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RECHTSANWÄLTE

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Versicherungsmonitor.de, 20 April 2015

Column

Gross negligence: questionable jurisdiction

In 2009, the legislator overturned the so-called "All-Or-Nothing-Principle" which until then left policy holders acting recklessly empty-handed. Since then, the insurer has to compensate for at least a part of the loss in case of gross negligence. Unfortunately, the reform fails to have the desired effect. Assuming false standards, courts more and more often come to the conclusion that the policy holder caused the insured event recklessly and the insurer has not to cover the entire damage.

Until 2008, the German Insurance Contract Act (Versicherungsvertragsgesetz, VVG) stipulated that a policy holder who caused damage recklessly should not benefit from insurance cover. The legislator amended this provision with effect from 2009: now, the insurer has to compensate for part of the loss proportionate to the severity of the policy holder's fault.

The legislator wanted to privilege policy holders by this provision. The former so-called "All-Or-Nothing-Principle", effective by then, was replaced by a more flexible provision allowing the reckless policy holder at least a part of insurance cover.

Paradoxically, this statutory provision has the opposite effect: courts more frequently come to the conclusion that the policy holder caused the damage in dispute not only negligently (which would leave the insurer fully liable) but recklessly. Thus, insurers today are more often entitled to reduce their payment.

If a court assesses the insured's severity of negligence, it decides according to its gusto or sense of justice and determines an allegedly appropriate quota. In my view, courts make two mistakes, when they determine a negligent conduct to be reckless:

The courts‘ first mistake is that they do not make a necessary distinction between ex ante and ex post. Gross negligence can only be given if it must be obvious to the policy holder that his behavior may cause damage. Whether a policy holder’s conduct is reckless thus has to be determines from the perspective of the policy holder. Certainly, hindsight is easier than foresight and afterwards it is often clear what caused the damage. However, courts do not put themselves in the policy holder’s position but rather assess the case retrospectively based on files.

Subjective aspects are not considered

In my view, the courts’ second main mistake is that they lose sight of the subjective perspective which is necessary to determine the policy holder’s severity of negligence. Only these policy holders act recklessly who must have known (subjectively) that their mistake may cause damage. Only because there is (objectively) a violation of a duty does not necessary mean that the policy holder was subjectively aware of it.

Thus, the legislator has achieved the opposite effect of what he intended. In cases in which courts formerly recognized no reckless conduct of the policy holder and therefore granted full insurance cover, today a reckless conduct of the policy holder is assumed and the policy holder only receives a partly compensation for his loss.

The legislator intended to strengthen the rights of the policy holder and to achieve fairer decisions in individual cases. It has achieved the opposite effect: The rights of policy holders are restricted and insurance payments are often arbitrarily reduced by judges.

Another point of view should not be forgotten: major damages often arise in industries where something is manufactured, produced or transported. Such industrial or technical processes are usually foreign to judges with academic education. At home, they are probably unable to repair a socket. These highly specialized academics then have to assess in which cases a forklift driver or a forwarder acted recklessly. In my opinion, it is obvious that this may lead to questionable results.

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