition to waive the claim. "Prohibited" is any of the policy holder's conduct which excludes or limits the insurer's successful recourse against a third party.[3] This includes the loss of the claim due to release waiver, compromise agreement or assignment to a third person.

*Example 1: The contract partner of the policy holder damages the policy holder culpably. In order not to put a strain on the business relationship with his contract partner, the policy holder enters into a settlement agreement with the contract party and waives a part of the compensation.*

*The insurer settles the damage to the full extent. The insurer addresses the contract partner (damaging party) by means of recourse. The policy holder's contract partner successfully objects that the claim for damage is partly expired due to the settlement agreement with the policy holder who was the owner of the claim at the point of time the settlement agreement was made. The policy*

---

[1] Cf. Rüffer/Halbach/Schimikowski, VVG, 2. Ed., sec. 86 No. 2.

[2] Cf. BT-Drs. 16/3945, Page 81.

[3] Cf. *Prölss* in Prölls Prölss/Martin, VVG, 28. Ed., sec. 86 No. 36 about jurisdiction and individual cases.

*holder who caused the loss of the claim by the settlement, violated the prohibition to waive the claim for damages with intent. The insurer is released from payment. The insurer can ask the policy holder to pay back the indemnification payment.*

### 2.1.2 Safeguarding claims

According to former legislation it was the insurer's task to actively safeguard recourse claims.[4] Sec. 86 para. 2 s. 1 Insurance Contract Act now regulates the policy holder's obligation to preserve a claim for damages that is assigned to the insurer. The policy holder has to (according to the wording and reasons of the law) pay special attention to the form requirements and terms.

*Example 2: The same as in the prior example, but this time the policy holder does not conclude a settlement agreement with the damaging party. The policy holder remains inactive and the damage claim against the damaging party expires. The insurer settles the claim to the full extent. The damaging party successfully raises a plea for limitation against the insurer's recourse claim. If the policy holder missed to avoid the limitation of the claim by gross negligent conduct, the insurer is entitled to partly shorten the insurance payment. The insurer can claim back part of the indemnification payment.*

### 2.1.3 Assisting in the assertion of damage claims

According to sec. 86 para. 2 s. 1 Insurance Contract Act, the policy holder is obliged to assist the insurer with the assertion of assigned damage claims. For example, the policy holder must provide the insurer with information which is necessary to give reasons for the claim.[5] Obligations to assist according to sec. 86 para. 2 Insurance Contract Act might correspond with the disclosure obligations resulting from the insurance contract.

*Example 3: The policy holder demands the entire indemnification payment from the insurer. An all risks cover exists. The insurer intends to claim against the damaging party after the settlement.*

*The insurer needs exact information about the cause of the damage in order to argue coherently that the damaging person is liable to pay compensation. The policy holder is of the opinion that the cause of the damage must not be determined exactly since the all risks insurance covers all possible*

---

[4] Cf. *Möller/Seeger* in Münchener Kommentar zum VVG, § 86 No. 288.

[5] Cf. BT-Drs. 16/3945, Page 82.

*causes.*[6] *If the insurer is not able to obtain all information needed, a recourse claim has no chance of success. The claim would be dismissed. The policy holder who avoided to give the available information knowing that the insurer then would not succeed with the claim, violated the obligation to assist with intent. The insurer is not liable to pay and can reclaim paid indemnity payments from the policy holder.*

2.2 Addressee of the obligations according to sec. 86 para. 2 s. 1 Insurance Contract Act

The obligations according to sec. 86 para. 2 s. 1 Insurance Contract Act relate to the policy holder. In case of an insurance for account of third parties, both the policy holder's and the insured's knowledge and conduct are relevant according to sec. 47 para. 1 Insurance Contract Act.

2.3 Requirements of the obligations according to sec. 86 para. 2 Insurance Contract Act

The obligations according to sec. 86 para. 2 s. 1 Insurance Contract Act presume that the policy holder has a claim for compensation against a third party which may be passed on to the insurer. Claims for compensation are mainly contractual and legal damage claims. But they may also be warranty claims aimed at receiving replacement and for example compensatory claims resulting from a joint and several debt according to sec. 426. The claim for compensation cannot be passed on, if the person responsible for the damage is included in the insurance contract cover as co-insured.

2.4 Consequences of a breach of an obligation according to sec. 86 para. 2 Insurance Contract Act

According to sec. 86 para. 2 Insurance Contract Act, a slight negligent breach of an obligation has no impact on the insurer's duty to indemnify. In case of a malicious violation the insurer is not liable to pay. Opposite to sec. 67 Insurance Contract Act (old version) a grossly negligent breach of an obligation according to sec. 86 para. 2 s. 3 Insurance Contract Act may impact the insurance cover. A grossly negligent violation entitles the insurer to a benefit cut.

[6] Example following *Möller/Segger* in Münchener Kommentar zum VVG, sec 86 VVG No. 284.

The release from the obligation to perform or the benefit cut implies that that the breach of obligation caused that the insurer could not obtain compensation (causality). If the damaging party has for example already been insolvent at the point of time the damage occurred, the insurer cannot realize the claim for compensation. A possible breach of obligation had no impact.

For the evaluation of the causality the point of time, when the insurer would have asserted the claim for compensation, is decisive. If the insurer asserts a claim, because he did not know about the obstacle to the claim, the point of time of the assertion is decisive. [7]

### 2.5 Risks for the policy holder resulting from the obligations of sec. 86 para. 2 Insurance Contract Act

The policy holder might sometimes have *prognosis risks*. The question is, whether and in which scope a claim for compensation exists.

Eventually, measures are required, which entail severe *cost risks*. A policy holder might have to consult an expert or institute independent proceedings for taking evidence to preserve evidence. The policy holder might possibly need to file a suit.

The obligation to safeguard the claim exists before the insurer has provided an indemnification payment. The question of coverage may thus still be unanswered.

## 3. PARTICULARITIES IN CONNECTION WITH SEC. 86 PARA. 2 INSURANCE CONTRACT ACT

### 3.1 Cover damaging conduct before the occurrence of the insured event?

It is questionable whether the policy holder's conduct before the conclusion of the insurance contract may endanger the insurance cover. Relevant in practice are those cases when the policy holder has agreed on a liability waiver or a liability limitation with his contract partner.

[7] Cf. *Prölss* in Prölls Prölss/Martin, VVG, 28. Ed., § 86 No. 43.

Obligations according to sec. 86 Insurance Contract Act exist not until the insurance contract is concluded and the insured event occurred. There can only be a claim for damages, which has to be pursued, with the occurrence of the insured event.[8]

Former jurisdiction assumed a violation of the waiver prohibition before the conclusion of the insurance contract in case of unusual agreements.[9] With the systematics of the obligation regulations of the Insurance Contract Act 2008, this cannot be reconciled. The specific regulation of sec. 19 Insurance Contract Act has the consequence that risk-relevant circumstances, which the policy holder creates before the conclusion of the insurance contract within the framework of his freedom of disposition, may only be effective as a breach of obligation to disclose – in so far as the requirements of sec. 19 Insurance Contract Act are fulfilled, thus especially the insurer asked for it.

### 3.2 Claim for reimbursement of policy holder's costs against the insurer?

If the policy holder takes measures to safeguard claims or to assist in the assertion, this might cause, as discussed, considerable costs.

It is disputed whether the policy holder must finally bear the costs or whether he has a claim for reimbursement against the insurer. The law does not provide for an explicit regulation. So far, the jurisdiction does – as far as apparent - not give an answer to this question. An argument against the insurer's obligation to bear the costs might be that sec. 86 para. 2 Insurance Contract Act is immanent, that the policy holder has to bear the costs. [10] Rightly, the policy holder can, applying sec. 83 Insurance Contract Act, demand a reimbursement of costs from the insurer, beyond the insured amount.[11]

### 3.3 Limitations of obligations according to sec. 86 para. 2 Insurance Contract Act

---

[8] Cf. *Prölss* in Prölls Prölss/Martin, VVG, 28. Ed., sec. 86 No. 36.

[9] Cf. Evidence in *Langheid* in Römer/Langheid, VVG, 2. Ed., sec. 67 No. 46.

[10] Cf. *Möller/Segger* in Münchener Kommentar zum VVG, sec. 86 VVG No. 276 and No. 280.

[11] Also *Prölss* in Prölls Prölss/Martin, VVG sec. 86 No. 39.

The scope of the obligations must be examined in the individual case. The principle of utmost good faith forms a limit. An objective measure applies. It is decisive, what an uninsured person would have done. If the measure implies costs and great effort, for example comparable with a suit, the chances of success must be considered as well. [12] The policy holder has a degree of assessment. If he comes to a justifiable assessment, which proves illegitimate afterwards, the policy holder acts at the most slightly negligently in accordance with sec. 86 para. 2 Insurance Contract Act. This does not affect the insurance cover.

According to the wording of the law, the policy holder must only assist in the assertion of the claim if required. Also here, an objective measure applies. Hereby, the insurer's legitimate interest in recourse must be considered. In *example 3* (see 2.2.3) the policy holder may not keep information about the cause of damage with the argumentation this information was not relevant for the insurance claim. He may not refuse the support of the necessary investigations about the cause of damage.

What the insurer himself may accomplish concerning the assertion of the recourse claim, does not fall to the policy holder in connection with his obligation to assist. For example, the policy holder is according to sec. 86 para. 2 Insurance Contract Act, not obliged to procure information which are not available to him (e.g. information of the attending doctors). If required, he has to authorize the to obtain the information.

### 3.4 Burden of proof for causality according to sec. 86 para. 2 Insurance Contract Act

It is controversial who bears the burden of proof that a breach of obligation had the consequence that the insurer could not obtain compensation from a third party. The burden of proof is with the insurer. The wording of sec. 86 para. 2 s. 2 Insurance Contract Act regulates the causality as a precondition for the legal consequence "release from payment" ("...,the insurer shall not be obligated to effect payment in so far ase he cannot as a result *claim* compensation for it..."). This draws a major distinction to the obligation regulations in sec. 28 and 82 Insurance Contract Act. These norms do not contain any causality regulations in connection with the legal consequence.

[12] Cf. *Prölss* in Prölls Prölss/Martin, VVG sec. 86 No. 38.

Therefore it is systematically coherent and consistent with the reasons given for the law that sec. 86 – different from those norms – contains no regulation about the causality counter proof to be executed by the policy holder. [13]

### 3.5 Agreements in the insurance contract

Insurance contracts often contain regulations about the policy holder's obligations. Agreements which deviate from sec. 86 Insurance Contract Act and are at the policy holder's disadvantage are excluded according to sec. 87 Insurance Contract Act. It is different, for example in the transport insurance. Cypher 15.6 DTV-goods 2000/2008 regulates a complete release from the obligation to perform in case of grossly negligent breaches of obligations. The deviation is possible due to secs. 209 and 210 Insurance Contract Act.

Especially in technical insurance, policy holders minimize the risks in connection with the processing of the recourse by agreeing how and by whom the processing of the recourse shall be performed and by making clear that the insurer bears the arising costs.

## 4. CONCLUSION

In case of the indemnity insurance, the policy holder is subject to the legal obligations according to sec. 86 para. 2 Insurance Contract Act. These exist with the occurrence of the insured event. The content and scope of these obligations are a question of the individual case. The obligations entail risks for the policy holder. These risks can be minimized by the policy holder if he takes suitable agreements about the recourse already in the insurance contract and asks the insurer for instructions in case of the insured event. Costs arising by the obligation to safeguard claims or to assist in the assertion may be reimbursed by the insurer to the policy holder.

Christian Drave
Attorney at law

Wilhelm
Partnerschaft von Rechtsanwälten
Registered office: Düsseldorf - AG Essen: PR 1597

[13] A.A. *Prölss* in Prölls Prölss/Martin, VVG sec. 86 No. 45. As here about sec 67 VVG old version KG in VersR 2002, 1541.

Reichsstraße 43, 40217 Düsseldorf

Telephone: + 49 (0)211 687746 - 43
Telefax: + 49 (0)211 687746 - 20

www.wilhelm-rae.de
christian.drave@wilhelm-rae.de