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RECHTSANWÄLTE

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Appeal in case of insurance for one's own account or for the account of a third party

Whose knowledge and conduct harms the policy holder?

1. INTRODUCTION

Insurance contracts do often not only cover the policy holder's own risks but those of co-insured third parties as well. The insurance contract the policy holder concludes with the insurer includes the third party by means of an insurance for the account of a third party according to sec. 43 et seq. Insurance Contract Act ("VVG"). Group and company policies or insurance contracts comprise a majority of co-insured companies and/or natural persons.

The settlement practice shows: in case of a loss, insurers time and again try vis-à-vis the policy holder, to refer to the knowledge or conduct of the co-insured who are allegedly detrimental to coverage. According to sec. 47 para. 1 VVG, relevant knowledge and mis-conduct of the insured is to be attributed to the policy holder. Also voices in literature partly support the attribution of knowledge or conduct of the insured to the detriment of the policy holder.[1] In an extreme case, the policy holder might be confronted with the risk of avoidance of the entire contract in case the co-insured committed deceit.

In fact, the policy holder will only be harmed by knowledge or conduct of a co-insured under strict conditions.

[1] Cf. currently for example *Spielmann*, Aktuelle Deckungsfragen in der Sachversicherung, 3. Edition , page 249 under 1.5.2 in the meaning of a genral objection to the detriment of the policy holder in a litigation.

The following article explains critical attributional aspects and in focus deals with the question in how far insurers may avoid the insurance contract in case of deceit committed by the (co-)insured.

2. STARTING POINT INSURANCE FOR THE ACCOUNT OF A THIRD PARTY

In the (pure) insurance for the account of a third party, the policy holder concludes the insurance contract for the benefit of the insured. He insures the interest of the insured (cf. sec. 43 para. 1 VVG). In case of the insurance for the account of a third party the formal power of disposition (policy holder) and the material entitlement to claim (insured) fall apart (cf. sec. 44, 45 VVG).

3. WHOSE KNOWLEDGE OR CONDUCT HARMS THE INSURANCE CLAIM OF THE POLICY HOLDER?

If the insured in case of a pure insurance for the account of a third party violates an obligation under the insurance contract, the insurer may be entitled to reduce benefits, sec. 28 VVG. As a result, the insured jeopardizes his own insured interest, i.e. the insurance claim.

But how about a combined insurance for one's own account and for the account of a third party, thus in case the insurance contract does not *exclusively cover the interest of the insured third party, but primarily or additionally the interest of the policy holder*? Complex commercial insurance contracts comprise a variety of insured interests and companies. May for example an insurer refer towards the parent company as policy holder of a commercial insurance contract to the fact that the co-insured affiliate committed a breach of obligation? Or refer to the fact that the affiliate concealed circumstances towards the insurer before conclusion of the contract with the effect that the insurer may withdraw from the contract or might in the extreme case be entitled to avoid the entire contract?

3.1 Principally knowledge and conduct of the policy holder decisive

Principally, the knowledge or the conduct of the policy holder is decisive when it comes to insurance contracts and general insurance contract law.

This differentiation shows sec. 29 VVG which contains provisions about partial withdrawal, partial termination, and partial release from liability.

An insurer's possible right to withdraw is according to sec. 29 para 1, para. 3 VVG only given for that part of the contract that deals with the insured who acts in deceit. If the insured violates an obligation to disclose and the insurer consequently declares to withdraw, the withdrawal is limited to that part of the insurance which is relating to the third party.[2] Breaches of obligations and the realization of subjective risk exclusions by the insured only harm the insured himself and have no effect on the insurance claim of the policyholder.[3]

Regardless thereof, certain constellations are acknowledged, where the knowledge or conduct of third parties have to be attributed to the policy holder.
The attribution to the detriment of the policyholder will be made when the third party is his representative, knowledge representative or declaration of intent representative.

3.2 Equality of insured and policy holder in the insurance for the account of a third party – the provision of sec. 47 para. 1 VVG

A special provision regulating the attribution for the insurance for the account of a third party is sec. 47 para. 1 VVG. The provision principally equates the knowledge and the conduct of the insured with the conduct of the policy holder. Here it is irrelevant if the insured was at the same time representative, knowledge or declaration of intent representative.[4]

Sec. 47 para. 1 VVG determines:

> *„Insofar as the knowledge and conduct of the policyholder are of legal significance, in the case of insurance for the account of a third party account shall also be taken of the knowledge and conduct of the insured person."*

Sec. 47 para. 1 VVG covers statutory and contractual obligations as well as risk exclusions in so far as the legal consequences in case of a violation are "of legal importance".[5] In terms of time, this might be about knowledge or conduct before the con-

[2] Looschelders/Pohlmann/Koch, sec. 47 recital 22.

[3] Bruck/Möller/*Brand*, sec. 47 recital 32.

[4] Cf. Looschelders/Pohlmann/*Koch*, VVG, 2. edition sec. 47 recital 1; BGH, NJW 1968, 447 (?)

[5] Vgl. Looschelders/Pohlmann/*Koch*, sec. 47 recital. 4.

clusion of the contract, during the insurance contract period and also after occurrence of the insured event.

4. PROBLEM: AVOIDANCE OF THE INSURANCE CONTRACT

The avoidance of an insurance contract which by means of a combined insurance for the own account or for the account of a third party which covers both the interest of the policy holder as well as the interest of the third party is problematic. There would be a severe risk for the policy holder if the insured might endanger the effectiveness of the overall insurance contract (thus e.g. the group policy) by his knowledge and conduct – thus for example in the extreme case malicious deceit by the insured.

4.1 Cancellation of the insurance for one's own account in case of avoidance of the insurance contract

According to views, the possibility to avoid for reason of malicious deceit affects the insurance contract as a whole.[6] The policy holder and all co-insureds included into it would be treated as if the insurance contract had never existed (sec. 142 para. 1 BGB) – and this even if the policy holder had been credulous, thus did not know or do resp. omit anything endangering coverage. From the policy holder's point of view there is the risk of a cancellation of the own insurance coverage.

4.2 No avoidance of the entire contract to the detriment of the policy holder

According to the view represented here, only a partial avoidance of the insurance contract might be considered, namely in so far as the contract affects the third party interest of the deceiving co-insured.

The consequence of a partial avoidance results from sec. 139 BGB, according to which only the void part of the contract ceases.

The fact that the insurance contract included the third party interest of the co-insured does not affect the existence of the policy holder's own interest and of the insurance contract. The contract remains effective with regard to one's own interest.

[6] Cf. for example Bruck/Möller/*Brand*, sec. 47 recital. 32, among others with reference to the comments about the VVG old version (sec. 79) in Römer/Langheid/Römer, different in the here represented meaning but in the meantime Römer/Langheid/Rixecker 4. edition 2014, ec. 47 recital 9.

4.2.1 Protective purpose requires differentiation with respect to affected interests

The limitation of the possibility of avoidance to that part of the contract concerning the interest of a third party, is also required by the protective purpose of sec. 47 para. 1 VVG.

The legal splitting of formal power of disposition and material entitlement to claim between policy holder and insured in the insurance for the account of a third party shall not be to the detriment of the insurer.[7] The insured person shall, for the protection of the insurer, be treated as if he were the policy holder. Beyond this protective purpose no attribution of knowledge and conduct of the co-insured to the detriment of the policy holder shall be made via sec. 47 para. 1 VVG.

To obtain consistent results it shall therefore in the individual case be differentiated with respect to the affected insured interest.

4.2.1.1 Congruent interests of policy holder and insured

The insurance contract (or one part of the contract) may only concern congruent interests of insured and policy holder.

Example 1: A lessee concludes a motor vehicle fully comprehensive insurance in favor of the lessor (insured). Before conclusion of contract, the insurer asks for previous damages. The lessor, though not the lessee, knows about a previous damage but does not disclose it.

In above mentioned example, the knowledge of the lessor has to be attributed to the lessee according to sec. 47 para. 1 VVG. Consequently, the insurer may withdraw from the insurance contract and – in case of deceit – avoid the contract. If the insurer was not allowed to avoid despite malicious deceit, because the policy holder has been credulous, the policy holder would profit from the insurance benefit.

Given the protective purpose of sec. 47 para. 1 VVG, the insurer shall not be placed in a less favorable situation than if the policy holder had himself had fraudulently deceived.

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[7] Cf. e.g. Römer/Langheid/*Rixecker*, 4. Edition 2014, sec. 47 recital 1 with citations

The avoidance appears consistent for above example. The insurance contract exclusively concerns congruent interests on the part of the lessor resp. the policy holder (interest to preserve the property and interest to replace the property), thus in the meaning of the indemnity insurance the same damage, the same financial loss.

4.2.1.2 Self-interest of the policy holder and third-party interest of the insured

The situation is different if the insurance contract comprises extensive own interests of the policy holder (combined insurance for one's own account and for the account of a third party) besides the interest of the (co-)insured.

Example 2: The third party liability insurance comprises the own liability of the parent company as well as the liability of the affiliate company resp. the liability of employees. Here, it is not justified to have the insurance coverage for the account of the policy holder's own interest omitted. This would though be the consequence if the insurer could avoid the entire contract for reason of malicious deceit.

If the spheres of one's own interest and the interest for the account of a third party are differentiated, a consequent consideration according to the purpose of sec. 47 VVG prohibits an avoidance beyond the part of the contract affecting the insured. The insurer shall not suffer a disadvantage because he did not conclude the insurance contract with the insured but with the policy holder who did not deceive. If, however, the insurer had not concluded a (separate) insurance contract with the insured, knowledge and conduct of the insured would not have any relevance for the insurance claim of the policy holder (if no allocation would be made for specific reason), e.g. because the acting person is a representative of the policy holder). Sec. 47 para. 1 VVG is only aimed at the prevention of placing the insurer in a less favorable position but not placing him in a better position towards the policy holder. However, the insurer would for example be put in such unjustified better position towards the insured in case of the possibility to avoid related to the entire contract /the part of the insurance contract dealing with one's own insurance, which would not exist without the co-insurance of the interest for the account of a third party.

Practice and literature do partly not differentiate with the required consequence between the insured interests. According to one view, example 2 (third party liability insurance) shall be treated just like example 1 (vehicle leasing and hull insurance). If the person claimed against by a third party, who maliciously deceived, had a right of in-

demnification against the policy holder (the company), he would indirectly profit from maintaining the (company's) third party liability insurance coverage.[8]

This argument does though not suggest allowing the avoidance of the entire third party liability contract. It rather shows that, for the protection of the insurer against an unjustified insurance claim, only a partial appeal is advisable and justified. That part of the contract dealing with the third party liability claim may be appealed against. Beyond that, the third party liability insurance coverage for the company has to remain according to the view represented here.

4.2.1.3 Limitation of the possibility to avoid to the third party interest does not inadmissibly limit the insurer's right to avoid

The Federal Court of Justice acknowledged that the insurer may avoid an insurance contract for the account of a third party due to malicious deceit committed by the policy holder. This means that no insurance coverage exists also for those insured persons covered by the insurance contract who did not maliciously deceive.

According to the Federal Court of Justice, the insurer may further not effectively waive his right to avoid the insurance contract for malicious deceit by contractual exclusion in advance.[9]

The assessment of the Federal Court of Justice about the appeal against the entire contract is not transferable to the case discussed here. In the case decided by the Federal Court of Justice, the policy holder had maliciously deceived. It was about a pure insurance for the account of a third party. The insured obtained the insurance claim in such a way, as the policy holder justified it – thus avoidable. The here discussed constellation though deals with a combined insurance for one's own account and for the account of a third party and beyond that not with a deceit committed by the policy holder, but by a (co-)insured.

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[8] Cf. Looschelders/Pohlmann/*Koch*, sec. 47 recital 23.

[9] The decision was about the insurance of specie in transit, cf. decision of 21. September 2011,court file number IV ZR 38/09, BeckRS 2011, 25937.

Here, the misconduct of the insured towards the policy holder may not be attributed via sec. 47 para. 1 VVG in so far as it deals with the insured own interest of the policy holder.

5. BURDEN OF EVIDENCE AND PROOF

The burden of evidence and proof for an allocation according to sec. 47 para. 1 VVG, as an exclusionary rule, in so far rests with the insurer. If the insurer intends to deny payment toward the policy holder due to knowledge or conduct of the insured, the insurer has to declare and prove that the insurance contract is entirely or partially an insurance for the account of a third party, thus which insured interest is concerned.[10]

6. CONTRACTUAL PROVISIONS

Policy holder and insurer may, according to sec. 47 VVG, deviate from provisions in the insurance contract.

Clauses may regulate questions of allocation in the policy holder's interest. Representative clauses contain extract regulations to allocate knowledge or conduct. In the individual case, contractual regulations about requirements to avoid and the effects of an appeal with regard to the insured interests in favor of the policy holder are possible. About pre-contractual notification obligations, insurance contracts may determine, who (policy holder/insured) shall be the addressee of the notification obligation. Further, clauses may regulate that pre-contractual notification obligations shall be regarded as fulfilled in favor of the policy holder under certain conditions.

7. CONCLUSION

An attribution of knowledge or conduct of a co-insured to the detriment of the policy holder via provisions of the insurance for the account of a third party is only possible under strict conditions. The insurer bears the burden of evidence and proof. If an insurance contract comprises (also) the own interests of the policy holder, an avoidance of the insurance contract as a whole is principally excluded due to the deceit committed by a co-insured. A differentiation between the affected insured interests (own/third party interest) is decisive. Policy holders should agree on appropriate contractual con-

[10] Cf. Römer/Langheid/*Rixecker*, sec. 47 recital 9 with citations

structions in order to avoid an endangerment of the own insurance coverage resp. the entire contract.

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