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Column

D&O insurance – the all-round worry package

D&O insurance offers protection for managers and companies against damaging acts committed by managers. It thereby promotes innovational spirit and the freedom to make decisions by the insured. The persons acting rely on backing of their entrepreneurial freedom. Then, the insured event occurs.

Current discussions about the waiver of rescission, the distribution of the sum insured and last but not least the amicable claim show that ideal and reality often fall apart, especially from the perspective of the insured persons. Amicable claim means that the company claims against the manager but does not intend to dismiss but to further employ the manager. The shareholders of the company do not want to lose an excellent manager for reason of one damage causing mistake. That is why a D&O insurance policy was concluded. The damage resp. the written claim is notified to the insurer. Some insurers though put the company and its manager under general suspicion of fraudulent collaboration to the detriment of the insurer (so-called collusive cooperation).

From the company's point of view it might be reasonable in case of an amicable claim to assert insurance claims itself. Today, the legislator allows the damaging party (the manager) to assign its insurance claim to the damaged party (the company) in liability insurance, so that the damaged party may assert the insurance claim itself. In a D&O insurance case, the manager will then not be in the focus of a public liability proceeding but is able to continue his management tasks undisturbed.

Many insurers criticize this development. They doubt the sincerity of the claim and accuse the involved parties of acting intentionally to the detriment of the insurer. It is not clear why managers who committed a mistake should generally be dismissed. Some in-

surers request this as a standardized approach. Consequently, they do not shy away from a coverage proceeding. Insurers litigate such proceedings with rigidity.

It is not obvious why some insurers fight with no holds barred. The legal amendment of the Insurance Contract Act in 2008 indirectly provides for the possibility to assign insurance claims in liability cases (it is not allowed to forbid the assignment in General Insurance Terms). Therefore, it was no surprise for the insurers that the insured made use of the legal possibilities in order to avoid conflict situations in case of amicable claims. The insured may assume that insurers know the legal situation and draft their products accordingly. Why should an amicable claim combined with the assignment of the insurance claim not be calculable and thus not be considered in the premium calculation? The new regulation was developed by the legislator over years and the constellation was included in the reasons given for the Insurance Contract Act 2008.

Consequently, D&O insurance as a product again suffers from its complexity and the insurers' behavior in the insured event. The insurers who were aware of the constellation and drafted their general terms accordingly are disadvantaged. The product loses credibility. Here, a clear commitment of some insurers is missing to offer insurance products within the framework of the current legal situation. Oversubtle legal discussions are out of place here. Eventually, it will again be up to the Federal Court of Justice to decide on how to handle such cases. Currently, two amicable claims combined with assignments of insurance claims are pending before the Federal Court of Justice. It would though be desirable if insurers solve such cases causing less harm to the reputation of all parties involved.

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