WILHELM

RECHTSANWÄLTE

Christian Becker

Claim settlement

Insurance payment despite breach of obligation: the proof of non-causality

1. INTRODUCTION

Policy holders have to observe standards of conduct (obligations). A breach of obligation may entitle the insurers to partially or entirely reduce the insurance payment. If the policy holder though can prove that his non-observance of an obligation did not cause the insured event, his coverage claim persists despite the breach of obligation. The following article explains the background of this regulation (proof of non-causality).

2. THE INSURER'S RIGHT TO REDUCE PAYMENT IN CASE OF THE POLICY HOLDER'S BREACH OF OBLIGATION

If the policy holder breaches an obligation, the insurer may be partially or entirely released from payment in the insured event.

In 2008, the legislator reformed the regulation, that insurers are entirely released from payment in case of breach of an obligation ("all-or-nothing-principle"). The legislator in sec. 28 Insurance Contract Act ("VVG") (2008) instead determined a right of the insurer to gradually reduce payment. Since 2008, the reduction of payment has to be commensurate with the severity of the policy holder's fault (cf. 2.1 to 2.3).

2.1 No reduction in case of simple negligence

If a policy holder breaches an obligation with simple negligence, the insurer is not entitled to reduce payment. The simply negligent breach of obligation has no consequences (Heiss in Bruck/Möller, Insurance Contract Act, 9th edition, volume 1 about sec. 28, No. 2010).

A policy holder breaches an obligation with simple negligence if he does not observe due diligence (Heiss, reference as above, No. 211).

Example 1: An insurance policy determines that the policy holder has to inform the insurer in case of an insured event in writing about the damage. If the policy holder informs the insurer only orally, the policy holder does not observe average diligence. This is only a simply negligent breach of obligation. The breach of obligation does not entitle the insurer to reduce payment.

2.2 Proportional reduction of payment in case of grossly negligent breach of obligation

If a policy holder breaches an obligation grossly negligently, the insurer may reduce payment commensurate to the severity of the fault.

The reduction quota may be up to 100% (cf. Federal Court of Justice of 22 June 2011, IV ZR 225/10 in NJW 2011, 3299). There is no such thing as legally defined reduction quotas for typical circumstances. The insurer always has to determine the reduction quota on the basis of the circumstances of the individual case. Generalizations are not allowed. There is no principle according to which a grossly negligent breach of obligation justifies at least a reduction by 50%.

A policy holder acts with gross negligence if he does not observe due diligence grossly and does not observe what should be obvious considering the given circumstances (cf. Pohlmann in Looschelders, Insurance Contract Act Commentary, 2nd edition, 2011 about sec. 28 Insurance Contracg Act, No. 44).

Example 2: Policy holders have to protect their buildings from frost damage. A technically experienced policy holder does not provide frost protection for water pipes in an unoccupied building. The water pipes burst. The policy holder must have been aware of the danger of damage due to his technical knowledge. The policy holder grossly negligently breaches obligations from the building insurance contract. The insurer is entitled to reduce payment (if the policy holder fails to proof that his breach of obligation did not cause the damage).

2.3 Complete cut of payment in case of intent and fraud

An insurer may be entitled to completely cut the insurance payment if a policy holder breaches obligations with intent or even with fraud. A policy holder acts with intent if he is well aware of the obligation and willingly breaches it (cf. Pohlmann, reference as above, No. 49; Heiss, reference as above, No. 62).

Example 3: If a car driver leaves the scene of an accident though knowing his obligation not to do so, he commits an intended breach of obligation of his comprehensive car insurance (cf. clause E.1.3 General Conditions for the Car Insurance "AKB" 2008). The intended breach of obligation may entitle the insurer to complete cut of payment (if the policy holder fails to proof that his breach of obligation did not cause the damage).

Fraudulent breaches of obligation require deceitful conduct by the policy holder (cf. Pohlmann, reference as above, No. 50). Fraudulent conduct committed by policy holders, thus enhanced intent, is an exemption.

Example 4: A drunken driver illegally leaves the scene of an accident in order to hide his alcoholization from the police and to preserve his insurance claim. The policy holder acts fraudulently. He has no right to claim for insurance payment.

3. PROVING NON-CAUSALITY

Even if a policy holder breaches obligations with gross negligence or intent, the insurer might be obliged to pay complete indemnification. This is the case if the policy holder succeeds in proving the non-causality between his conduct and the insured event:

> Sec. 28 para. 3 Insurance Contract Act:
>
> *„(3) Notwithstanding subsection (2) **[sec. 28],** the insurer shall be liable insofar as the non-observance of the obligation neither caused the occurrence or the establishment of the insured event nor the establishment or the extent of the insurer's obligation to effect payment. The first sentence shall not apply if the policyholder fraudulently breached the obligation."*

3.1 Requirements for the proof of non-causality

According to sec. 28 para. 3 VVG, certain requirements have to be fulfilled for a liability of the insurer despite a breach of obligation.

3.1.1 Personal scope of application

Sec. 28 para. 3 VVG has to be applicable to the insured event of the respective policy holder. The proof of non-causality according to sec. 28 para. 3 VVG must not be effectively limited or excluded by contract.

3.1.1.1 „Normal“ policy holders

Sec. 28 para. 3 VVG is always applicable for insured events of policy holders who do not insure major risks in the meaning of sec. 210 VVG (cf. 3.1.1.2) but some “normal” risk.

According to sec. 32 VVG, contractual limitations or exclusions of the proof of non-causality to the detriment of the policy holder are not possible:

Sec. 32 VVG:

> *„Agreements deviating from sections 19 to 28 (4) …to the detriment of the policyholder shall not be permitted.”*

3.1.1.2 Major risks

Policy holders, who have insured major risks as per definition of sec. 210 VVG, may also refer to the proof of non-causality independent of sec. 32 VVG.

Numerous commercial insurance contracts cover major risks (among others property insurance contracts of policy holders with at least 250 employees and a balance sheet total of EUR 6,200,000.00). The legislator regards these policy holders as business experienced and thus in less need of protection. Sec. 32 VVG does therefore not apply for insurance contracts that cover major risks (cf. sec. 210 VVG).

However, insurers cannot limit or exclude the right to prove non-causality for policy holders who wish to insure major risks (cf. among others Prölss in Prölss/Martin, Insurance Contract Act, 28th edition, about sec. 28, No. 63). This does at least apply if the insurer wishes to limit or exclude the right to prove non-causality in his general terms and conditions.

According to sec. 307 para. 2 cypher 1 German Civil Code “BGB”, general terms and conditions may not differ from the basic principles of legal regulations. The legislator aimed at creating a right of insurers to reduce payment in specific, individual cases. Part of a fair settlement of individual cases is the policy holder’s right to proof non-causality.

That is why insurers shall not be able to generally exclude the right to proof non-causality in their general terms and conditions regarding major risks.

Limiting clauses would be ineffective according to sec. 307 para. 1 s. 1 BGB. The ineffective clause would be replaced by the legal regulations regarding the proof of non-causality (cf. sec. 306 para. 2 BGB).

3.1.2 Degree of negligence

Policy holders cannot refer to the proof of non-causality in all cases of culpable breaches of obligation.

The proof of non-causality is not applicable if a policy holder fraudulently breached an obligation (cf. sec. 28 para. 3 s. 2 VVG).

If the policy holder breaches an obligation with gross negligence or intent, the policy holder may prove non-causality with the effect that the insurer is liable to complete indemnification payment.

If the policy holder breaches an obligation with simple negligence, he does not have to prove non-causality, since this breach of obligation does not have any consequences for the insurance claim according to sec. 28 para. 2 VVG.

Due to the often difficult differentiation between simple and gross negligence, policy holders should in any case – as a precautionary measure and as far as possible – try to prove that their breach of obligation did not cause the damage.

3.1.3 Non-causality

In order to preserve the insurance claim despite grossly negligent or intended breach of obligation, the breach of obligation must neither be the cause for the occurrence or the determination of the insured event nor for the determination or the scope of the insurer's liability.

3.1.3.1 Causality between the breach of obligation and the occurrence of insured event

The breach of obligation must not be the cause of the occurrence of the insured event

The occurrence of the insured event is not caused by the breach of obligation if a policy holder's misconduct could be disregarded and the insured event had nevertheless occurred.

Example 5: If a policy holder has to install fire-resistant doors according to a business contents insurance contract, the insurer is liable if the fire emerges independent of missing fire-resistant doors. The breach of obligation (the missing installation of fire-resistant doors) could be disregarded and the fire would have occurred anyway.

3.1.3.2 Causality regarding the determination of the insured event and the scope of liability

Further, the breach of obligation must not have influence on the determination of the insured event.

Example 6: According to building insurance contracts, policy holders have to leave the location of damage (e.g. a scene of fire) unchanged, until the insurer has examined the location and cause of damage by experts. If the policy holder modifies the location of damage despite this obligation, is not necessarily impossible for the insurer to determine the insured event. If the policy holder took good photos before modification and if witnesses can confirm the former condition, the insurer can determine the insured event by measures of preservation of evidence. The breach of obligation would have had no influence on the determination of the insured event.

Further, the breach of obligation must not have influence on the determination of the scope of the insurer's liability.

Example 7: The same as example 6, but the policy holder's preservation of evidence is incomplete. The insurer cannot determine the scope of the damage caused by the fire anymore. By consequence, the modification of the place of fire (breach of obligation) has influence on the scope of liability. The policy holder cannot prove that there is no causality between his breach of obligation and the determination of the scope of the insurer's liability.

3.2 Burden of proof

The following burden of proof applies:

3.2.1 The policy holder's burden of proof for non-causality

The policy holder has to provide evidence and thereby prove why his breach of obligation has neither caused the occurrence of the insured event nor the determination of the insured event and the scope of the insurer's scope of liability (cf. among others Heiss, reference as above, No. 221).

The policy holder has to refute the alleged causal connection between the insured event and the breach of obligation (cf. Pohlmann, reference as above, No. 137).

If the obligation demands forbearance, it is sufficient to prove that the insurer's disadvantage would have had occurred even in case of dutiful conduct (cf. Pohlmann, reference as above, No. 137).

If the policy holder can provide evidence and thus prove that the breach of obligation did not cause the insured event, he is entitled to complete insurance payment.

3.2.2 The insurer's burden of proof with regard to fraud

Despite missing causality between the breach of obligation and the insured event, insurers are not liable if their policy holders acted fraudulently.

Insurers bear the burden of proof regarding their policy holders' fraudulent conduct (cf. Heiss, reference as above, No. 215). If an insurer is not able to prove that the policy holder breached the obligation fraudulently, the policy holder is entitled to complete insurance indemnification.

4. CONCLUSION

Policy holders should always have a critical look at reductions of indemnification payments based on breaches of obligations.

Insurers often claim gross negligence of their policy holder, even if a breach of obligation was simple negligence at most.

There are no legally determined reduction quotas for grossly negligent conduct. Insurers always have to consider all circumstances of the individual case and calculate an adequate reduction quota.

Experience shows that insurers often do not examine the individual case sufficiently and determine reduction quotas which are too high.

Insurers usually do not examine if a breach of obligation really caused the insured event. They rather reduce their payment without exact examination of causality. It is therefore the policy holder's task to preserve his insurance claim by proving that there is no causality between his breach of obligation and the insured event.

Christian Becker
Lawyer
Specialist solicitor for insurance law

Wilhelm Rechtsanwälte
Partnerschaft von Rechtsanwälten
Reichsstraße 43
40217 Düsseldorf

Telephone: + 49 (0)211 687746 - 14
Telefax: + 49 (0)211 687746 - 20

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

AG Essen PR 1597