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Legal protection: When is it worthwhile to take out a cover action?

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Insurance companies offer the customer a good feeling until the customer is then faced with a mostly justified refusal of benefits in the event of a claim. The vast majority of intermediaries have hardly any market overview for a comparison of offers at home and abroad – especially not the customer.

The broker lets a software decide what is most suitable for the customer. If the insurance rating software was sponsored by certain insurers, it is called “VersicherungsGate” in broker liability. Already when taking out (legal expenses) insurance, but also frequently when refusing cover in the event of damage, customers still do not know what is actually insured. It is not uncommon for the insurer to find out from the court what he meant in his insurance conditions, or how they are to be interpreted or whether they are effective. For example, an entrepreneur who was persuaded by his bank to take managed SWAP interest rate bets followed by a loss of two million euros said that such cases were not insured by RSV: This error cost the entrepreneur so far already around the 50.000 ?

Often no pre-contractuality

No insurer (VR) will provide cover for houses that are already burning. The RSV wants to be on the safe side here and has therefore generally provided for a waiting period: In the case of breaches of contract, the (first) breach must normally only occur after three months. For example, one RSV refused cover for a claim for reimbursement of costs against the private health insurance (PKV) after the PKV had offset counterclaims (which had arisen prior to the conclusion of the RSV).

The Federal Supreme Court (BGH, judgement of 25.02.2015, ref. [IV ZR 214/14](#)) ruled to the detriment of RSV, because it depends solely on the case description of the customer:

“Accordingly, if the policyholder makes a claim against a third party, only the statement of facts on which the policyholder justifies the breach of duty by his opponent is decisive for determining the breach of duty that decisively characterises the insured event. The earliest possible point in time for this is the alleged breach of duty by the respondent, from which the policyholder derives his claim.

In many cases no post-contractuality

More often consumers and entrepreneurs are persuaded by the intermediary to change insurance. The Federal Minister of Justice has determined that about 85% of all consultations are not documented in violation of duty – how can this be done if the reasons cannot be presented in a technically correct manner as a comparison of conditions? In the RSV, the old, previous BoD generally only has the option of reporting any claims up to two years later in order to obtain a cover note.

However, this may not always be the case:

The Higher Regional Court of Stuttgart (OLG Stuttgart, judgement of 27.11.2008, file no. [7 U 89/08](#)) decided: “If the policyholder misses this deadline, the BoD cannot refuse cover if the policyholder is demonstrably not to blame for missing the deadline. The OLG refers to the consistent case law of the BGH. If a policyholder is unaware of the loss event and is not at fault, it would be contrary to good faith if RSV were to invoke the time limit for subsequent liability. With RSV cover, it is therefore a question of whether a concrete case of damage is involved; just as with liability cover it is a question of whether the (allegedly) injured party has already determined enough that a serious claim can be made (OLG Frankfurt/Main, judgement of 5 December 2012, file no. [7 U 73/11](#)).

Alternatively, the intermediary is liable as a “quasi-insurer” instead of the terminated RSV. For example, many RSV insurers have excluded benefits in the event of cancellation of existing life insurance policies in new policies. In this case, the covering agent can be liable for the lost service due to incorrect advice.

The policyholder can react to offers of cover – not only RSV – from insurers by expressly insisting on his legal right to advice in accordance with § 6 of the German Insurance Contract Act (VVG), for which the insurer is then also liable for incorrect advice or advice not provided.

Multiple coverage obligation due to recent breach

The Federal Court of Justice (ruling of 8 April 2014, file no. [IV ZR 103/15](#)) decided that the revocation of life insurance contracts is only a breach of duty in the RSV if the BoD refuses to reverse the transaction. Or if the insurer acknowledges the revocation but refuses to pay the amounts to be presented by the policyholder himself – with the help of an actuarial expert opinion – from repayable premiums plus of all calculated drawn uses less reasonable risk costs.

If the policyholder cancels what would be possible forever and, according to the Federal Court of Justice, remains possible even after the insurance has been cancelled, expired or the insured event has occurred, the policyholder expects far more in monetary payment from the BoD than just the surrender value or payable as an expiration payment or as an insurance benefit. Also the premium refund, which is often only offered by many life insurers in the event of cancellation, less the premium refund. calculated risk contributions with the discontinuation of all uses regularly turns out to be far too little on closer actuarial examination.

It is therefore irrelevant that the first breach of duty regarding the right of withdrawal is not correctly and effectively instructed. Just as, according to the consistent case law of the Federal Court of Justice, each of several consultations can be erroneous, and therefore each erroneous consultation will also become separately time-barred. Thus, any consultation on casino securities, derivatives and swap transactions can again be erroneous.

Multiple coverage obligation despite exclusions

Even the higher courts are aware that even managers and entrepreneurs have often never read their insurance conditions or do not understand their content – not infrequently even those who have drawn them up with the insurer. The BGH creates a counterbalance to this by interpreting the insurance conditions according to an average layman's understanding, not only with regard to consumers (BGH, ruling of 08.05.2013, ref. [IV ZR 233/11](#)). As a result, numerous clauses in the RSV that exclude risks were or are invalid. How is an insurer supposed to know what he has promised before he reads what he must have meant thanks to a BGH ruling?

If, for example, certain contractual legal claims are excluded in the General Legal Protection Conditions (ARB), there may nevertheless be a legal claim to cover from RSV if there are competing legal claims or, for example, competing tortious claims for damages (LG Hannover, judgement of 16.10.1998, ref. [13 O 158/98](#); AG Mönchengladbach, judgement of 17.02.2004, ref. [29 C 496/03](#)), § 29 ARB. There is no need for a criminal judge to have previously certified the intent in a judgment.

Multiple coverage obligation despite unclear inclusions

Auxiliary transactions are sometimes also insured in the company legal protection, i.e. not only the purchase of office furniture and printer accessories, for example, is considered by reasonable laypersons. A manager now finds out in a claim that he is not liable for insured €100m, but €600m. If RSV does not want to cover the action against the broker for indemnification as an auxiliary transaction due to a disputed interpretation of the ARB, the policyholder (UN) or manager only needs to claim that the insurance broker has fraudulently or maliciously deceived the UN about the content of his support service – for example by omission. Frequently, industrial insurance brokers also save themselves the trouble of preparing the legally required documentation, or other core obligations are grossly violated, which in fact results in a reversal of the burden of proof. In this case, an additional legal claim to repayment of the forfeited brokerage or commission, which is usually insured under the RSV, is also possible, [§ 654 BGB](#).

Multiple claims for cover despite inaction of the insurer

In liability insurance, the minimum obligation of the BoD is to assess the damage and decide how it wishes to provide insurance cover. In this respect, the Hanover Regional Court already ruled in its judgement of 7 November 1967 (file no. [2 C 274/67](#)): “The insurer fulfils its obligation to defend unfounded claims for compensation and to reduce and properly determine the damage in principle by calling in an expert to examine the damaged objects, taking photographs, describing the damage in detail and calculating its amount or estimating it by explaining the reasons”. Only when the BoD has communicated its decision does the limitation period expire after three years, calculated from the end of the year: During this period, an action for cover can also be brought in the RSV as an action for declaratory judgment.

by Dr. Johannes Fiala and Dipl.-Math. Peter A. Schramm

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Scheuen Sie sich nicht, uns für ein Kennenlerngespräch anzurufen. Gerne nehme ich mir persönlich Zeit, um Ihren Fall zu prüfen und den ungefähren Aufwand für Ihr Anliegen abzuschätzen.

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Dr. Johannes Fiala

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Weiterempfehlung

Sie haben gefunden, wonach Sie gesucht haben? Sie kennen jemanden der unserer Unterstützung benötigt?
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