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## **Overview of jurisdiction from the policy holder's point of view and under consideration of the new VVG**

### **1. INTRODUCTION**

After the introduction of the law to reform the insurance contract law per 1st January 2008, there is an increasing number of decisions of instance courts in which the new insurance contract law is applied. The following overview highlights the consequences of new decisions.

### **2. OVERVIEW OF JURISDICTION**

2.1 Breach of the obligation to notify: Regional Court Cologne, judgement of 7th October 2009 – 23 O 154/09

#### 2.1.1 Content and subject matter of the decision

With its judgement of 7<sup>th</sup> October 2009 the Regional Court Cologne decides, that the insurer's right to withdraw from the contract due to the breach of the obligation to notify is excluded, if the policy holder has neither breached the obligation to notify with intent nor with gross negligence.<sup>1</sup> In this case the insurer solely has the right to terminate the contract subject to a term of one month.

On 4<sup>th</sup> December 2007, the claimant requested the conclusion of a private health insurance from the defendant insurer. In connection with the investigation of an insured event, the claimant found out that the claimant had increased blood sugar and cholesterol levels in the years 2004, 2006 and 2007, which the claimant did not mention in connection with the health related questions, the insurer declared his withdrawal from the contract with a letter dated 10<sup>th</sup> February 2009 due to the pre-contractual breach of the duty of disclosure.

The Regional Court uphold with the complaint to investigate the inefficacy of the withdrawal. The question "whether" a breach of the duty of disclosure was committed by the claimant is still subject to sec. 16 VVG a.F., while the legal consequences of such breach of the duty of disclosure are subject to sec. 19 para. 2, 3 VVG. Since the claimant did not commit a severe default in accordance

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<sup>1</sup> LG Köln, VersR 2010, 199 f..

with sec. 19 para. 3 s. 1 VVG, a withdrawal was out of the question, since the claimant could at the most be accused of slight negligence. This would according to the new legislation solely allow to terminate but not to withdraw from the insurance contract.

### 2.1.2 Consequences in practice

In order to answer the question, whether an insured must consider himself to be exposed to the insurer's claims resulting from sec. 19 para. 2 to 4 VVG, it is decisive to identify, whether the breach of the duty of disclosure was with intend resp. gross negligent. The insured acts gross negligent and risks the right of withdrawal in case the due diligence required for business relations is breached to a gross degree and ignores what should be obvious under normal circumstances.<sup>2</sup>

If the insured is confronted with such claims, it is his duty to prove that he has not committed the breach of the duty of disclosure with unusually high carelessness.<sup>3</sup>

## 2.2 Question in text format: Regional Court Hagen (Westfalen), Judgement of 16th December 2009 – 23 O 40/09

### 2.2.1 Content and subject of the decision

With judgement of 16th December 2009 the Regional Court in Hagen decided that the application of sec. 19 para. 1 VVG requires the question to be in a text format.

The court did regard the insurer as not allowed to withdraw from the contract according to sec. 19 para. 2 VVG. The insurer had undisputed not asked any questions about risk relevant circumstances. This would though be a precondition for making use of the right to withdraw.<sup>4</sup> Furthermore, no advising was made about the legal consequences for the case that a pre-contractual duty of disclosure was not performed duly. A reference to legal consequences contained in the set of clauses would not be sufficient to meet the requirements of sec. 19 para. 5 s. 1 VVG.

### 2.2.2 Consequences in practice:

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<sup>2</sup> BGH, VersR 2005, 1449; VersR 1992, 1087; VersR 1989, 582; ständige Rechtsprechung seit BGHZ 10, 14.

<sup>3</sup> BGH, VersR 2003, 364; VersR 1997, 351; VersR 1988, 474.

<sup>4</sup> Rüffer/Halbach/Schimikowski, *Versicherungsvertragsgesetz*, § 19 VVG.

At first, the decision clarifies that the insured is only subject to the rights resulting from sec. 19 VVG, if the questions were posed in text form. If there are though no question sheets of the insurer existent, the insurer may in the first place not make use of the rights resulting from sec. 19 VVG. The legal consequences intended in case of wrong declarations about risk circumstances cannot have an effect, since the advising of legal consequences is missing.

## 2.3 Advising of consequences: Regional Court Dortmund, Judgement of 17th Dezember 2009 – 2 O 399/09

### 2.3.1 Content and subject of the decision

The Regional Court Dortmund decided with its judgement of 17<sup>th</sup> December 2009 the formal and material requirements the note given to the insurer according to sec. 19 para. 5 s. 1 VVG about the consequences of a pre-contractual breach of the duty of disclosure must fulfil.

In case of a pre-contractual breach of the duty of disclosure, the insurer may only make use of the rights described in sec. 19 para. 2 till 4 VVG, if he properly informed the insured about it in advance. Sec. 19 para. 5 s. 1 VVG is only applicable for new contracts and not for contracts closed before 1st January 2008. Furthermore the court requests a special instruction „by separate notification in text format“, whereby according to the Regional Court Dortmund no formal criteria are decisive for the interpretation of sec. 19 para. 5 s. 1 VVG, but material considerations, which should be orientated on the whole purpose of the regulation. In addition, In addition, the court assumes the notification also as sufficient if it is made after the request for an insurance. Finally it is requested that the notification needs to be comprehensive and unmistakably for the insured in order to fulfil the warning function. The insured must be informed about the insurer's rights and its consequences for the insured when the pre-contractual breach of the duty of disclosure is offended.

### 2.3.2 Consequences in practice:

If the insured made wrong statements in connection with the application for the insurance and thus breached against the obligation of disclosure as regulated in sec. 19 para. 1 VVG, the insurer may not withdraw for this reason alone, terminate the contract nor adapt it, if he informed the insured wrongly about his rights and the consequences. The sole right that remains her is the right to rescission by reason of fraudulent misrepresentation

The insured should therefore, whenever he is confronted with claims resulting from sec. 19 VVG, check, whether the insurer made a proper instruction.

## 2.4 Quote: Regional Court Munster, Judgement of 20th August 2009 – 15 O 141/09

#### 2.4.1 Content and subject of the decision

The Regional Court Munster had to decide with its judgement of 20th August 2009 as one of the first courts about the quota formation in the comprehensive insurance in case of an insured event caused with gross negligence.<sup>5</sup> The claimant as the insured person caused a traffic accident. The court affirmed the gross negligent causation of the accident resulting from the disregard of a red light. The court found that the reduction of the indemnification in the amount of (at least) 50% was justified by this.

The court did not follow the general opinion in literature whereby the reduction of the indemnification should be limited to a maximum of 50%<sup>6</sup> or whereby the insurer would be allowed to even make a reduction of 100% of the indemnification<sup>7</sup>. The quota formation should always consider the individual case. The court disagreed with this opinion to start the quota formation with a value of 50% and then make an individual.<sup>8</sup>

#### 2.4.2 Consequences in practice:

At this point of time, there are no decisions available taken by higher courts that deal with the formation of a reduction quota in case of gross negligent causation. The Regional Court refrains from presuming a standard starting value and prefers to calculate the quota in accordance with the circumstances of the individual case rather than following strict standards.<sup>9</sup> In case of an insured event the contracting parties may also disregard sec. 87 VVG to the insured's disadvantage. The parties are according to the preamble to the court free to agree to a fixed quota regulation in order to avoid disputes about a proper quota formation.<sup>10</sup> This would move the dispute from the question of the rate of the quote to the question when the causation degree is reached within the gross negligence.<sup>11</sup>

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<sup>5</sup> LG Münster, VersR 2009, 1615-1617 = NJW 2010, 240-242.

<sup>6</sup> vgl. Baumann, r+s 2005, 1.

<sup>7</sup> Veith, VersR 2008, 1580.

<sup>8</sup> Felsch, r+s 2007, 485; Langheid, NJW 2007, 3665; Meixner/Steinbeck, Das neue VVG, Rn. 216.

<sup>9</sup> LG Münster, VersR 2009, 1615 (1617).

<sup>10</sup> Begründung, BT-Drucks. 16/3945, S. 80.

<sup>11</sup> Kassing, VP 9/2009, p. 184

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