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Conditions subsequent to the policy in case of ambiguous conduct of the liability insurer

1. INTRODUCTION

In case of an insured event, the insurance contract obliges the insurer and the insured to fulfil specified duties.

The insurer is obliged to indemnify the insured for financial losses caused by an insured event according to the contractual provisions.

In return, the insured is obliged to respect specified conditions (disclosure, cooperation, notification and conduct obligations). The fulfilment of these conditions is a condition precedent to the assertion of a claim for indemnification payments. A breach against these conditions may lead to the insurer's right to refuse the indemnification payment or even to a partly release from the obligation to perform.

The obligation to fulfil the conditions ends, according to the unanimous opinion, with the final denial of indemnification by the insurer.¹ In case of a final denial of coverage by the insurer, the insured is not obliged to fulfil the conditions anymore. As long as the insurer denies coverage, the insured does not risk the release from the obligation to perform due to a breach against conditions according to the legislation of the Federal Court of Justice (BGH)². In so far, the legal situation is clear.

The so-called “neither nor”-situation is though ambiguous. After the insured event has been announced by the insured, the insurer does not finally disagree nor agree with the coverage.

¹Vgl. *Marlow* in: Beckmann/Matusche-Beckmann, Versicherungsrechts-Handbuch, § 13 Rdnr. 45 m.w.N.

² Vgl. etwa BGH VersR 1981, 321; BGH NJW 1989, 2472.

The insured remains in an uncertain position with the insurer saying that at this point of time no declaration about coverage may be taken.

If the insured is sued for liability and defends himself without assistance, he must fear that the insurer claims a breach against procedural rights and consequently the insurer's refusal of performance. The affirmative action for a right against the insurer for coverage does not serve the insured as a satisfying solution due to the unenforceability of the ascertainment of the title. A claim for performance according to the insurance contract would be premature, since no decision about the liability is available yet.

The policy holder of the liability insurance contract may in case of unclear conduct of the insurer devise his right himself (acknowledgement, settlement etc.) only if he is not obliged to fulfil obligations in this situation.

The question relevant in practice is therefore, whether the insured must fulfil the obligations also in case the insurer does not make clear statements about coverage after the insured event occurred and the insured event has been denoted.

2. BINDING OBLIGATIONS

An obligation might be binding even if the insurer does not make unambiguous statements concerning his liability to coverage.

For some liability insurance contracts, the general terms and conditions might say, that the insurer has to perform legal proceedings in the name of the insured and at his own expense.³ The insured would then be obliged, to leave the proceedings with the insurer.

If the insured engaged an attorney at law to protect his interests, he would, in case of the binding obligation to cede the proceeding, commit a breach of obligations. The costs of defence occurring could possibly not be demanded for reimbursement from the insurer.

The ambiguous conduct of the insurer might though breach against the promise of performance resulting from the insurance contract and therefore be contrary to contract. If the insurer's conduct is contrary to contract, he will not be able to refer to the insured's breach against obligations and will therefore be obliged to reimburse the costs for the defence.

³ Vgl. Ziff. 5.2 Abs. 2 der Muster AHB des GdV.

2.1 Scope of the insurer's obligation to provide indemnification

The scope of the insurer's obligation to provide indemnification is relevant for the legal evaluation of the insurer's ambiguous conduct.

The insurer's promise of performance includes the defence against unjustified claims as well as the indemnity from justified claims (compare sec. 100 VVG).

The defence of unjustified claims (obligation to legal protection) is according to regular legislation of the Federal Court of Justice a coequal obligation to performance as the indemnity in case of justified liability claims and not just an inferior collateral duty⁴.

The insurer has no right to pass the trouble and costs in connection with the handling of liability obligations to the insured.⁵ If the insurer wishes to deny a claim, he must do everything necessary for its defence; he alone has the work and responsibility in connection with the examination and defence.⁶

Resulting from the comprehensive coverage promised by the insurer, the insurer is even obliged to defend in case a collision between the insured's interests and the insurers interests are unavoidable. In this case the insurer must put aside his own interests. Only this broad interpretation of the performance promise can guarantee the protection intended by the liability insurance⁷.

2.2 „Neither-nor“-position of the insurer

Against the background of this scope of performance it is questionable whether the ambiguous conduct of the insurer can be justified.

If the insurer has serious indications for his release from the obligation to perform he must decide whether he offers coverage or not. A decision must though also be taken when the insurer is not in a position to make a clear statement due to unclear facts.

⁴ Vgl. BGHZ 119, 276; BGH v. 21.1.1976, IV ZR 123/74; BGH VersR 1956, 186.

⁵ Vgl. BGHZ 15, 154.

⁶ Vgl. BGHZ 119, 276.

⁷ Vgl. BGH NJW 2007, 2258.

He must inform the insured timely. It might be sufficient in such a situation that the insurer accepts legal coverage under the reserve to reject coverage depending on the outcome of the liability proceeding.

Thus, the insurer cannot pass on the work and costs as well as the risk to lose the proceeding to the insured, but he may at the same time reserve not to be bound to the settlement decision taken by the insured. The insurer is then not allowed to retain the insured to his obligation and refer to the release from the obligation to perform due to insufficient or uninstructed conduct of the case.

If the insured asks the insurer after the occurrence of an insured event and after the provision of the necessary information to make an unambiguous statement, this already covers his obligations. The insured has then a right to an immediate and unambiguous statement by the insurer about the coverage.⁸ If the insurer makes no clear statement about the coverage, this can be regarded as a concealed denial of coverage. The insurer can then be treated as if he gave the insured plenty of rope for the settlement. If the insurer does not deny his obligations to perform and does at the same time not fulfil his obligations, he commits a contractual breach of obligations.⁹ The insured is no longer bound to the obligations.

2.3 The insurer's allegiance

The ambiguous conduct of the insurer might as well be fraudulent.

Like all reciprocal contracts, the insurance contract obliges the parties to respect the principles of utmost good faith (sec. 242 BGB).

The insurance contract parties depend notably on the support and loyalty of the other party¹⁰. The insurer is predominant towards the insured due to his business and insurance related know-how and experience. The insured is in further need of protection since a liability insurance is aimed at covering existential property risks.

The insurer is in a position to evaluate his obligation to perform after the insured event has been denoted by the insured and the required documents have been provided.

⁸ Vgl. LG Dortmund a. a. O.

⁹ Vgl. LG Dortmund v. 1.4.2010, 2 O 355/09.

¹⁰ BGHZ 47, 101; 99, 228; BGH VersR 2003, 581.

The insurer knows about the need for action as soon as the insured event has been denoted, since the insured impends court claim and the burden of the procedural and the attorney costs. The insured cannot be expected to wait until the insurer has decided.

By creating the „either-nor“-situation, the insurer makes use of his superior position and acts in bad faith. The insured is no longer bound to his obligations.

3. CONCLUSION

Also in case of ambiguous conduct of the insurer, the insured is not bound to the obligations as in case of the final denial of coverage.

If the insurer makes no unambiguous declarations about his liability, he acts according to sec. 100 VVG and at the same time cedes his power to disposal about the liability relation. The insurer must therefore, as long as he does not fulfil his obligations according to the conditions, be treated, as if he gave the insured plenty of rope for the settlement.

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