

RECENT LEGISLATIVE AND JUDICIAL DEVELOPMENTS IN CONTINENTAL EUROPE AFFECTING THE CASUALTY INSURANCE INDUSTRY

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INTRODUCTION

Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry is the latest installment in Guy Carpenter & Company Ltd.'s ("Guy Carpenter's") legislative update series, designed to provide our international clients and markets with a concise overview of key trends in the Continental European legal environment. These issues have had an impact on insurers and reinsurers or are expected to have an effect in the near future.

Guy Carpenter has produced this report thanks to our ongoing valued cooperation with the insurance practice of law firm Heuking Kühn Lüer Wojtek and its network of legal experts, acknowledged as leading insurance law practitioners in their respective jurisdictions across Continental Europe. The objective has been, as in previous reports in this series, to focus on the legislative or judicial developments that we consider to be of greatest impact in each selected country. It has not been our goal to produce an exhaustive review of the entire scope of legislative changes and judicial rulings of the past year in Continental Europe, but rather to highlight the main developments that we and our legal colleagues perceive as being worthy of attention, and where necessary, further in-depth study.

This issue of *Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry* looks at a selection of 11 jurisdictions and covers the period May 2011 to September 2011.

In Austria, a third party does not have a legal interest to join an action for insurance coverage by the insured against the third party liability insurer, even when the insured is bankrupt and its liquidator has filed a lawsuit (OGH 22.10.2010, 7 Ob 178/10t).

GENERAL AUSTRIAN LEGAL BACKGROUND

The two party requirement (Zweiparteiensystem) – where each party is either a claimant or defendant – is, according to the Austrian Code of Civil Procedure (ACCP, Zivilprozessordnung), one of the basic principles of civil lawsuits. A third party may join a pending civil action to support one of the two primary parties when the third party has a legal interest in one of the main parties' success. In addition, occupational standards require Austrian notary publics to purchase professional indemnity insurance (PI).

The relevant legal provisions are set forth in Section 17 et seqq. of the ACCP and in Section 30 Paragraph 1 of the Austrian Notary Public Code of Professional Responsibility (Notariatsordnung).

FACTS OF THE CASE

In the case at hand, a former Austrian notary public (the insured) caused damages to several Austrian financial institutions (predominantly banks) in excess of EUR100 million. He engaged in numerous, allegedly improper executions of property transactions where the purchase payment was held in escrow. This resulted in what may have been the largest PI matter caused by the actions of a notary public in Austria in decades – or perhaps even in history.

The Austrian notary public went bankrupt. The financial institutions affected by his actions filed a claim in bankruptcy court with the expectation that they would receive payments from the PI. Representing the co-insurers, the lead carrier of the PI appropriately denied coverage. One of the banks affected by the scheme decided to fully finance a civil lawsuit. On March 2, 2011, the former notary public's liquidator filed a lawsuit seeking a declarative statement of coverage for the losses suffered by the bank.

The bank subsequently joined the liquidator in the civil lawsuit against the lead carrier. This was done on the premise that the court's decision could adversely affect the bank's legal interests if the liquidator's claim was denied. The latter, according to the bank, constituted a legal interest to join the proceeding. The lead carrier promptly put forth reasons to reject the bank's intervention.

The lead carrier's arguments were rejected by the Vienna Commercial Court, the court of first instance. This decision was reversed by the Court of Appeals. The bank then filed an appeal (Revisionsrekurs) with the Austrian Supreme Court (ASC, Oberster Gerichtshof, OGH), which rejected the bank's motion to intervene in the civil proceeding.

CONSIDERATIONS OF THE ASC

Due to a substantial amendment to the ACCP in 2009 (ACCP Amendment 2009, Zivilverfahrensnovelle 2009), the ASC initially analyzed the court of first instance's decision as to whether the bank's decision may have been separately appealed by the lead carrier, and whether this appeals process was two-sided, where both parties to a dispute may file an appeal.

Section 18 Paragraph 4 of the ACCP's previous version stipulated that a court order granting an intervention may not be appealed by the other party. However, Section 18 Paragraph 4 of the ACCP was abrogated by the ACCP Amendment 2009 on April 1, 2009. The ASC needed to analyze whether the previous version of Section 18 Paragraph 4 should be applied to a civil lawsuit filed on March 11, 2009 – that is, prior to the abrogation taking effect. In line with relevant case law, the ASC concluded that a pending civil proceeding shall be adjudicated according to the most up-to-date version of applicable procedural prescriptions, provided that transitional provisions do not stipulate otherwise. Consequently, the lead carrier was permitted to appeal the Vienna Commercial Court's decision separately.

The ASC also had to determine whether the bank had the right to answer the lead carrier's appeal against the court order issued by the Vienna Commercial Court. An appeal procedure against a court order was generally not two-sided prior to the enactment of the ACCP Amendment 2009, in the sense that an appeal could only be made by one of the parties. However, Austrian legislative authorities intended to affirm the general principle of equality of strength of the parties – in line with Article 6 of the Human Rights Convention – by implementing the ACCP Amendment 2009. Both parties to a dispute are now permitted to present arguments in the appellate process unless the law stipulates otherwise. Consequently, the former rule has been turned upside down. Since the order by the Vienna Commercial Court appealed by the lead carrier was issued after March 31, 2009, the ASC found that the appeals process in this particular case must be two-sided. The bank was therefore permitted to answer the lead carrier's appeal.

After resolving the procedural issue, the ASC proceeded to consider the merits of the case. Section 17 Paragraph 1 of the ACCP stipulates that a person who has a legal interest in the success of a particular party to a lawsuit may join the action on the side of that party. The legal interest of the intervener must be precisely specified according to Section 18 Paragraph 1 of the ACCP. The party seeking to intervene must demonstrate an unambiguous legal interest. This is one of the formal requirements for joining a lawsuit. Attempts to intervene that fail to meet this standard are rejected during the court's pre-trial evaluation.

According to case law, an economic interest does not constitute sufficient grounds for joining a civil action. In the past, for example, the legal interest of a creditor to join a recovery action by the liquidator was denied. Likewise, the ASC has also rejected arguments favoring the right of an insured third party to join another insured in a civil lawsuit against a professional liability insurer (OGH 6 Ob 201/09s, with further quotes).

The ASC in the case at hand found that the bank cannot be treated differently from an insured third party that joins an action for insurance coverage by an insured against the professional liability insurer. In both cases, the insured third party's motion to join must be denied, even though a liquidator, as opposed to an insured, initiated the action for coverage as a claimant under the PI.

COMMENTARY

The ASC's reasoning in this particular case is in line with existing insurance case law regarding the sufficiency of an insured third party's legal interest to join an action for coverage against an insurer.

Based on ASC case file no. 7 Ob 29/06z, the Court of Appeals maintained that a further appeal to the ASC was permissible. The Court of Appeals quoted from an ASC decision that stated that, under certain circumstances, an insured third party may seek a declarative statement of coverage. Such circumstances exist when it is expected that the insured third party may lose the claim for insurance coverage, which would serve to establish a settlement fund. Loss of a claim for coverage may result from failure to bring an action within the statute of limitations set forth in Section 12 Paragraph 3 of the Austrian

Insurance Contract Act (Versicherungsvertragsgesetz, VersVG). This may be suspended by a lawsuit of a third party or if an insurer denies coverage and the insured failed to act. The Court of Appeals based its decision to grant the bank's appeal on the premise that the meaning of the term "legal interest" is the same in Section 17 of the ACCP as it is in Section 228 of the ACCP.

It was to be expected that the ASC would not follow the Court of Appeals' reasoning in this case. An analysis of existing case law concerning the legal interest of a third party to join an insurance legal action revealed that third party liability insurers are generally permitted to join the vicarious liability lawsuit against the insured only as defendants. For example, they would be permitted to join in situations where the insured is not the claimant (OGH 8 Ob 226/76). On the other hand, an insured third party was granted the right to join an action for insurance coverage on the side of the insured where execution proceedings had been initiated by the insured third party (OGH 7 Ob 19/82). In terms of intervention in insolvency proceedings, creditors have previously been denied the right to join the liquidator even when the insolvency claim contained the right to an exclusion (Aussonderungsrecht) or a right to separation (Absonderungsrecht).¹

The line of argument made by the bank in this case could not possibly have been successful, given these precedents. The bank maintained that no precedent exists regarding whether an insured third party seeking damages in the insolvency proceeding, which would be covered by the assets of the insured, may also have a legal interest to join the insured's action for insurance coverage against the insurer.

Given existing case law, it should be expected that the ASC will deny insured third parties the right to join an action for coverage by a liquidator against the insurer.

¹ Klauser/Kodek, ZPO 16.01 ZPO § 17 E 17.

While state supervision is no cure for unexpected turbulences in the financial market, it remains an essential tool for the mitigation of financial crisis risks. The recent financial problems in Greece, Portugal, Italy, Ireland and Spain are likely to fuel the call for a well coordinated and strong financial supervision system within the European Union (EU). This is also true in the insurance market, where players invested in mispriced government bonds and are now busy disposing of them.

After the financial crisis of 2008, the European Commission saw that it was crucial to foster closer cooperation among national supervision authorities, since nationally-based supervision had not been able to keep up with financial globalization.

In November 2008, as a first reaction to the recent financial crisis, the European Commission created a high-level group to develop ideas for strengthening EU supervisory arrangements in the financial sector. In its final report, dated February 25, 2009, this group proposed restructuring the entire EU supervisory institutions architecture. The purpose was to create an integrated monitoring panel for financial services, including (re)insurance companies. The European Council decided to make the appropriate amendments to EU legislation surprisingly quickly, on June 19, 2009.

Since then, the EU institutional framework for the supervision of insurance companies has changed considerably. The European Insurance and Occupational Pensions Authority (EIOPA) came into existence on January 1, 2011, and is one of three European Supervisory Authorities (ESAs) created in addition to the new European Systemic Risk Board (ESRB). These new watchdogs replace the former European Committees for the banking, securities and insurance and occupational pensions sectors. They have been given extended control powers designed to facilitate more effective financial supervision.

EIOPA succeeds the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and works alongside the new European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA). By cooperating with national authorities, EIOPA monitors developments in the market and works to detect threats to financial stability as early as possible.

LEGAL FRAMEWORK, TASKS AND POWERS

EIOPA has taken over CEIOPS's functions, including drafting regulatory technical standards, general guidelines for the supervision of the insurance market and proposals to national supervision authorities in case of non-compliance with EU law. EIOPA also conducts peer reviews to ensure the consistent application of existing and future technical EU rules in the insurance and occupational pensions sector.

Unlike CEIOPS, though, EIOPA is not limited to an advisory or consultative role. Its powers include individual binding decisions, as provided for in Regulation (EU) No. 1094/2010 of November 24, 2010, the legal framework of the new authority (EIOPA Regulation, the Regulation). Such decisions may be addressed to national supervision authorities and even to individual financial institutions.

In certain emergency situations in the financial markets, the existence of which has to be determined by the European Council, EIOPA may adopt individual decisions requiring the competent national authorities to take action (Article 18 (3) of the Regulation). In case of non-compliance by a national authority, decisions may be addressed to individual financial institutions, with an extreme example being the cessation of any practice (Article 18 (4)).

When a dispute between several national authorities arises and an agreement cannot be reached, EIOPA may make binding decisions for the authorities concerned to ensure compliance with EU law (Article 19 (3)), and where appropriate, for financial institutions (Article 19 (4)). Finally, if a national authority fails to comply with its obligations under EU law and is reluctant to take necessary action in due time, EIOPA can adopt individual decisions addressed to financial institutions, if the relevant EU provisions are directly applicable to them (Article 17 (6)).

Time will reveal the full impact and relevance of EIOPA's new powers. National authorities and financial hegemonies have been advocating for the maintenance of their autonomy as EIOPA developed. Therefore, EIOPA currently works within strict conditions to make use of its discretionary powers.

EIOPA'S ARCHITECTURE

EIOPA is designed as an authority with legal personality (Article 5 (1) of the Regulation), meaning that it may have its own rights and obligations. Its main decision-making body is the Board of Supervisors (Article 40 of the Regulation), comprising representatives of the national supervisory authority in each EU Member State (in the case of Germany, the Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin). The Board of Supervisors adopts all opinions, recommendations and decisions issued by EIOPA on the basis of an annual work program (Article 43 (2), (4)).

In January 2011, the Board elected Gabriel Bernardino, of Portugal, to represent the authority as non-voting chairman for a term of five years. Mr. Bernardino is joined by the Spanish Executive Director Carlos Montalvo, who is in charge of the management and implementation of EIOPA's annual work program.

The Management Board is responsible for all executive work. Its members are the Chairman, six representatives of national supervisory authorities and a representative of the European Commission. Currently, this Board consists of representatives from Austria, Ireland, Poland, Italy, the Netherlands and the United Kingdom. The Management Board proposes the annual work program and exercises budgetary power (Article 47 of the Regulation).

Finally, the architecture of EIOPA includes a Board of Appeal for remedies against EIOPA's decisions (Articles 58 and 60 of the Regulation). Like its predecessor CEIOPS, EIOPA has its seat in Frankfurt am Main.

STAKEHOLDER GROUPS

An unusual feature of the new ESA structure is that authorities are supplemented by stakeholder groups in order to include consultations with concerned private actors. EIOPA, according to Article 37 of the Regulation, hosts two such groups: one for insurance and reinsurance and another for occupational pensions. The insurance and reinsurance group has 30 members, with 10 of them representing insurance, reinsurance and insurance intermediary companies. It is chaired by Michaela Koller, of Germany. She is Director General of the CEA, the European insurance and reinsurance federation.

Having only advisory powers under the EIOPA provisions, this insurance and reinsurance group still gives stakeholders sufficient opportunity to express their interests. It meets at least four times per year and at least twice with representatives of the Board of Supervisors. EIOPA and the European Commission ask the group to provide its opinions regarding insurance-related regulatory technical standards, the implementation of technical standards and EIOPA's guidelines and recommendations.

Beyond the right to be heard, the stakeholder group is free to inform EIOPA about possible breaches of EU law and request that EIOPA investigate these. At any time, the group may submit its opinions about EIOPA's actions toward a common supervisory culture to any peer review of competent authorities and assessment of market developments. The authority is requested to publish any opinion and advice of the stakeholders.

The influence of this group remains to be seen.

CURRENT ISSUES

The institutional change corresponds to further harmonization of substantive insurance supervision law within the EU. EIOPA will supervise the implementation of these new provisions within the member states in order to achieve a fully coordinated EU supervision structure. One of the top issues on EIOPA's agenda, in this respect, is to make European insurance companies fit with the equity provisions of the Solvency II Directive, which becomes effective in 2013.

Recently, EIOPA announced that around 90 percent of European (re)insurers have met minimum solvency requirements and passed its second stress test carried out in June. The test was meant to detect how insurance companies would handle different degrees of macroeconomic crisis under Solvency II terms. It has been argued that these tests did not reflect the possible emergence of a national bankruptcy within the EU, even as that scenario became more and more of a reality. However, the test and its results still allowed EIOPA to make a clear statement to member states and to the market.

CONCLUSION

From an overall perspective, national authorities that focus on the supervision of financial markets will face more than implementation challenges as the substantive supervision legislation is harmonized within the EU. They may have to accept a subsequent transition, including discretionary power shifts to the EU level, which may have significant consequences for concerned sectors, including the insurance industry. However, this process advances the involvement of stakeholders. (Re)insurance companies are well advised to provide adequate and dedicated input during this process to make their positions known.

The scandal surrounding the Mediator® diabetes drug (benfluorex hydrochloride) was revealed by Dr. Irene Frachon in June 2010 in her book, whose title could not be more explicit – “*Mediator 150 mg – How Many Deaths?*” This title triggered the first of many legal battles with Servier Laboratories, the manufacturer of the Mediator drug. While Servier won the first round, when judges ordered that “*How Many Deaths?*” be deleted from the book’s title, the Court of Appeal of Rennes later allowed the subtitle, emphasizing that the book was contributing to a legitimate debate regarding the Mediator case.

The Mediator public health scandal has been the focus of major media exposure in France, and there are even plans to make Dr. Frachon’s book into a movie. The case has also aroused interest outside France since the Mediator drug was marketed abroad for many years. The drug was removed from several foreign markets following reports of cardiac valvulopathy and pulmonary arterial hypertension, long before benfluorex-containing medicines were banned in France.

From 2006 until 2009, the Mediator drug was available only in Cyprus, Portugal and France after the drug’s marketing authorizations were revoked throughout Europe. In the United States and Canada, the drug Dexfenfluramine, marketed by Servier under the name Redox (and the name Isomeride in Europe), triggered the huge “Fen-Phen” (the drug combination fenfluramine/phentermine) scandal. These medications are chemically similar to Mediator and are said to be “cousins” of the drug.

Public interest in the drug is not surprising, given the severe heart-valve diseases suffered by some who took the Mediator drug during the 33 years they were available on the shelves of every French pharmacy. The five million people who took the drug from 1979 to 2009 and their close relatives are concerned about the side effects of Mediator. Some 500 to 2,000 persons are believed to have died due to exposure to benfluorex, the active ingredient in the Mediator drug.

Hundreds of criminal claims have already been submitted against Servier. Criminal proceedings are currently ongoing before the Criminal Court of Nanterre for aggravated deception and before the Criminal Court of Paris for involuntary manslaughter and unintentional injuries. The first criminal trial in the Mediator case is scheduled to take place in Nanterre in Spring 2012.

In addition to criminal and civil claims before courts, Mediator victims may be able to seek indemnification from an ad hoc state compensation fund that should be operational by the end of 2011. The French State has moved swiftly to create this fund, especially when compared with its slower response to other major public health scandals, including HIV/Hepatitis C contaminated blood, Creutzfeldt-Jakob disease and the growth hormone scandal. Moreover, this prompt reaction stands in stark contrast to the suspected delay in the French government’s withdrawing the marketing authorization for the Mediator drug. As a result, nine former French Health Ministers have reported to commissions set up at the highest level of the State, and one of them admitted to pressure from Servier and the firm’s close ties to French politicians.

The draft bill creating a state compensation fund for benfluorex victims was adopted by the Council of Ministers of France in May 2011, passed into law on July 6 and validated by the Constitutional Council on July 28. The law is expected to become effective by September 1, 2011.

From a financial point of view, former users of the Mediator drug are not the sole victims of the scandal. The French State has already sustained major financial damages due to the Mediator issue. In addition to its status as a victim of Mediator, the state may be liable as well for damages stemming from the drug’s use because of breaches in the duties of drug-related government agencies.

VICTIMS OF THE MEDIATOR DRUG IN FRANCE

MEDIATOR DRUG USERS

Mediator victims sustain heart valves damage, causing pain, suffering and early death, as well as preventing them from participating in normal activities. They must undergo medical treatment and/or surgery, including lung transplants for the most severe cases.

Victims' associations have made significant progress in the indemnification process. To encourage victims to claim indemnification, some of these associations are crossing the country to inform Mediator users of their rights. The associations are fighting for all victims to obtain full compensation for damages, in light of the fact that class actions do not exist under French law. Health Minister Xavier Bertrand has rejected Servier's proposal to offer compensation only to a limited category of victims and to cap the damages. The act setting up the compensation fund provides indemnification for all damages. Nevertheless, victims fear that they will not obtain full compensation because the Health Minister admitted that compensation per victim may be limited, even though the total compensation amount would not be.

THE FRENCH STATE

The National Insurance Fund (CPAM, Caisse Primaire d'Assurance Maladie) has borne the charge for the reimbursement of the Mediator drug, valued at EUR879 million. It now bears the costs of medical treatments that Mediator victims must receive as a result of the drug's use.

The French National Office for Accidents of Medical Nature (ONIAM, Office National d'Indemnisation des Accidents Medicaux) will make advance payment for damages of victims claiming indemnification from the state compensation fund. This will occur if the "responsible person" at the individual victim's insurer fails to offer compensation or makes an obviously insufficient compensation offer within the allotted period of time. This period is set at three months from the day the pool of experts for the state compensation fund has rendered its opinion. It opines on the circumstances, the causes, the kind and the extent of the damages and the liability of benfluorex drug manufacturer/distributors, and possibly, the liability of other health professionals as listed under the Public Health Code. These professionals are all subject to mandatory professional liability insurance.

As far as Servier is concerned, one of its four liability insurers publicly declared in January 2011 that its coverage has excluded damages caused by anorexigens (appetite suppressants) since 1997, following the Redox/Isomeride scandal. Therefore, coverage to Servier would be denied if the Mediator drug is deemed an anorexigen. The General Social Policies Inspectorate (IGAS, Inspection Generale des Affaires Sociales) affirmed that the Mediator drug was an anorexigen in a report published on January 15, 2011. The denial of insurance coverage, and most likely also that of Servier's three other insurance companies, should not impact the drug maker's ability to compensate Mediator victims, considering its profits of EUR378 million and cash flow of EUR2 billion.

Under the act passed in July 2011, any persons deemed responsible, or their insurers, may receive a penalty when failing to make an indemnification offer or offering obviously insufficient compensation in settling a benfluorex victim's claim. This penalty is capped at 30 percent of the compensation paid by the state fund.

The Health Minister has emphasized on various occasions that taxpayers will not bear the burden of indemnification paid by the compensation fund. Instead, the government will claim that Servier, or any jointly responsible persons, repay compensation disbursed from the fund, in addition to their penalty. However, if the State is held liable for lack of vigilance, French taxpayers will ultimately bear part of the victim compensation costs.

RESPONSIBLE PERSONS FOR DAMAGES CAUSED BY MEDIATOR DRUG IN FRANCE

In July, a French newspaper reported that medical experts, in three and a half years of research, had not identified a cause other than the use of the Mediator drug for the heart damage suffered by patients. This is the first time medical experts have established a causal link between using the Mediator drug and severe heart valve damage. This conclusion is promising to those who are working to expose Servier's potential liability. Additional medical tests are underway.

In addition to Servier, the French State may be liable for delay and negligence in withdrawing the Mediator drug, and medical doctors may be blamed for prescribing the Mediator drug for use outside of its marketing authorization, for example, as a diet pill.

SERVIER, MEDIATOR DRUG MANUFACTURER

Victims claim that in early 1995 – 15 years before the Mediator drug was banned in France – Servier knew that the drug could cause severe heart damage. Last May, a newspaper revealed that a study done in 1993 by two researchers of Servier's UK subsidiary found norfenfluramin concentrations in the blood of Mediator users. Norfenfluramin, one of the chemical compounds that the Mediator drug is converted to, was the active ingredient in Servier appetite suppressants Isomeride and Ponderal, which were identified in 1995 as responsible for causing pulmonary arterial hypertension.

Had Servier not denied the connection between Mediator and the Isomeride/Ponderal drug, the Mediator drug could have been banned as early as 1997 when Isomeride and Ponderal were withdrawn from the market. Yet according to Servier, no one knew there was a problem with the Mediator drug before 2003. In its view, Servier maintains that the responsibility to victims should be split between the firm and the State.

THE FRENCH STATE

Victims claim that the French State did not fulfil its duty of vigilance. In this view, the State ignored the safety alerts regarding the dangers of appetite suppressants that were known since 1995.

The French Health Products Safety Agency (AFSSAPS, Agence Française de Sécurité Sanitaire des Produits de Santé) should have taken action following the removal of appetite suppressant Isomeride from the French market in 1997, and the withdrawal of Mediator from Italy and Spain in 2004 and 2005, respectively. The general director of AFSSAPS was dismissed in early 2011 due to the Mediator scandal. At that time, the Health Minister made it clear that he wanted transparency and independence in order to restore confidence in the French government's oversight of drugs.

According to victims, Mediator should have been taken off the market no later than 1999 if the State and its agencies, including AFSSAPS and Haute Autorité de Santé, had examined the consequences of the withdrawal of Mediator abroad and tackled conflict of interest issues. Following its investigations, the IGAS has actually admitted that Mediator should have been banned beginning in 1999.

OTHER POSSIBLE RESPONSIBLE PERSONS

- The criminal claims filed with the Court of Nanterre are directed not only against Servier, but also against Jacques Servier in his capacity as president of the firm, and against Biopharma, the company who marketed the Mediator drug.
- At the EU level, two French Euro-deputies have requested an investigation regarding an alleged lack of reaction from the European Medicines Agency (EMA). The EMA and the AFSSAPS, which have members in common, have a close relationship, which has raised concerns over conflicts of interest.
- Doctors may be liable for prescribing Mediator as a weight loss drug, which was outside its marketing authorization. According to unofficial sources, the French government considered requesting medical doctors contribute to victims' compensation. Some observers understood the ONIAM, which is in charge of the compensation fund, to announce that medical doctors would be joined to legal actions brought against Servier, but the ONIAM denied this interpretation. Medical doctors' unions claim they too were deceived by Servier with regard to the composition and dangers of the use of the Mediator drug. Therefore, they maintain that they cannot be blamed for prescribing a medication that was authorized by the State's health authorities.

COMMENTARY

The Mediator scandal will remain in the spotlight for a long time, even as an additional scandal involving Servier may be emerging. According to the AFSSAPS, Servier's osteoporosis drug, named Protelos, may have triggered severe adverse reactions, including the deaths of two patients. The battles against Servier are only beginning.

The state compensation plan for Mediator is not yet operational. Victims are expected to be able to file with the ONIAM by the end of this year. It will be months before experts recognize the liability of the involved parties for either indemnification proceedings or legal actions before courts.

The question of insurance coverage remains open and will depend upon the conclusions drawn by the experts and court rulings in cases filed by victims or the ONIAM against Servier. Insurers should be joined parties in these cases. Technical issues will be central to the debates, from both a legal point of view and also with regard to the definition of health products and their conditions for use. At this stage, the exclusion of the insurer's coverage has not been disputed, but the amounts at stake are so high that such an exclusion clause will most likely be scrutinized.

As far as professional insurance of medical doctors is concerned, the recent developments in medical liability in French law have led to dramatic increases in the insurance premiums of specialists such as obstetricians, surgeons and anaesthetists. If general practitioners are held responsible for prescribing a hazardous medication that received approval from health authorities, then it may become increasingly difficult and expensive for these doctors to obtain insurance coverage. These potential insurance issues could potentially discourage medical practice.

The liability issues raised in the Mediator matter are affecting paramedical professions as well, including medical representatives whose role is to promote pharmaceutical companies' medications to doctors and hospitals. A report of the IGAS, released last June, recommends that these medical representatives no longer be authorized to perform these activities. Additionally, the Health Minister's bill for large-scale reform of pharmacovigilance states that medical representatives cannot meet "face to face" with doctors in French hospitals, and that only group meetings are permitted. The Health Minister added that this prohibition may be extended to private practice physicians as well.

Undoubtedly, there will be a demarcation in the French medical and paramedical landscape dividing the situation into “before and after” periods around the Mediator scandal. The Health Minister clearly stated that “[pharmaceutical] laboratories must understand that things have changed” in regard to reform of medicine control. He emphasized that the benefit of the doubt will go to patients, not drug laboratories, moving forward.

Recent cases involving the diabetic medicines Actos® and Competact®, made by Takeda Laboratories, provide a good example of the government’s willingness to lay full responsibility on drug laboratories and to shift to drug makers the burden of proving an absence of risks. These two drugs were withdrawn in France and Germany in early June due to bladder cancer concerns. However, the EMA decided to maintain the marketing authorizations of these drugs. Despite this recommendation from the EMA, the French Head Minister made it clear that the Actos and Competact medicines will not return to French pharmacies.

The impact of Mediator and other potentially hazardous drugs is shifting the medical environment in France. The precautionary principle now incorporated into the French Constitution may ultimately enlarge the scope of liabilities in medical and paramedical activities. The liabilities have already broadened in recent years through development of new laws and results of court cases. This expansion of liabilities is leading to a growth in professional liability insurance premiums. It also raises significant questions for insurers around how these new risks should be covered.

INTRODUCTION

In German liability law, the injured party may bring a claim against the injuring party (the insured), but not against the injuring party's liability insurer. Questions of liability and insurance coverage are handled separately. First, the liability judgment must include a determination of whether, and to what extent, the injuring party (the insured) is liable for causing the injury to the injured party. Once determined, this liability cannot be questioned in the court of the coverage proceedings. This is referred to as the "*binding effect of the liability judgment for the coverage proceedings*."

Therefore, the injured party pursues a claim by bringing an action against the injuring party (the insured), initiating "liability proceedings." If there is a question of whether an insurer is obligated to provide coverage, the injuring party (the insured) separately brings an action against the insurer, initiating "coverage proceedings."

Even though the injured party has no direct claim against the insurer, the injured party can be the claimant of the coverage proceedings against the insurer. This occurs if the injured party prevails in the liability proceedings, then seizes and collects the alleged coverage claim of the injuring party (the insured) against the insurer, and then files this coverage claim against the insurer. If the insurer is unsuccessful at the end of the coverage proceedings, the insurer must reimburse the injured party for the damage caused by the injuring party (the insured).

The question about the extent to which a liability judgment has a binding effect in coverage proceedings was the subject of a recent decision of the Federal Court of Justice of Germany (Bundesgerichtshof, High Court).²

FACTS OF THE CASE

LIABILITY PROCEEDINGS

In the liability suit, the injuring party (the insured) was a former notary public who was contracted by the injured party, a German company. The liability court condemned the notary public to pay damages to the German company because he breached his contractual duties. He failed to deliver the German firm's money in a timely fashion to a Spanish company. The liability court argued that the notary public was liable to pay damages pursuant to Section 280 German Civil Code. Liability pursuant to Section 280 German Civil Code requires a breach of duty, regardless of whether it is committed during performance of professional activities. By contrast, liability pursuant to Section 19 German Federal Act of Notaries Public (Notaries Public Act), on which the liability court did not base its decision, does require a breach of duty committed while notarial activity is being performed.

COVERAGE PROCEEDINGS

After prevailing in the liability proceedings, the German company seized the coverage claim of the notary public against his professional liability insurer and filed the coverage claim against the liability insurer.

The Appellate Court dismissed the German company's case, arguing that delivering its money to the Spanish company was not part of the notarial activity of the notary public. Therefore, he did not breach his duty while exercising his professional activity in accordance with the underlying *General Conditions for the Liability Insurance for Financial Losses* (General Conditions). According to the General Conditions, the liability insurance only provided coverage for financial losses when they were due to a breach committed while professional activities were being performed.

² Federal Court of Justice of Germany, December 8, 2010 – IV ZR 211/07.

The Appellate Court argued that, because the notary public was held liable in the liability judgment pursuant to Section 280 German Civil Code, which does not require the performance of professional activities, there was a binding effect for the coverage proceedings as to the fact that no professional activities were performed. If professional activity had been included in the judgment, the liability court would have held the notary public liable in accordance with Section 19 Public Notaries Act, rather than Section 280 German Civil Code.

The German company decided to appeal to the High Court.

FINDINGS

The High Court found that there was a binding effect for the coverage proceedings as to the fact that the notary public had not delivered the money in time and, thereby, breached his fiduciary duty. As to the question of whether the insured had breached his duty while exercising his professional activities as a notary public, the High Court stated that the liability judgment had no binding effect for the coverage proceedings. In this regard, the High Court found that the question of professional activity was not decisive in the liability judgment.

The notary had breached his duty to deliver the money on time. Therefore, he was liable whether he was exercising his professional activity or not, and there was a breach of duty that was sufficient to condemn him.

The High Court found that the Appellate Court had misinterpreted the extent of the binding effect when the Appellate Court stated that it was determined in the liability judgment with binding effect for the coverage proceedings that the notary did not exercise a notarial activity when he failed to deliver the money on time.

Contrary to the opinion of the Appellate Court, the High Court held that the notary had breached his fiduciary duty while exercising his notarial activities. Therefore, there was a breach of duty while exercising professional activities, according to the General Conditions. Ultimately, the High Court set aside the judgment of the Appellate Court and remitted the case to the Appellate Court to examine the question of the notary's intentional behavior.

SUMMARY

The High Court's actions helped clarify the *"binding effect of the liability judgment for the coverage proceedings."* In this case, the liability judgment was only binding for the coverage proceedings in its determination that the notary did not deliver the money in time, thereby breaching his contractual fiduciary duty. The liability judgment had no binding effect for the coverage proceedings concerning whether the notary breached his duty while exercising professional activities. There was no binding effect because the question of exercising professional activity was not decisive in the liability judgment. Only facts that are decisive for both the liability judgment and coverage proceedings can have a binding effect for the coverage proceedings.

INTRODUCTION

Italy has recently enacted a statute (D.Lgs.28/2010) introducing mediation as a means to resolve the controversies arising from insurance contracts and some other specific matters. The main features of the mediation procedure are the following:

MEDIATOR

The mediator is the person who carries out the activity of mediating the controversies brought by interested parties. Mediators operate within specific Mediation Chambers registered in a specific register kept by the Ministry of Justice. Mediators must guarantee their independence from the interested parties.

TYPES OF MEDIATION

- Facultative – Used when the parties so decide. In fact, every controversy relating to matters that can be deferred to arbitration can also be resolved through mediation, upon agreement of the parties.
- Deferred – Used in situations where a judge invites the parties to try to solve the matter through mediation. In this case, a judge orders that the case must stay until the controversy has been settled through mediation. If mediation ultimately fails, the judicial proceeding is continued.
- Mandatory. In certain matters, the parties are not entitled to start litigation in court unless they have previously carried out a mediation proceeding.

THE MEDIATION PROCEEDING HAS BEEN MADE OBLIGATORY FOR CERTAIN MATTERS

- Rights concerning title on land
- Severance of commonly owned properties
- Severance of inherited patrimonial assets
- Marriage agreements
- Lease and rental contracts
- Free lending
- Rental of business
- Compensation of damages deriving from medical malpractice or libel
- Insurance, banking and financial contracts
- Motor insurance claims and controversies related to the reciprocal rights of the members of a “condominium.” (Note: Mediation procedure is applicable to these two categories effective March 21, 2012.)

In simple terms, all disputes relating to insurance contracts (with the exceptions of those relating to motor insurance, as specified above) cannot be brought before the courts unless the parties have previously undergone a mediation procedure. Exceptions are cases in which the plaintiff is entitled to demand ad interim injunctions or to start special and urgent proceedings. Examples of these situations include payment injunctions, seizure of goods or urgent or provisional orders in matter of lease.

It should be noted that the controversies subject to the stated preliminary procedure are those that originate from a contract of insurance. However, the ones related to issues that are only consequent or ancillary to a contract of insurance, such as subrogated claims or recourses between insurance companies, should not be subject to mediation procedure.

Another interesting issue concerns the case of performance guarantee, or performance bonds, issued by insurance companies. This situation is unusual because from a legal standpoint, these contracts can be construed as contracts of guarantee rather than contracts of insurance. However, generally, these types of contracts should be considered as “contracts of insurance” for the purpose of the application of D.LGs n.28/2010, given that they are issued by insurance companies and that they are managed through actuarial techniques.

BASIC STEPS OF THE MEDIATION PROCEEDING

- In order for the mediation proceedings to begin, the counterparty must be served with a notice of the invitation to take part in the mediation before a specific Mediation Chamber. The chamber is chosen by the claimant from a list of chambers registered as mediators in a registrar that is held by the Ministry of Justice. The defendant must reply within the period of time fixed by the claimant, communicating whether or not it is willing to participate in the proceeding. The defendant is entitled to refuse participation in mediation when the refusal is justifiable. Justification may be scrutinized by a judge in subsequent litigation.
- After receiving the reply, the Mediation Chamber Secretary appoints the mediator, who will carry out the mediation activity and communicate such appointment to the parties, together with the date scheduled for the first meeting.
- During the meeting, the mediator solicits the parties to reach an agreement for the settlement of the controversy. The law specifies the use of a particular type of alternative dispute resolution (ADR) procedure, leaving the individual Mediation Chambers to adopt the kind of mediation they prefer. The general rules governing such options, as well as the other details of the proceedings, are set out in the regulation that every chamber must adopt.
- As a result of mediation sessions, the parties may agree to settle the dispute, or they may not.
- If the parties agree to settle the controversy before the mediator, then the mediator writes and signs the minutes of the settlement and the parties sign it for acceptance. In case the liable party does not comply with the terms of the agreement, the other party may have the settlement agreement formally endorsed by the judge and thus rendered enforceable.
- If the parties do not settle, the mediator, upon the request of both parties, can suggest a fair and equitable solution of the controversy, and the proposal can be written into the minutes of the meeting. Upon the request of only one of the parties, the proposal can only be made by the mediator if regulations of the Mediation Chamber authorize the mediator to do so. Should the judge’s decision be the same as the proposal made by the mediator, the party who rejected the proposal is charged with the entire costs of the litigation borne by both parties.
- The duration of the mediation proceeding is fixed by law at a period of a maximum of four months. This period may be extended only in very exceptional circumstances.

POSITION OF INSURERS

Since D.Lgs n.28/2010 was enacted, insurers have asked the legislature to turn the obligatory mediation in insurance matters into a mere facultative mediation, or to delay the entry into force of the whole legislative decree. To date, the insurers' lobbies obtained a one-year delay for enforcing obligatory mediation only for controversies relating to motor insurance and condominium relationships. This becomes effective on March 21, 2012.

Insurers have not welcomed the introduction of obligatory mediation. They believe that this preliminary step is likely to increase claims handling costs without a substantive benefit for the insured parties.

In particular, the main criticisms raised by insurers are:

- Participation in numerous mediation procedures requires the presence of an insurer proxy with sufficient power of attorney to be able to freely negotiate the resolution of a dispute. Insurers need to create and train special mediation teams for dispatch each time a mediation procedure is begun.
- The legislative decree does not state any specific forum for mediation, which enables the claimant to summon an insurance company before a mediator who, for example, may have a pro-consumer reputation. The mediator may also be located far from both parties.
- The legislative decree provides very low requirements for professional experience and skills for mediators. Insurers are concerned that they will be summoned before a mediator who has poor knowledge of the questions at issue and the relevant rules of law.
- Insurers generally attempt to settle claims before claims payment is denied. Consequently, they feel that obligatory mediation will often result in delays and wasted energies. However, facultative mediation may be useful, depending on the specific circumstances of the case.

After obtaining the delay in implementation of obligatory mediation for motor insurance, insurers focused on trying to find effective business solutions for coping with the expected massive recourse to mediation in the field of motor insurance. Very few actions were taken regarding obligatory mediation in matters other than motor insurance litigation.

When mediation commences:

- Insurers must decide whether to take part in the proceeding or to decline the invitation to appear before the mediator.
- If insurers decide to participate, they generally entrust a lawyer to provide them with general instructions. Very often, the procedure is adjourned two or three times before it reaches a stage where effective mediation activities can begin.

Currently, insurers tend to attempt participation in the mediation, rather than reject the summon of the claimant before the mediator. Unjustified refusal to take part in a mediation proceeding allows the judge to consider the defendant's position less favorably. Insurers have been trying to create a general agreement on basic rules governing mediation. The goal is to engage as many mediation bodies and insurers as possible in the agreement to maximize the common agreement's applicability. The aim is to allow the parties to be able to select a mediator who works within the signed agreement. This process was begun to sustain the impact of obligatory mediation for motor insurance claims, which becomes effective on March 21, 2011.

POSITION OF THE INSURED

The aim of the legislature in enacting obligatory mediation was essentially two-fold:

- To offer claimants a solid opportunity to see their demands examined in an efficient and simple procedure before a third party, whose mission is to help the parties solve the disputes in an alternative mechanism.
- As a consequence of mediation, the number and the duration of civil cases brought before courts would be drastically reduced.

Both of these targets favor the clients of insurers. The expectation was that the new legislation would satisfy the needs of a large number of litigants.

The new provisions on mediation are still far from welcomed by many observers, especially the professional law groups. The reasons for these critical views are, in summary:

- The legislative decree does not provide that mediators be required to have a minimum degree of knowledge about law, nor does it mandate specific professional standards or requirements, other than those of being “reliable” and “efficient.” No guarantee exists that claimants will be properly guided by mediators to reach a fair and reasonable agreement in a specific case.
- According to the legislative decree, there is no requirement that the parties be assisted by an attorney, which may be detrimental to claimants.
- If recourse through mediation is compulsory, for example, in insurance-related matters, claimants are prevented from going before a judge to exercise their rights of defense, which are guaranteed by the Constitution.
- Compulsory mediation requires that the claimant take an additional step in the claims process, with no guarantee that the claim will be settled. If needed, after the mediation, a proper judicial proceeding must be commenced and completed. This may cause the claimant to bear more legal costs and extends the length of the whole process.

These concerns regarding the key aspects of the newly introduced mediation proceedings requirements have brought several legal professional groups and associations, along with some individual lawyers, to challenge the legitimacy of the latest rules. They have begun a lawsuit before the Administrative Court of Rome (T.A.R. Lazio) against the Ministry of Justice regarding the rules enacted for the application of the legislative decree n.28/2010. The aim is to annul some of the most important rules of the decree.

On March 11, 2011, the T.A.R. Lazio issued an order to stay the case and address the Constitutional Court the questions of the legitimacy of the rules, providing that:

- In the matters subject to obligatory mediation, the claimant is unjustifiably prevented from bringing a lawsuit before the judge in order to protect his or her rights.
- The requirements stated for being appointed as mediator are not sufficient to guarantee the necessary competence for the position.

The grounds for such a decision are based on various issues encompassing the alleged lack of legislative power of the Ministry because of the limits of the delegating statute, as well as some general principles stemming from the European Union (EU) Directive on Mediation.

With these points in mind, it is likely that future appointments of mediators will be subject to more stringent professional requirements, and that mediation procedures will be left either to the option of the parties or to the discretion of judges following a proper court case.

COMMENTARY

Despite all of the criticism raised against D.Lgs.28/2010, the need to reduce the duration of civil litigation in Italy is a priority, and the attempt to introduce obligatory mediation should be welcomed in matters in most of the currently pending court cases.

However, mediation may not be the only, or most appropriate, way to solve the problem. A better court office organizational structure, an increase in the number of judges operating in the territory and an effective reform of the enforcement of judicial decisions may have changed the scenario. But at present, obligatory mediation in insurance contract litigation is a fact, and insurers should use mediation as a means of avoiding long lasting litigation. This may be achieved through comprehensive and objective preliminary analysis of claims, carried out in preparation of the mediation, so that only cases worthy of defense are litigated.

Of course, insurers must prevent the possible abuse of mediation. The abuse could happen if certain Mediation Chambers used a hostile approach to insurers and gained reputations for being “convenient forums” of mediation for insurers’ clients.

For controversies other than those relating to motor insurance, the attitude of the insured may be more positive than expected. Indeed, a client that has suffered a material loss to industrial or private property, or a building contractor who wants to establish whether some event is covered by a policy, has the same goal as the insurers. They want to avoid long-lasting litigation, and they are not interested in wasting time before a mediation body that is not competent on the matter at stake.

Moreover, insurers may find some common ground with a claimant when a mediation procedure must be commenced, and the two parties can agree upon a reliable Mediation Chamber. Certainly, a good effort can be made by the same parties to make efficient use of mediation sessions in an attempt to reach a fair settlement and to avoid a costly and lengthy litigation process.

INTRODUCTION

The public consultation by the European Commission (EC) “*towards a coherent European approach to collective redress (Brussels, February 4, 2011 SEC (2011) 173 final)*” shows that the topic of “mass damages” is prominent on the European agenda. We take this opportunity to provide information on the current Dutch “Class Action (financial settlement) Act” (WCAM), which came into force on July 27, 2005. The act prescribes that a collective settlement is a viable and successful way of resolving mass damage claims. This situation is different from that in the United States, for example.

The WCAM facilitates an agreement for settlement of mass damage claims in a specific situation. The settlement occurs between an organization representing the interests of those who have sustained a loss and the liable party (or parties). It can be declared binding by the Court of Appeal in Amsterdam (the sole court of jurisdiction for the Act) relating to the entire group of damaged/aggrieved parties.

Collective settlement of mass damage claims through the WCAM provides advantages and opportunities. It helps avoid a need for multiple proceedings with related, often substantial, litigation costs. It also provides a significant degree of certainty regarding the financial obligation of the defendants, including the (re)insurers of the claiming/aggrieved parties. Another advantage for the claiming/aggrieved parties is the opportunity to receive damages of a realistic amount in a shorter period of time, avoiding many years of protracted legal proceedings. The possible emotional burdens of extended litigation, uncertainty about both the extent of the legal costs and the outcome of the trial are all avoided. The WCAM is a good solution in many legal situations, ranging from cases of physical injury to cases of financial loss.

OVERVIEW OF WCAM

The main thrust of WCAM is the fact that the payment/compensation agreement resulting from the decision of the Amsterdam Court of Appeal is binding upon the entire group of damaged/aggrieved parties. Reference is made to Article 7:907, Paragraph 1 DCC, which stipulates that it is imperative that the resulting agreement be concluded between one or more parties. These parties bind themselves to an agreement to compensate for the loss on one hand, and a foundation or association with full legal competence which, by virtue of its articles of association, represents the interests of the damaged/aggrieved parties, on the other hand. After reaching an agreement, the parties can submit a joint request to the Amsterdam Court of Appeal to have it declared binding. The agreement must provide for the compensation of losses caused by a single event or similar events. The nature and size of damages for each individual damaged/aggrieved party will vary, of course. The level of payments awarded must acknowledge this variance.

A decision made by the Amsterdam Court of Appeal that an agreement is binding can only be justified if the interests of the damaged/aggrieved parties are clearly protected by the terms of the agreement. Article 7:907 Paragraph 2 DCC states the minimum requirements that must be included in the agreement. Paragraph 3 mentions the circumstances in which the court will reject the application.

As the nature and size of damages for individual damaged/aggrieved parties often differ, the principal of using categories of loss (“damage scheduling”) is required. Damage scheduling requires that the appropriate category for a damaged/aggrieved party be determined. The agreement must include the conditions that must be met to qualify for compensation. The damaged/aggrieved party is then able to make a claim for damage compensation corresponding with the relevant category.

³ Article 7:907- 910 of the Dutch Civil Code (BW). Specific procedural requirements are dealt with in the Dutch Code of Civil Procedures (Rv – Art. 1013-1018). An English translation of the WCAM and the relevant articles in the Dutch Code of Civil Procedures appear at the end of this chapter.

Article 7:907 DCC paragraph 3 concerns rejection of the application. Section b is of prime importance because it requires the Amsterdam Court of Appeal to — *inter alia* — investigate whether the amount awarded is reasonable for each category of loss. It mentions a number of elements for the investigation, such as the size of the damages to those individuals allocated to a certain category and the ease and speed with which payment can be obtained.

OPT-OUT FACILITY

Basically, once the Amsterdam Court of Appeal has declared the agreement binding, it will no longer be possible for a damaged/aggrieved party to request compensation beyond what has been agreed upon. However, it is possible for a damaged/aggrieved party to withdraw within a specific period of time from the binding agreement. This is generally called an “opt-out facility.” Article 7:908 DCC, Paragraph 2 states that parties that make use of the opt-out facility remain fully entitled to make their own individual claim and commence proceedings if required. With a view of the impact of a binding agreement on the individual damaged/aggrieved parties, these parties are offered the opportunity to be heard in the proceedings leading up to the decision that the agreement is binding. This facility is offered to the damaged/aggrieved parties through their being summoned to join the proceedings through notices placed in one or more national newspapers. The party from which compensation is being claimed may make a request during the hearing to declare the agreement binding. They may request that pending proceedings concerning a compensation agreement be suspended.

WHAT IF LIABILITY IS DENIED?

Although it is clear that the WCAM is inspired by the American “damage class action” procedure, the underlying principle is very different. Under the WCAM, the parties must first reach agreement, after which they may jointly ask the Court of Appeal to declare their agreement binding. A damage claim action procedure in the United States requires that a representative victim request the court to order the liable/defending party to pay damages to a group (the “class”). In the U.S. scenario, it may sometimes be very difficult for an agreement to be reached if, for example, the parties have a different view on legal issues. The defending party is generally not willing to agree to a settlement if it believes it does not have liability. If this is the case, then another mechanism comes into play – the collective right of action in accordance with Article 3:305a DCC, in existence since 1994. If essential legal questions need to be answered, an interest group may ask by way of a collective action to issue a declaratory decision on the issue. This court need not be the Court of Appeal in Amsterdam. Money claims are not possible under Article 3:305a DCC. This ability to ask questions helps in the clarification of legal issues. It also increases the willingness to enter into negotiations. (It may also strengthen the defending party’s denial of liability.)

CONCLUSION

The experiences with the WCAM demonstrate that it is a useful tool for redressing mass claims, for issues of personal injury or plain financial loss. As it involves reaching an agreement, it requires two willing participants, which is not always the case. The Dutch law on collective action is, therefore, of essential importance. It may be a necessary means for reaching a point where parties are eligible to enter into negotiations. The WCAM is a productive legal instrument, but it is not perfect. The Dutch Ministry of Justice and Security acknowledges this. It is exploring the possibility of furthering the success of the WCAM by proposing possible obligatory hearings early in the process or before the actual proceedings begin. This will further help resolve legal issues and also consider possible preliminary questions by the lower courts to the Dutch Supreme Court. We are not certain if this change will occur, but its implementation would enhance the success of the WCAM.

ENGLISH TRANSLATION OF THE WCAM AND THE RELEVANT ARTICLES IN THE DUTCH CODE OF CIVIL PROCEDURES

ARTICLE 7:907 AGREEMENT ON A FINANCIAL SETTLEMENT OF MASS DAMAGES CLAIMS

1. An agreement for the purpose of compensating damage caused by an event or by similar events, concluded between a foundation or association with full legal capacity and one or more other parties who have engaged themselves under this agreement to pay compensation for this damage may, upon the joint request of the parties that concluded the agreement, be declared binding by the court for other persons to whom the damage was caused, provided that the foundation or association represents the interests of these persons pursuant to its articles of association (articles of incorporation). Persons, to whom the damage was caused, shall be deemed to include persons who have acquired a claim with respect to that damage under universal or particular title.
2. The agreement must in any case include:
 - a. a description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;
 - b. the most accurate indication possible of the number of persons belonging to the group or groups;
 - c. the compensation that will be awarded to these persons;
 - d. the conditions which these persons must meet to qualify for the compensation;
 - e. the procedure by which the compensation will be established and can be obtained;
 - f. the name and domicile of the person to whom the written notification referred to in Article 7:908, paragraph 2 and 3, can be sent.
3. The court shall reject the request if:
 - a. the agreement does not comply with the provisions of paragraph 2;
 - b. the amount of the compensation awarded is not reasonable having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage;
 - c. insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded;
 - d. the agreement does not provide for the independent assessment of the compensation to be paid pursuant to the agreement;
 - e. the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
 - f. the foundation or association referred to in paragraph 1 is not sufficiently representative with regard to the interests of persons on whose behalf the agreement was concluded;
 - g. the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration by the court that the agreement is binding;
 - h. there is a legal person who will provide the compensation pursuant to the agreement and he is not a party to the agreement.
4. Before making a decision, the court may give the parties the opportunity to add further contractual provisions to the agreement or to change its content.
5. The request referred to in paragraph 1 shall interrupt the prescription period for any right of action for compensation of damage against the persons who are party to the agreement to the extent that the agreement provides for compensation for this damage. If the request has been granted irrevocably (final and binding), a new prescription period shall commence at the start of the day following the one on which the definitive decision is made on the compensation to be awarded. A new prescription period shall also commence at the start of the day following the one on which the notification referred to in Article 7:908, paragraph 2, has been given. If the request is not granted, a new prescription period shall commence at the start of the day following the one on which this judicial decision has become irrevocable (final and binding). If the agreement is terminated pursuant to Article 7:908, paragraph 4, a new prescription period shall commence at the start of the day following the one on which such a termination takes place pursuant to that paragraph. Article 3:319, paragraph 2, of the Civil Code shall be applicable.

6. The agreement may provide that a right to compensation pursuant to the agreement shall expire if a person entitled to compensation has not claimed the compensation within a period of at least one year after the day following the one on which he became aware that his right on payment of the compensation is due and demandable.

ARTICLE 7:908 LEGAL EFFECT OF AN AGREEMENT WHICH IS DECLARED BINDING BY THE COURT

1. As soon as the request for a declaration that the agreement is binding, has been granted irrevocably (final and binding), the agreement referred to in Article 7:907 shall, as between the parties and the persons entitled to compensation, have the effect of a settlement agreement in the meaning of Article 7:900, to which each of the persons entitled to compensation are regarded to be a party.
2. The declaration that the agreement is binding shall have no consequences for a person entitled to compensation who has notified the person referred to in Article 7:907, paragraph 2, under point (f), in writing, within a period to be determined by the court of at least three months following the announcement of the decision referred to in **Article 1017 paragraph 3** of the Code of Civil Procedure, that he does not wish to be bound by the agreement. [See also **Book 3 Code of Civil Procedure, Title 14 Class actions**]
3. A declaration that the agreement is binding shall have no consequences for a person entitled to compensation, who could not have known of his loss (damage) at the time of the announcement referred to in paragraph 2 if, but who has notified, after becoming aware of his loss (damage), the person referred to in Article 7:907, paragraph 2 under point (f), in writing of his wish not to be bound by the agreement. A party that has engaged himself under the agreement to pay compensation for damage may give a person entitled to compensation as referred to in the first sentence notice in writing of a period of at least six months within which that person can state that he does not wish to be bound by the agreement. This notice shall also state the name and the domicile of the person referred to in Article 7:907, paragraph 2, under point (f).
4. A stipulation releasing a party to the agreement from an obligation, to the disadvantage of the persons entitled to compensation, is null and void after a declaration of the court that the agreement is binding, unless it gives the parties who have engaged themselves under this agreement to pay the compensation, the joint power to terminate the agreement no later than six months after the expiry of the period to be determined by the court referred to in paragraph 2, because the declaration that the agreement is binding affects too few of the persons entitled to compensation. In that case, termination shall be effectuated by an announcement in two newspapers and by means of a written notification to the foundation or association referred to in Article 7:907, paragraph 1. The parties who have terminated the agreement shall ensure that a written notice of termination is sent as soon as possible to the known persons entitled to compensation, for which purpose the parties may use the last known domicile of the persons entitled to compensation.
5. Once the agreement has been declared binding, the parties who concluded the agreement may not invoke the grounds for nullification referred to in Article 3:44, paragraph 3, and Article 6:228 of the Civil Code, and a person entitled to compensation may not invoke the ground for nullification referred to in Article 7:904, paragraph 1.

ARTICLE 7:909 THE COURT'S POWER TO GIVE A DECISION ON THE COMPENSATION

1. When, pursuant to the agreement, a definitive decision has been taken about the compensation which is due to a person entitled to it, this decision has binding force. If, however, this decision or the procedure by which it was reached is unacceptable according to standards of reasonableness and fairness, the court has the power to give a decision on the compensation.
2. If no decision is given on the awarding of compensation within a reasonable stipulated period, the court has the power to give a decision on the compensation.

3. Once the agreement has been declared binding, the foundation or association referred to in Article 7:907, paragraph 1, may demand performance of the agreement on behalf of a person entitled to compensation, unless that person objects to this.
4. The person entitled to compensation shall not receive compensation pursuant to the agreement if this would place him in a clearly more advantageous position.
5. If the party or the parties who have engaged themselves under the agreement to provide compensation for damage can meet their obligations under the agreement by payment of an amount stipulated in the agreement, and if it emerges that the total amount of outstanding compensation claims exceeds the total amount to be contributed, the subsequent outstanding claims shall be reduced, pro rata, to the amount still remaining. Depending on factors such as the nature and seriousness of the damage, the agreement may include a different method of reduction than the method prescribed in the first sentence. The payment of an outstanding claim may be suspended if, in connection with the provisions of the first and second sentences, there are reasonable grounds for doubt as to what amount must be paid.

ARTICLE 7:910 OTHER DEBTORS WHO ARE JOINT AND SEVERAL LIABLE; DISTRIBUTION OF A REMAINING SUM

1. If other debtors, besides the party or parties who have engaged themselves under the agreement to compensate the damage, are joint and several liable for the same compensation, Article 6:14 of the Civil Code applies accordingly. Subject to evidence of a contrary intention, the agreement shall be deemed to include also a clause as referred to in that statutory provision.
2. If the party or parties who have engaged themselves under the agreement to compensate the damage have complied with their obligations under the agreement through payment of an amount stipulated in the agreement and, after the persons entitled to compensation have received payment, there is a sum remaining, this party or these parties may jointly request the court which declared the agreement binding to order the person managing this remaining sum to pay it to the party, or if there is more than one party, to each party in proportion to their respective contributions. The court shall deny the request if it is not established to the court's satisfaction that all persons entitled to compensation have been paid.

TITLE 14 CONCERNING THE PROCEDURE IN CASES INVOLVING DECLARATIONS THAT AGREEMENTS FOR THE COLLECTIVE SETTLEMENT OF DAMAGE CLAIMS ARE BINDING

ARTICLE 1013 CONTENT OF THE PETITION

1. The petition (application) whereby the request referred to in Article 907(1) of Book 7 of the Civil Code is filed shall state:
 - a. the name and place of residence of the petitioners;
 - b. a description of the event or the events to which the agreement relates;
 - c. the names and places of residence of the persons known to the petitioners on whose behalf the agreement was concluded, whereby it shall be sufficient to use their last known addresses;
 - d. a brief description of the agreement;
 - e. a clear description of the request and the grounds on which it is based;
2. The agreement shall be attached as an appendix to the request.
3. The Court of Appeal in Amsterdam shall have exclusive competence to take cognisance in first instance of a request as referred to in this article.
4. Notwithstanding the terms of Article 282(2), no copy of a statement of defence or the documents submitted is required to be sent to the persons on whose behalf the agreement was concluded.

5. The notice to appear shall be sent to the persons referred to in the first paragraph under c by ordinary post, unless the court determines otherwise. Notice shall also be given by an announcement in one or more newspapers to be designated by the court, by which legal entities as referred to in Article 1014 shall also be given notice to appear. In addition to the place, the date and the time of the hearing, each notice must also include a brief description of the agreement and the consequences of the granting of the request, presented in a manner to be prescribed by the court. The notice shall also state that the documents referred to in Article 290(1) are available for inspection at the court registry and that copies are available, and shall refer to the right to file a defence. Unless the court decides otherwise, the petitioners are responsible for giving notice pursuant to this paragraph. The court may order that the information referred to in this paragraph must also be announced in some other way.
6. If it determines the date and the time of the hearing, the court may also decide that, notwithstanding the terms of Article 282(1), defences must be filed by such time prior to the hearing as the court may decide.

ARTICLE 1014 WRITTEN DEFENSE

A foundation or association with full legal competence which, pursuant to its articles of association, represents the interests of the persons on whose behalf the agreement was concluded may file a defense.

ARTICLE 1015 SUSPENSION OF PENDING LEGAL PROCEEDINGS FOR COMPENSATION

1. Pending proceedings concerning claims in respect of which the agreement provides for compensation shall, on request by a party to the agreement from whom compensation is being claimed in the proceedings, be suspended during the hearing of the request in accordance with Article 225(2), even if the date on which the judgment will be issued has already been determined.
2. The suspended proceedings shall be resumed in accordance with Article 227(1):
 - a. if compensation is being claimed in the proceedings that is not provided for in the agreement;
 - b. if the person entitled to compensation has submitted the statement referred to in Article 7:908, paragraph 2, of the Civil Code;
 - c. if it has been established that the request will not be granted;
 - d. if the agreement is terminated pursuant to Article 7:908, paragraph 4, of the Civil Code;
 - e. if, having regard to the interests of a person entitled to compensation and taking all the circumstances into account, the hearing of the request has taken unacceptably long and is likely to continue for an unacceptable length of time;
 - f. if either of the parties claims an order for the payment of the costs of the proceedings after the decision to declare the agreement binding has become irrevocable.
3. Article 7:907, paragraph 5, of the Civil Code does not apply to claims in proceedings that are resumed pursuant to paragraph 2.
4. Except in those cases referred to in paragraph 2, after suspension of pending proceedings the case shall be removed from the cause-list at the request of either of the parties if the decision to declare the agreement binding has become irrevocable.
5. Article 225(2), second sentence and (3), and Article 222(2) and (3) shall apply.

ARTICLE 1016 EXPERTS

1. The court may order that one or more experts shall make a report on points that are relevant for the request.
2. Subject to the application of Article 289, the court may decide that the costs arising from applying the provisions of this title shall be borne by one or more of the petitioners.

ARTICLE 1017 FORMAL REQUIREMENTS

1. The court registrar shall send a copy of the decision to the petitioners as soon as possible by ordinary post.
2. The decision and the agreement declared binding by that decision shall be filed with the court registry where they will be available for inspection and where copies will be available for persons entitled to compensation.
3. A copy of the decision to declare the agreement binding shall be sent by ordinary post, as soon as possible after it has become irrevocable, to the persons known to be entitled to compensation and to the legal entities referred to in Article 1014 that appeared at the proceedings. Furthermore, as soon as possible after this decision has become irrevocable, a notice to that effect shall also be published in one or more newspapers to be designated by the court. Each notice shall include, in a manner to be prescribed by the court, a brief description of the agreement, in particular the method by which compensation can be obtained and, if the agreement so provides, the period within which the claim for compensation must be made, as well as the consequences of the declaration that the agreement is binding and the period within which and the procedure by which persons entitled to compensation can free themselves from the consequences of the declaration that the agreement is binding. The notice shall also state that the decision and the agreement thereby declared binding are available for inspection at the court registry. Unless the court decides otherwise, the petitioners are responsible for sending the information and publishing the notice referred to in this paragraph. The court may order that the information referred to in this paragraph must also be intimated by some other method.
4. As soon as possible after the request to declare an agreement binding has been denied irrevocably, the petitioners shall ensure that the persons on whose behalf the agreement was concluded are notified to this effect in a manner to be prescribed by the court.

ARTICLE 1018 APPEAL IN CASSATION; REVOCATION

1. Appeal in cassation is only open to the petitioners and may only be brought by the petitioners jointly.
2. [A request for] revocation [of the decision] is only open to the foundation or association referred to in Article 7:907, paragraph 1, of the Civil Code, and to the other petitioners jointly. If the foundation or association referred to in the first sentence is dissolved, [a request for] revocation is open to a foundation or association as referred to in Article 1014. Revocation of the decision upon the request of a foundation or association as referred to in the first or second sentences shall have no consequences for a person entitled to compensation who objects to it.

INTRODUCTION

PRODUCT LIABILITY UNDER NORWEGIAN LAW

Several laws, including non-statutory law, govern Norwegian product liability and apply to all businesses producing or selling a product. According to these laws, Norwegian businesses are responsible for ensuring that their products are safe and do not pose a hazard to consumers. Moreover, businesses may be held liable for any damage and/or harm caused by their products.

Under Norwegian law, product liability claims typically fall into three categories: negligence, strict liability and contractual. Negligence claims against manufacturers are based on customary norms derived from court rulings and legal theory. Strict liability under the Product Liability Act (produktansvarsloven) focuses on the product and the damage it causes, rather than the negligent behavior of the manufacturer. Finally, product liability may be based on the breach of contractual obligations under the Norwegian Purchase Act (kjøpsloven). An example would be a defective product that does not possess contractually promised properties. Those who submit product liability claims may choose among these three systems. The use of one in a claim does not preclude use of the others.

LEGISLATIVE DEVELOPMENT OF PRODUCT LIABILITY IN NORWAY

The Norwegian Product Liability Act, which deals with strict liability, became effective on December 23, 1988, but the legislative work was commenced by Royal Decree (kongelig resolusjon) of March 21, 1975. The enactment of the Product Liability Act was initially postponed pending the outcome of parallel, similar legislative work by the European Union (EU), which resulted in the adoption of the Product Liability Directive of July 25, 1985. The Norwegian Ministry of Law subsequently incorporated the Product Liability Directive into the Norwegian Product Liability Act, so the two are in agreement with each other.

THE PRODUCT LIABILITY ACT AND KEY PROVISIONS

RANGE OF APPLICATION OF THE PRODUCT LIABILITY ACT

Section 1-1 of the Norwegian Product Liability Act applies to the liability of a producer for damage caused by a product made or supplied for sale as part of its profession, business or equivalent activity.

Section 1-3 of the Product Liability Act includes not only the manufacturer in its definition of “producer,” but also the person importing a product for sale or distribution in the course of its business. Therefore, the term “producer” in the Product Liability Act encompasses manufacturers, importers, suppliers and sellers, among others, ensuring that nearly everyone in the chain of distribution may be held responsible.

Based on Section 1-2 of the Product Liability Act and also Article 2 of the EU Product Liability Directive, the term “products” includes goods and movables, whether a natural product or industrial product, raw material or finished product, part product or main product, as well as products incorporated into other movables or real property. The term “products” includes electricity as well.

CAUSATION AND PROOF

As a general rule, the claimant has the burden of proof and must establish the factual basis for its claim under the three systems of liability: negligence, or fault-based liability; strict liability under the Product Liability Act; or contractually-based liability under the Norwegian Purchase Act.

If a claimant presents evidence that the court considers prima facie proof of a fact relating to any of the conditions for liability, then the producer has the burden of submitting evidence to rebut the presumption. With respect to claims based on the Product Liability Act, the producer must refute claims in accordance with Section 1-3.

Under Section 2-1 of the Product Liability Act, the manufacturer must compensate for damages that its product causes if it is found that the product does not have the safety that a user or the public may reasonably expect – it has a safety deficiency (sikkerhetsmangel). In this case, the user must prove that the product has caused the damage in question and that this damage must be the result of the safety deficiency.

REMEDIES AND DAMAGES RECOVERABLE

Liability damages under the Product Liability Act are awarded as monetary compensation, aimed to restore users to their position prior to any damage. Damages recoverable under the Product Liability Act include personal injury claims relating to bodily injuries and mental harm. Damage to property is also recoverable, provided that the property is meant for private use or consumption and was used by the claimant mainly for private purposes or consumption.

Additionally, Section 3-5 of the Product Liability Act provides compensation for pain and suffering (non-material damages) if the damage is caused intentionally or is the result of gross negligence.

DEFENSES

According to Section 2-2 of the Product Liability Act, the producer is free from liability if it can demonstrate: (1) that it did not supply the product for sale as part of its activities; (2) the safety deficiency did not exist at the time when the product was supplied for sale and that there was no obligation to avert the damage or to minimize it afterwards; or (3) the reason for the safety deficiency was that the product satisfied preemptory rules issued by a public authority.

LIMITATION OF LIABILITY

Article 16 of the EU Product Liability Directive allows for the option of limiting a producer's liability for damage resulting from death or personal injury caused by identical items with the same defect (serial damages), and this limit may not be less than EUR70 million. Norwegian legislators have decided not to exercise this option. However, the acts on tort law in Norway provide a general rule that allows damages to be reduced if it is just and fair with regard to the economic circumstances of the wrongdoer.

TRENDS AND UPDATES

In recent years, there have been no major new trends or developments in product liability law in Norway other than the provisions allowing for group claims under the Civil Dispute Act.

INHERENT RISKS USERS MAY HAVE ACCEPTED

The Norwegian Supreme Court ruled that products with inherent risks may be regarded as accepted by the user at the time of purchase. On January 26, 2004, the Supreme Court ruled that a user did not have a claim for compensation after being exposed to allergenic dental care products. The Supreme Court emphasized the necessity and usefulness of the product, and further, that the user knew about the risks.

DAMAGES CAUSED BY A PRODUCT DO NOT BY THEMSELVES LEAD TO LIABILITY

In a decision by the Appellate Court on September 14, 2010, an insurance company that paid compensation to a policyholder after a fire in a laundry machine sought recourse against the importer of the machine. The importer was acquitted because the insurance company failed to prove beyond the balance of probabilities that the fire was de facto caused by a safety deficiency. The decision highlighted that damages caused by a product do not by themselves lead to liability under the Product Liability Act. Further, the decision illustrates that product users have an uphill climb if they do not have secure evidence for the case at hand.

INTRODUCTION

Directors and officers (D&O) insurance has grown steadily in popularity since it was introduced in Poland 15 years ago. Accompanied by a rise in risk-aware corporate leadership, D&O insurance has evolved from an unknown product in the mid-1990s to a near necessity during periods of economic instability.

Liability for damages caused by the decisions of professionals has become apparent. Although the market for D&O insurance is still developing, insurance premiums for 2010 were between PLN30 million and PLN50 million (approximately USD10.2 million and USD17.1 million). Current predictions indicate the market size will double in the coming years.

Managers increasingly consider D&O insurance an important instrument for their futures, with damages against directors and officers easily exceeding individual wealth. Liability includes actual loss (*damnum emergens*) and lost profits (*lucrum cessans*). Beyond personal risk, however, companies benefit from D&O liability insurance because it allows management to operate with less risk aversion. Management tends to be willing to make more difficult decisions when it has sufficient protection, resulting in the possibility of larger profits and increased shareholder wealth. D&O insurance also increases a company's likelihood to regain its losses when riskier decisions fail.

Insurance products are continually being modified, in part because of increased competition among insurers. Some changes, though, are clearly the result of legal disputes arising from contracts already in force.

MANAGERIAL LIABILITY

The legal basis for the liability of corporate officers can be found in the Polish Code of Commercial Companies (CCC) of September 15, 2000. Under Art. 483 (for joint-stock companies) and Art. 293 (for limited liability companies) members of a management board are liable to the company for any damage inflicted upon the company through negligence or action contrary to the provisions of law or the company's articles, unless no fault can be attributed to this person. A suit against an officer can be filed with a prior approval by the shareholders' meeting (Art. 228 No. 2, Art. 393 No. 2 CCC). This type of lawsuit constitutes up to 95 percent of all claims brought against managers.

Additionally, if the action of several managers causes damage to a company, specific factual circumstances can establish joint liability (Art. 294 CCC). This type of liability falls under the articles of the Civil Code (Art. 366 CC) that govern joint liability because there are no specific provisions in the CCC. Scholarship on the issue recognizes that other managers who do not prevent the damage from occurring are concurrently liable with the manager who causes damage. But, this is possible only when there is no specified division of tasks within the management board. The underlying principle of such liability is that the members of the board of managers have a duty of care to the company. Negligence in controlling the actions of another manager, while not expressly noted in the CCC articles, can become a basis of liability to the company.

Should the issue reach judicial proceedings with the supervisory board, a special attorney appointed at the shareholders' meeting represents the company against the manager (Art. 379 sec. 1 CCC). During judicial proceedings, the plaintiff must establish three elements: (1) the extent of the damages brought on the company, (2) the contributing behavior of the manager that violated the provisions of law or the company's articles and (3) a causal link between the damage and the manager's actions.

During the proceedings, the member of the management board must prove a lack of guilt, whereas the company must prove the existence of damages. The court evaluates the manager's action using due diligence standards that should be applied to a professional manager.⁴

If the company fails to bring an action redressing damages within one year following disclosure of injury, a single shareholder or person otherwise entitled to participate in the profit can bring a derivative suit on behalf of the company (*actio pro socio*). An example of this type of person is a bondholder with rights to participate in company profits. This action is authorized under the provisions of Art. 486 CCC. In such a suit, the plaintiff must prove an abuse by the manager, damage inflicted upon the company and the casual link between the damage and the manager's actions.⁵

However, derivative actions are not an efficient remedy, for several reasons:

- Free-rider effect and shareholders' passivity preclude shareholders from bringing a suit in the hope that someone else will bear the costs of the action, especially when the payoff is likely to be negative.
- There is no favorable cost regime. In fact, the court may order bail to be provided as security for damage caused by the derivative action. This regulation (Art. 486 sec. 2 CCC) aims to prevent an abuse of the derivative action.
- The information asymmetry makes it difficult for the shareholders to bear the burden of proof. Additionally, in case the action proves to be groundless, and the court establishes that the plaintiff acted in ill faith or was flagrantly negligent, the plaintiff is likely to cover the damages brought by the action upon the manager.

When the manager is insured, depending on the provisions of the contract, the company can sue the manager's insurer directly, or have a claim against the insurer after a final judgment has been made against the former employee. In such a case, the insurer can also act in the proceedings against the manager as an intervener. Polish civil procedure allows a party to notify and call to attend the proceedings a third party against whom it would have a claim in case of a negative court judgment (Art. 84 Code of Civil Procedure). A sued manager may notify the insurance company that it can step into the proceedings and argue in the manager's favor in order to reduce its own liability. The insurer may do this because the insurer would be obligated to pay the company if a court issues a judgment against the manager.

FACT PATTERN

In one recent D&O insurance case, a company faced a difficult situation when the insurer refused to pay compensation. The company (Plaintiff) and the insurance company (Respondent) entered into a D&O liability insurance contract. The Respondent agreed to insure all four members of the board of managers against third-party claims or the Plaintiff. It also agreed to pay indemnification in connection with claims occurring during the duration of the contract, or the additional, contractually specified period of time. The contract covered all claims that would result from real or alleged wrongful actions taking place during and in connection with the performance of managerial functions.

One of the managers negotiated and closed a frame agreement concerning delivery of the Plaintiff's goods and failed to secure the company's interests. When the recipient failed to meet obligations on the payment for delivered goods, the Plaintiff entered bankruptcy. The Criminal Court sentenced the manager in two instances to imprisonment and issued a fine for inflicting damages upon a legal entity when performing an executive function within it (Art. 296 sec. 3 and 4 of the Polish Penal Code). According to one of the provisions of the general terms of the insurance contract, the Respondent was not liable for the damages caused by actions that constituted a criminal act according to the Penal Code. No investigation against the other managers took place.

⁴ Judgment of the Supreme Court of January 26, 2000, I PKN 482/99.

⁵ Judgment of the Supreme Court of February 9, 2006, V CK 128/05.

LEGAL ISSUES OF THE CASE

The main legal problem in the case described above was in determining whether the rest of the management board members could be held liable for failing to prevent the criminal act. These members were not accused in criminal proceedings. Consequently, their case would not fall under the general terms of an insurance contract shielding the Respondent. The Respondent emphasized that there was an internal division of tasks within the board, and that the managers (other than the one convicted) were not supposed to interfere with one another's tasks. As a result, they claimed they were not liable for damages. The Plaintiff responded that the internal division of tasks did not prevent other managers from controlling the actions of the rest of the management board. This position was supported by the judgment of the Court of Appeal in Katowice.⁶

A second issue addressed whether the company could sue the insurer directly or only after a final judgment against the managers was released.

In the first issue described above, the court ruled in favor of the Respondent, stating that the division of tasks was clearly stated in the articles of the management board and that each manager was responsible for the specific company entities subscribed to them. The action causing damage was not in the scope of the insurance contract, and consequently, the Plaintiff was not entitled to it. In the evaluation of the court, the Plaintiff also failed to prove the liability of other managers. According to the court, the principle of individual liability of a member of the board of managers did not allow a suit against the insurer for the breach of other managers' obligations towards the company. The Plaintiff appealed.

The Plaintiff argued that the rest of the managers did not fulfill their duties because they knew about the financial condition of the contractor, and moreover, they participated in the creation of the agreement by taking part in negotiations and co-signing the documents. According to the Plaintiff, the internal division of tasks among the members of the management board was not sufficient, especially when Art 371 sec. 1 CCC requires all of the managers to deal with matters of the company. Additionally, Art. 483 sec. 2 CCC puts a duty of care on every manager that is a result of the professional character of their actions. The Plaintiff pointed out that there are at least two spheres of activity of the managers: the internal one within the company and an external one. The external sphere might include entering into interactions with a third party on behalf of the company. Despite the internal division of tasks, the company's statute required a co-action from the managers, and a joint action of the managers cannot be defined simply as the technical act of co-signing documents. As a result, all of the managers were involved in the creation of the delivery contract that led to the bankruptcy. The duty of every manager is to take care of interests by applying the professional duty of care when taking any actions.

Additionally, the argument that a final judgment against the managers was a prerequisite for suing the insurer was not correct, because the wording of the contract did not provide such terms. The interpretation of the Respondent and the court of first instance missed the nature of the insurance agreement because the scope of the agreement included all actions resulting from fallacious actions. Also, the nature of the insurance contract enables a suit against the insurer directly. The Respondent tried to argue that it was possible for the parties to change this within the contractual freedom of the parties. According to the Plaintiff, however, the terms of agreements cannot be shaped against the nature of the obligation (Art. 353¹ CC).

CONCLUSION

The parties to the dispute, urged by the court, decided to enter into negotiations and finally reached a settlement. Despite an unfavorable judgment of the first instance, the Plaintiff's position was very strong, and the arguments could likely have been shared by the court of second instance. The fact that the insurer changed the general contract provisions after the settlement indicates a rule about the liability of all managers for the actions or inactions of another member of the board of managers. This rule can be established on the basis of the CCC provisions in cases with similar fact patterns. This finding should motivate other insurers to redesign their contract provisions accordingly in order to limit their liability.

In a decision dated May 10, 2011 (JUR 2011/194346), the Supreme Court of Spain ruled that a policyholder breached the duty of disclosure prior to the conclusion of a contract, even though the insurer did not submit to the policyholder any questionnaire at the time the policy was initiated. Whether this decision fits into the legal framework of the Spanish Insurance Contract Act is the subject of this article.

LEGAL FRAMEWORK

Section 10 of the Spanish Insurance Contract Act 1980 (ICA) deals with disclosure or declaration of risk, misrepresentation and its consequences.

Under Section 10 of the ICA, prior to the conclusion of the contract, the policyholder (buyer of cover) is subject to a duty to disclose to the insurer, pursuant to the questionnaire submitted by the insurer, all the circumstances known by the policyholder that may be relevant for the evaluation of the risk. The policyholder may be relieved of this if the insurer does not submit a questionnaire or if there are circumstances that may be relevant for the evaluation of the risk that are not covered in the questionnaire submitted by the insurer.

Therefore, the policyholder does not have a proactive duty to disclose all material facts that may have a bearing on the evaluation of the risk, but only those facts asked by the insurer. The declaration is confined to the questions raised in the questionnaire, which are prohibited from being too broad or general. Under this system, knowledge of information that would be sensitive and even prejudicial to the insurer is not necessarily subject to disclosure to the extent the relevant questions are not asked in the questionnaire.

The declaration of risk made by a policyholder is the basis for the contract and binds the policyholder as party to the contract. Insureds are also bound by the declaration whether they have signed the application or not because the duty of disclosure lies with the policyholder who acts on behalf of the insureds.

When there are "inaccuracies" (misrepresentations) or "reservations" (concealment or non-disclosure) in the information provided in the completed questionnaire or proposal form, the remedies available depend on when the insurer becomes aware of them.

If the insurer knows about them before the loss takes place, the insurer is entitled to rescind the contract within one month of learning about the misrepresentation or reservation. In this event, the insurer may keep the premium for the period in progress, unless it acted in bad faith or with gross negligence. If the loss occurs before the rescission is notified, or if the misrepresentation or non-disclosure is discovered after the loss takes place, the insurer is no longer entitled to rescind the contract but may only reduce the indemnity. The amount of the reduction is based on the amount that is the proportion of the premium actually collected to the premium that would have been collected had the true risk been disclosed to the insurer. If the policyholder acted in bad faith or with gross negligence though, which would be proved by the insurer, the insurer is released from its obligation to indemnify.

The declaration of risk is intended to give the insurer a clear picture of the risk it is assuming. It needs to determine if the coverage should be granted, the type/scope of coverage and its price.

But the declaration is based on questions submitted by the insurer. These should be specific and relevant, and the insurer is responsible for drafting them adequately for the type of risk it is considering covering. If it is found that the questions were not answered truthfully later on, the insurer has the burden to prove that the untruthful answers affected its perception of the risk in such a way that it would have charged a higher premium or would not have covered the risk at all.

BACKGROUND OF THE SUPREME COURT JUDGMENT

On March 2, 2001, a landslide caused material damages to a residential building under construction. The insured builder (Arcade Park) made a claim for both material and third party damages under an all risk construction and assembly works policy.

The insurer declined the claim for alleged wilful misconduct of the policyholder. The insurer alleged that, at the time of taking out the policy, the policyholder had concealed the fact that in February 2000 a landslide took place in the plot where the construction was being done. At that time, the property developer was the current claimant, Arcade Park, and the builder was Necso Entrecanales y Cubiertas, which took an all risk construction policy with the insurer. There is no indication that Necso Entrecanales y Cubiertas reported the claim to the insurer at the time. Discrepancies between Necso Entrecanales y Cubiertas and Arcade Park led the former to terminate its contract with Arcade Park, which from that moment took over the direct execution of the construction.

On November 24, 2000, Arcade Park took out, as policyholder-insured, the all risk construction and assembly works policy to cover the building under construction. The insurer did not submit to Arcade Park any questionnaire at the time of application for the policy. The policy contract contained a condition, the tenth, under the heading “Commenced Work,” that stated *“the insured declares that at the time of the entry into force of this insurance, there are no circumstances that could give rise to a claim under this policy.”*

COURT DECISIONS

The court of first instance dismissed the claim, holding that Arcade Park had concealed the landslide that occurred in February 2000, which affected the insurer’s appropriate evaluation of the risk. The court also held that the concealment of the landslide infringed the tenth particular condition of the policy and breached the policyholder’s duty of disclosure established in Section 10 of the ICA, even though the insurer did not submit a questionnaire to the policyholder.

The court took the view that the lack of a questionnaire did not mean that the insurer had adopted a passive stance regarding acquiring information about the risk to be covered. The lack of a questionnaire had been balanced with the declaration of the insured contained in the tenth particular condition of the policy. The court held that the insurer was aware that the construction had already begun before Arcade Park took out the new policy. The insurer expressed, through the declaration required under the aforementioned condition, an active interest in obtaining the relevant circumstances for the evaluation of the risk from the policyholder.

Therefore, the court ruled that Arcade Park's omission to disclose the February 2000 landslide breached the duty of good faith that ought to preside over the relations between insurer and insured. This breach, continued the court, amounted to a fraud (dolus), understood as *"reticence in the expression of circumstances known by the policyholder that may influence the evaluation of the risk which, had they been known by the insurer would have influenced decisively the insurer's will to conclude the contract"* (Decision of the Supreme Court of December 31, 1998 [R] 1998\9775]).

The claimant appealed. The Court of Appeal dismissed Arcade Park's appeal and confirmed the first instance judgment, although it concluded that there was gross negligence on the part of the policyholder, instead of fraud.

Arcade Park then appealed to the Supreme Court, which also confirmed the Court of Appeal's judgment, releasing the insurer from any obligation to bear the risk and pay the indemnity requested by Arcade Park. The Supreme Court first made an interesting and comprehensive summary of the existing case law on the interpretation of Section 10 of the ICA on terms similar to those set forth under the legal framework of this commentary.

In line with the earlier decisions of the lower courts, the Supreme Court held that in the case at issue, it had been proved that the policyholder breached the pre-contractual disclosure duty established in section 10 of the ICA, even though the insurer did not submit to the policyholder any questionnaire. The aim pursued by the questionnaire had been met by the tenth particular condition. The Supreme Court, therefore, equated the pre-contractual disclosure duty of the policyholder to the "contractual" declaration of the risk contained in the tenth particular condition of the policy.

The decision of the Supreme Court leaves some ground for discussion and doubt because it is not entirely consistent with the regime set forth in Section 10 of the ICA. It may convey the wrong signal to the market in that the questionnaire may be replaced by a statement in the particular conditions of the policy. Section 10 requires that a questionnaire be submitted to the policyholder prior to the conclusion of the contract if the insurer wishes to have information on the risk.

THE POLICYHOLDER IS NOT REQUIRED TO VOLUNTEER INFORMATION

The purpose of the questionnaire is to allow the insurer to evaluate the risk prior to entering into the contract. If no questionnaire is presented to the policyholder, then the insurer may not rescind the policy, reduce the indemnity or even deny coverage in the event of bad faith on the part of the policyholder who withheld information on the risk.

To say that the statement made in the particular conditions of the policy equates to a submission of a questionnaire may be an exaggeration. It is assumed the Court understood that such a statement presupposed a previous discussion and request for information similar to a questionnaire. Nonetheless, for the avoidance of doubt, it is advisable that insurers present the questionnaire to potential policyholders for all events covering all the issues they might find relevant in order to have a comprehensive knowledge of the risk at hand.

SPAIN UPDATE: AUDITORS' LIABILITY

We now provide an update to the brief report published in the September 2010 issue in this series. It regarded the Law 12/2010 of June 30, published on July 1, 2010, in force beginning July 2, 2010, that amended the Accounts Audit Act (approved by Law 19/1988 of July 12).

On July 2, 2011, the Consolidated Text of the Accounts Audit Act was published, approved by Royal Legislative Decree 1/2011, of July 1, which abrogated Law 19/1988 and Law 12/2010. Royal Legislative Decree 1/2011 (RLD 1/2011) has been in force since July 3, 2011.

The main goal of the RDL 1/2011 is to provide a systematic understanding of the rules that govern accounts audit activity. It aims to regulate, harmonize and clarify the rules that amended the original wording of Law 19/1988.

The liability of auditors was set forth in Section 11 of the Accounts Audit Act (then in force), as amended by Law 12/2010, which is numbered Section 22 in the RLD 1/2011.

The most significant change concerning the liability of auditors is the introduction of a new paragraph in Section 22.2 of the RLD 1/2011: *"The liability of auditors and audit firms shall be enforceable in proportion to the direct liability for the damages and loss of profits they could cause by their professional activity, both to the audited company or a third party.*

For these purposes, it is considered a third party any person or entity, public or private, which proves that he/it acted or failed to act, in reliance of the audit report, being this the essential and appropriate element to form their consent, motivate their conduct or make their decision.

The civil liability shall be enforceable on a personal and individualised basis, excluding any damage caused by the audited company itself or a third party."

This issue will continue to be discussed in future editions of this report.

I. SWEDISH SUPREME COURT MAKES FINAL RULING: MOTOR INSURANCE, NOT TAXPAYERS, TO SETTLE ROAD TANKER ACCIDENT REPAIR BILL

FACTS OF THE CASE

As reported in the April 2010 issue of this series, a tanker-truck was involved in a traffic accident in November 2005 on one of two parallel bridges in Sweden. The cab and the tank trailer overturned, landing between the bridges. About 55,000 liters (14,529 U.S. gallons) of an explosive and flammable liquid poured down between the bridges and ignited. The resulting fire caused extensive damage to the bridges.

The Swedish National Road Administration (Vägverket), the government body responsible for maintenance of roads, arranged and paid for the repairs of the damage. Repair costs amounted to SEK23.8 million (approximately USD169.9 million). The cab and tank trailer were covered by the mandatory motor third-party insurance (Trafikförsäkringen) issued by a Swedish insurer.

THE COURT OF APPEAL'S DECISION

The Court of Appeal found that the Swedish National Road Administration was entitled to indemnity in accordance with the Traffic Damage Act (Trafikskadelagen), on the grounds that the character of the measures taken deviated from what is normal in connection with a traffic accident, the measures were not of a protective nature and the measures did not pertain to what could be considered normal maintenance of the road.

THE SUPREME COURT'S RULING

The Supreme Court's judgment was rendered on June 9, 2011. The common ground was that the Swedish National Road Administration had a legal obligation under the Swedish Road Act (Väglagen) to carry out the measures for which indemnity was claimed.

The Supreme Court emphasized that a bearing principle behind the Traffic Damage Act is that the economic consequences of property damage or personal injury caused by traffic with motor vehicles in Sweden shall essentially and finally be borne by the owners of motor vehicles. This shall occur through the specific system for indemnification laid down in the Act.

The key question for the Supreme Court to decide was whether the actual property damage was compensable under the Traffic Damage Act, or if the right to such indemnity, as maintained by the insurer, was ruled out due to the fact that the Administration had a legal obligation to repair the damage.

The Supreme Court referred to a range of its previous judgments:

- According to a judgment rendered in 1950 (NJA 1950 s. 610), the government was not entitled to compensation for fire-fighting costs. The reason given for this conclusion was that the responsibilities of the government and municipalities for fire fighting are such that costs could not be reclaimed from the person who caused the fire, absent specific statutory support.

- In a judgment handed down in 2001 (NJA 2001 s. 627) that referred to the 1950 decision, the Supreme Court took the position that extra costs for example, overtime pay to policemen and expenses for a bomb protection force directly attributable to, and caused by a false alarm were not compensable without specific statutory support because the costs concerned measures that the authorities had legal obligation to take.

Both judgments concern basic public responsibility to provide service to protect society and its members. It was therefore considered appropriate to let the community (det allmänna) carry the costs for such measures.

A judgment rendered in 2004 (NJA 2004 s. 566) concerned costs for decontamination work and road closing arrangements in connection with a traffic accident where the measures taken were necessary for traffic safety and environmental reasons. The obligations of the body responsible for road maintenance were such that there was no right to compensation for the labor costs incurred. It was stated that there is no reason to distinguish between situations where the claim for compensation concerns damages and situations where compensation is sought under the Traffic Damage Act.

The Supreme Court found that the previous judgments follow a general principle. Costs generated within the frame of tax-financed protective establishments of society, for measures that the community has a legal obligation to take, shall be carried by the community, unless there is specific statutory support for entitlement to compensation.

Accordingly, the Administration's right to indemnity should be limited where the measures taken are protective. The purpose of the measures would be to mitigate direct consequences of a traffic accident or to prevent new accidents that might be caused by a heightened risk resulting from a traffic accident. Examples that were provided were decontamination of oil spill, clearance at traffic accident scenes of items that may cause damage if struck, road closures, traffic redirection or placement of temporary road signs.

Costs for the repair or replacement of damaged property, not directly caused by protective measures for which the community had a legal obligation, should normally be considered property damage compensable under the Traffic Damage Act. In general, the Swedish National Road Administration should be entitled to compensation for costs of repairs of damaged or destroyed underpasses, traffic signs, wire railings, lamp posts, traffic lights, roadways, safety isles, bridges and other arrangements needed permanently for the keeping, operation or usage of the road.

THE SUPREME COURT'S CONCLUSION

The Supreme Court affirmed the Court of Appeal's decision. It reasoned that the Swedish National Road Administration claimed compensation for the costs of bridge repair and not for the protective measures taken in connection with the accident. Therefore, the Administration was entitled to traffic damage compensation with respect to the property damage incurred.

II. NEGLIGENT AUDITOR LIABLE TO CAPITAL INSURANCE POLICYHOLDER

SWEDISH TAX LAW AND CAPITAL INSURANCE

Under Swedish tax law, each transaction in securities, such as those involving shares and funds, triggers a 30 percent tax on profits. Consequently, capital insurance (Kapitalförsäkring) – a type of savings product – has become increasingly popular.

Capital insurance offers policyholders two major advantages: profits from transactions made within the product are tax-free, and policyholders are not obligated to submit fiscal declarations with respect to the transactions.

Instead, policyholders are subject to a variable yearly yield tax (avkastningsskatt) on the capital in the product, which in recent years has ranged from 1.1 percent to 1.2 percent – regardless of whether the transactions have yielded a profit.

MAIN FEATURES OF CAPITAL INSURANCE

Capital insurance (not to be confused with the “traditional” Swedish endowment assurance that is also named “Kapitalförsäkring”) is built around a securities portfolio, where (värdepappersdepå) policyholders place various securities, such as shares and funds, depending on the preferred investment type.

The securities portfolio is established and owned by the insurer. According to policy conditions, the policyholder – not the insurer – is entitled to profits generated by it. Therefore, losses are the policyholder’s – not the insurer’s. The fact that the policyholder carries the risk of losses is, of course, a prerequisite for the classification of capital insurance as an insurance contract.

Based on a power of attorney issued by the insurer, the policyholder is permitted to freely make any transactions with portfolio assets. The only requirement for the policyholder is that a minimum value be maintained.

CASE FACTS AND BACKGROUND

A policyholder decided to sell 54,000 Class A shares and 280,000 Class B shares of a company called 24h Poker. The shares were placed in a capital insurance securities portfolio against settlement consisting of 91 shares in a company called Daydream for each share in 24h Poker. Daydream was listed on the Stockholm Stock Exchange.

The policyholder’s decision was based on information in Daydream’s annual financial report (årsredovisning) and a prospectus issued to the 24h Poker shareholders. Daydream’s auditor had issued a clean audit report, which was also referenced in the prospectus. Ultimately, the value of the Daydream shares was substantially lower than stated in the annual financial report and the prospectus.

WARNING ISSUED BY AUDITORS DISCIPLINARY BOARD

Daydream's auditor was reported to the Committee for the Authorization of Public Accountants (Revisorsnämnden), not only by the new board of Daydream, but also by the Stockholm Stock Exchange. The committee decided to warn the auditor for its failure to observe generally accepted accounting standards (god redovisningssed), neglect in sufficiently ascertaining the reasonableness of Daydream's assumptions regarding future turnover and failure to ensure that Daydream's calculations were based on relevant figures.

THE DISPUTE

The policyholder initiated legal proceedings before the Stockholm District Court, seeking a declaratory judgment that the auditor's firm and the auditor shall be jointly and severally liable for the loss suffered by the policyholder. The loss resulted from the diminished value of the capital insurance securities portfolio, which in turn, was caused by the auditor's negligent omissions in connection with the audit of Daydream's accounts.

APPLICABLE STATUTORY PROVISIONS

The applicable statutory provisions, the Companies Act (Aktiebolagslagen) Chap. 29 § 1 compared to Chap. 29 § 2, stipulates that an auditor shall compensate the company for loss caused intentionally or by negligence in the performance of duties as an auditor, by violation of the Companies Act (Aktiebolagslagen), the Act on Annual Financial Report (Årsredovisningslagen) or the Articles of Association (Bolagsordningen). The same applies when loss is suffered by a shareholder or "someone else" (a different party).

AUDITOR'S POSITION

The auditor rejected the claim and argued that the policyholder was not the owner of the securities portfolio, and therefore, did not suffer loss as a shareholder. The shareholder was the insurer. The policyholder could not be considered to be "someone else" (någon annan) in the sense meant by the applicable provisions of the Companies Act.

THE DISTRICT COURT'S DECISION

The common ground before the Stockholm District Court (Stockholms tingsrätt) was that the insurer was the owner of the content of the securities portfolio, the Daydream shares, and was consequently the shareholder. Because of policy conditions, the policyholder suffered a loss resulting from the diminished value of the portfolio. The crucial question was whether the policyholder could be considered to be a member of the second category, "someone else," in the relevant Companies Act provisions and consequently entitled to compensation from the auditor for his loss.

The Court found in favor of the policyholder. In summary, its reasoning was that even if the insurer is noted as owner of the shares (the Daydream shares), it is common ground that the policyholder had the right to exercise essential parts of the rights arising out of the ownership. The policyholder had the right to sell the shares in the securities portfolio or to replace them with other securities, as long as he maintained the minimum value of the portfolio assets according to the insurance contract. As far as has been established, the insurer has not reserved any rights to exercise any function as owner. Such reservation would also appear to be without effect, as the policyholder has been entitled to remove the shares from the portfolio if he wished to do so. Accordingly, the insurer's status as owner of the shares lacked real substance.

The auditor's firm and the auditor have appealed against the judgment on material grounds, as well as on the ground that the District Court allegedly committed a number of procedural errors.

COMMENTARY

This case is likely to be watched for reasons beyond only the size of the suit. No legal precedent exists for the interpretation of "someone else" (någon annan) in the Companies Act Chap. 29 § 1 compared to § 2.

An eminent Swedish law professor specializing in professional liability described the judgment at this point as the most far reaching on auditor's liability ever rendered in Sweden. He expressed concern over potential serious tax consequences for policyholders, should the judgment be upheld.

INTRODUCTION

The use of individual surveillance technology and monitoring to avoid insurance fraud is being discussed in the casualty insurance community – not just in Switzerland but also all over the world. The most recent driver of this in Switzerland, however, is a decision made last year by the country's supreme court.

In July 2010, the Swiss Supreme Court (Court) handed down an interesting judgment regarding an insurer's right to use individual monitoring to uncover fraudulent claims (Judgment of July 2, 2010, 5A_57/20).⁷

In its decision, the Court raises the question about the extent to which insurers can use individual monitoring and surveillance to form a legitimate interest. It clarifies the scope and limits of Art. 28 ZGB (Swiss Civil Code). According to the regulation, any person whose personal rights are unlawfully infringed upon may bring a suit for protection against those causing the infringement. However, an "infringement" may be justified by the consent of the person whose rights are infringed upon by an overriding private or public interest or by law. Simply put: if a person consents to "infringement," it is not unlawful. This has significant implications for insurers.

The case below provides clarity into how much an insurer can use surveillance technology and individual monitoring.

CASE FACTS

In 2001, the claimant was injured in a traffic accident and claimed compensation for injuries suffered and the subsequent inability to do housekeeping (Haushaltsführungsschaden). The claimant brought several actions against the third-party liability insurers of the driver.⁸ However, the claimant's statements were not clear and lacked evidence. Further, the claimant was found to be contradictory. One of the insurers became suspicious and had an insurance fraud surveillance expert monitor and videotape the everyday activities of the claimant. The outcome of the investigator's surveillance report and video footage was used as evidence by the insurer that, contrary to the claimant's allegations, he was able to go shopping, carry loads without major problems and wash and polish his car. For that reason, the Cantonal Court and the Appeal Court dismissed the claimant's action for damages.

The claimant then changed his strategy and brought a new action (the case at hand) based on Art. 28 ZGB, alleging the insurer (and its staff), the surveillance company (and its staff) and the insurer's lawyer violated his right to privacy and protection in accordance with Art. 28 para. 1 ZGB. He then called for compensation at SFr5000 (approximately USD6900) each, among other things, and to hold the defendants jointly and severally liable. In addition, the claimant's companion, who was observed in some of the pictures and in the video footage, participated in the lawsuit as a joint claimant.

The Court upheld the Cantonal Court's decision and dismissed the entire case.

⁷ Cf. BGE [2010] 136 III 410 *et. seq.*

⁸ Cf. BGE [2006] 4 C. 166/2006 dated August 25; LGVE [2006] I Nr. 29.

FINDINGS

The Court stated that, pursuant to Art. 28 para. 1 ZGB and as a basic rule, any infringement of the rights to privacy and protection is against the law. However, it is not against the law if there is a justification by the consent of the person whose rights are infringed upon, by an overriding private or public interest or by law. The Court thereby referred to a previous judgment, saying that the use of individual expert monitoring could generally infringe upon the claimant's rights to privacy and protection.

However, the Court held that such infringement may be justified by an overriding private or public interest. Since insurance fraud would affect the levels of premiums charged, the common interest of all insured persons could be affected. As a result, the Court identified the common interest of all insureds to fight off unjustified, fraudulent claims as being such a common interest.

Because of this, the claimant's interest to privacy had to be weighted against the common interest of the insured's community. That is exactly what the Court did when it pointed out that the claimant failed to perform his duty to disclose information to the insurer. Therefore, it was the claimant himself who brought about the individual monitoring and surveillance. The individual monitoring and surveillance was not based only on an initial suspicion, but there was reasonable evidence that made the surveillance necessary in an objective way.

Further, the Court held that there were additional factors giving rise to the legitimacy of the surveillance and individual monitoring in the case at hand. The Court pointed out that the amount in dispute, the activities and the locations that had been monitored and reported – as well as the surveillance timeline – had to be taken into account.

Faced with these circumstances, the Court had to consider that the amount in dispute was fairly high at SFr2 million (approximately USD2.7 million), the surveillance was limited to everyday activities only in public places and the surveillance period was clearly restricted to a certain period for example, two or three weeks).

Based on these findings, the Court decided that the insurer's right to use individual monitoring and surveillance would prevail over the insured's right to privacy.

As far as the claimant's companion was concerned, the Court stated that she was not subject to the surveillance order so there was not even an infringement in respect of Art. 28 para. 1 ZGB. In fact, the surveillance order was explicitly limited only to the claimant's everyday activities. Consequently, all pictures and video footage that included the claimant's companion had to be classified as having been made by coincidence, but not in a systematic way (called an "undesirable by-catch").

CONCLUSION

This case gave the Court the opportunity to enforce its prior jurisdiction with reference to insurer's interest in individual monitoring and surveillance cases vis-à-vis the insured's rights to privacy and protection. Although there is a clear tendency to protect individual privacy throughout Continental Europe, the use of individual surveillance technology and monitoring of insured persons seems to be widely accepted – as long as there are clear implications for insurance fraud. In that context, the insurer's right to use individual monitoring and surveillance is, as a basic rule, limited to cases where these measures are objectively necessary and appropriate.

Consequently, a short and clearly defined surveillance order restricted to public places is much easier to justify than long lasting monitoring of private activities that also includes private places.

A broad diversity of topics is investigated in our latest update:

- The reports from Austria and Germany highlight liability insurers' need for awareness of how their defense strategy on behalf of an insured respondent will influence the right of access of third parties to the liability coverage.
- New legal procedures in Italy that require plaintiffs and defendants to engage in mediated settlements will also require liability insurers to reassess defense costs and strategy.
- In Spain and Sweden, recent jurisprudence is extending the duty of care for auditors.
- A recent ruling by the Swedish Supreme Court stated that the cost of repairing a road bridge damaged in a road tanker accident should be borne by the motor liability insurer rather than the Swedish National Road Administration. The ruling highlights how the state is now looking to transfer more of its cost burden to the private insurance sector
- For Norway, we present insight into the Product Liability Act.
- For Poland, we learn of how recent directors and officers (D&O) liability cases are emphasizing the importance of entity coverage.
- In Switzerland, jurisprudence is helping insurers to control fraudulent third party bodily injury claims.
- From our Belgian contributors, with their proximity to European Union (EU) legislators, we have a detailed insight into the scope of activity of the new insurance supervisory body, EIOPA, which has replaced CEIOPS. We learn how insurers will be able to exert greater influence over the shape of future supervision of the sector.
- From our French contributors, we have a detailed analysis of the Servier Laboratories' "Mediator" pharmaceutical product liability series loss, with an assessment of not only the cause and spread of liability, but also its impact on the way mass tort claims will be handled in France in the future.
- Our Dutch legal experts highlight the importance of the February 2011 EU public consultation on Collective Redress. They remind us of how legislation in the form of the WCAM (Dutch Class Action Act) has been in place since 2005 in the Netherlands to facilitate class actions and simplify indemnification levels, offering a blueprint for other European jurisdictions.

Perhaps the most interesting theme to emerge from these reports is the developing role of the state as claimant. This is evidenced both by the Swedish Supreme Court decision to allow the state to seek recourse against the private insurance sector for damage to state property caused by a motor accident, and by the introduction in France, on September 1, 2011, of a state compensation fund for victims of "Mediator." The fund will provide a form of class action settlement, and the costs will then be recovered through subrogation by the state against the manufacturer and its product liability insurers. At a time when almost all European governments are feeling financial strain, this trend may be expected to increase.

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