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Insolvency resistance of company pension schemes Tax consultants are liable for incorrect advice

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Numerous rulings indicate how easily tax advisors can be held liable in connection with advice on occupational pension schemes (bAV). One of the key issues in advising business managers is the insolvency-proof nature of the provision – it is precisely on this point that insurance sales spread numerous legal inaccuracies. Therefore, typical liability traps and their avoidance will be presented as examples from practice.

1. defective pledge – defective subscription right

In a recent case¹, the owner of a car dealership lost his retirement benefits in the form of an endowment policy and a private pension insurance policy. The entrepreneur had secured the endowment insurance “by pledging it to his wife” – later it turned out that the pledge was invalid. Securing the pension insurance by granting a subscription right in favour of the wife did not help either – the insolvency administrator confiscated all the assets. Insurance intermediaries also like to operate here with “sample forms”, which are sometimes created at the insurer by business economists without tax or legal training.

If the tax advisor then passes on these “free samples of no value” to the client, he often finds himself unsuspectingly liable.

In case of doubt, he is regarded as an expert by the courts – just like an auditor or lawyer – and is therefore liable as a professional expert.

The question of whether there has been a breach of the Legal Services Act (RDG) is a completely different matter. If there is such a breach, the professional liability will not provide cover in the event of a claim.

The Federal Court of Justice (BGH) speaks here of the duty to delegate – in the area of insurance law, for example, to an insurance advisor, and otherwise to a lawyer.

It is typical, for example, that the pledge of a retirement pension has not been made or has not been made effectively – for example, because the insurer was not aware of it or because the insurer no longer has any files relating to it.

Incorrect wording is also common in the case of subscription rights. In particular, conditions precedent or conditions subsequent, such as hidden revocability, should be mentioned here.

Such errors represent open flanks for pledgees and insolvency administrators.

2. defective insolvency petition

In the case decided, the insolvency administrator had used the money from the insurance policies to pay the court and procedural costs. There was therefore no (partial) debt relief at all. The entrepreneur had applied for the “regular insolvency proceedings” with higher costs for insolvency trustees and court – in case of alternative private insolvency these costs would not have been incurred.

And the legal dispute with the insolvency administrator about the two contracts had finally contributed to the increase in the costs of the proceedings. Therefore, the ex-entrepreneur’s legal advisor was held liable for the additional costs, and convicted.

3. faulty professors’ reports

Similar traps await the tax advisor who does not clearly demarcate his assignment when it comes to the area of partial retirement or working time accounts: here, too, providers like to operate with “legal opinions” which, at first glance, are supposed to suggest seizure protection and insolvency security. Notorious here is the “expert opinion” of a professor for family law, from whose “summary” – without signature and date – no concrete reference to the contract concept of the pension provider results.

But also in the field of taxation, a university professor who also runs a company consultancy for occupational pension schemes can be “ahead of his time”: In a trade journal he spreads the thesis that a pension commitment (PZ) financed in deficit can be transferred to a pension fund (PF) “tax-neutrally and without additional liquidity” – the discrepancy between the PZ-Heubeck discount factor and the PF calculation interest rate does not “bother” him. Months later, insurance intermediaries are trolling the first tax advisors – they’re all about “repackaging” the available cash into their own PF, a commission business.

The only way to help here is to dutifully³ obtain binding information and, if necessary, refer the matter to professionals who are authorised to advise on employment, insurance and insolvency law.

4. incorrect occupational pension reports

For the tax advisor, it follows that he should delegate his responsibility in the long term if necessary – i.e. explicitly exclude legal advice outside the field of tax advice and representation. In the case of occupational pension consultants, etc., their professional accreditation must be checked. A credit report may reveal that an affidavit was filed long ago.

Some bAV-Unternehmensberatungs-GmbH provides PZ expert opinions, including tax, labour and insolvency law. The catch is that management consultants cannot even insure themselves against legal errors and work without a legal advice permit from the GmbH: Recently, hundreds of pension commitment texts with incorrectly selected text modules – under the professional direction of an alleged pension tax consultant – had been circulated by a trainee.

Only the delegation of responsibility to suitable professionals can relieve this situation. However, the tax advisor should not forget to at least check the tax results in particular before taking over the preparation of the annual financial statements if he does not want to run into his own liability.

5. defective insolvency protection

Insurance sales companies are happy to serve managing partners with the statement that company and private pensions are protected against seizure and insolvency. However, “off-the-shelf solutions” cannot prevent the vast majority of insolvency administrators from confiscating assets, leaving those affected to seek Hartz IV or social assistance. If the legal departments of the product providers or the sponsors of company and private pensions plausibly embellish the legal situation, this can be a trap for the tax advisor if he negligently adopts their half-truths in his own client advice.

5.1. Example pension commitment

According to the case law of the BGH⁵, the insolvency administrator may terminate and collect the reinsurance of a pension commitment. Insurances associated with the insurance contract (e.g. against occupational disability or accident) are thus lost. Since the vast majority of insolvencies are filed too late or other grounds of “managerial liability” can be found, the insolvency administrator will then set off and draw the recovered insurance assets to the estate to distribute among the creditors.

It should not be overlooked that in particular the pension commitment itself can be a reason for over-indebtedness according to [§ 19 InsO](#), because the Heubeck value as a liability item of the tax balance sheet will economically regularly have to be more than doubled in order to then recognise equity on the assets side. This phenomenon also applies, for example, to the reinsured provident fund.

5.2. Example Rürup

At most, within the framework of the new [§ 850 c ZPO](#), a self-employed person can initially build up a relatively small old-age pension in such a way that it cannot be seized, so that in the event of insolvency supplementary social assistance will come into question.

The exclusion of a contractual termination option leaves insolvency administrators and pledge creditors with the options of the lapse of the basis of the contract and extraordinary termination under the German Civil Code – especially in an “emergency”: In contrast, the providers of a Rürup provision spread the fairy tale of complete protection against seizure and insolvency. § Section 850 c of the Code of Civil Procedure also does not preclude the attachment of the actuarial reserve including the surplus participation of supplementary insurances (e.g. occupational disability, accident, provision for widows and orphans).

5.3. Example life insurance shell from Liechtenstein

This construct, which is already extremely insecure as a final withholding tax avoidance model, is often recommended by banks and brokers because of its “bankruptcy privilege”. Often overlooked is the fact that the choice of foreign law is legally ineffective in cases of “assembly line” mediation. This means that

German insurance contract law applies – and unfortunately this does not know any bankruptcy privilege.

6. conclusion

Mass legal constructs, especially from the pens of commission-oriented pension funds and product providers, tend to be legally erroneous. The tax adviser should obtain a written receipt from the client for his hand file stating which advice has been taken on and which has not. In particular, the adviser should obtain confirmation of the fact that he has referred the client to external advisers and to the obtaining of binding information.

by Dr. Johannes Fiala

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Dr. Johannes Fiala

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