

Final Test DVA 2011 I

These are pattern answers, only. Different remarks are as good, if making sense, and are legally reasonable. Answers in German are possible (with some deduction), if not exceeding half of the text.

I. Please, describe what utmost good faith means in insurance contract law

1. by making the difference of warranties in respect of the required diligence;

No negligence required in cases of violated warranties, but in cases of utmost good faith duties, e.g. information duties before concluding a insurance contract. Insurer can deny liability provided that the insured has acted wilfully or with simple negligence (no precondition of gross negligence, like in § 28 VVG).

2. by making the difference in respect of the causality test;

No causality test in cases of warranties, as different from violations of utmost good faith. Causality is not only to be presumed by the fact that a violation of a warranty is proven, but it is not even a precondition of the legal consequences of warranties' violations.

3. by making the difference in respect of the materiality test.

No materiality test in common law of warranties. Materiality, in cases of utmost good faith, means that the violation of a duty must be of certain importance for the decision of the other part to decide on whether to conclude the contract or not. The ABI-Statement of 1976/7 (ABIS) provides for materiality tests in cases of warranties' offences with the exemption of wilful violations, which are to be assessed as fraud of the insured. In this respect, the utmost good faith duties became more similar to the warranties law. The ABIS, however, is not binding for non-members of the association, and not in the relation of the contract parties of an insurance contract.

4. Are there investigation duties of the insured, in principle/in special cases? (please give an example)

No investigation duties, in principle. § 18 Marine Insurance Act of 1776, however, provides for an attribution of knowledge in cases that the captain of a ship is self-responsible for well functioning machines and, repairs of them in time on board, etc. This is why he ought to know what has went wrong in this respect during the ship transport, despite the fact that he has not done something by himself.

II. The term "days of grace" is very common in British insurance contracts practice. Can you explain its meaning by focussing on the following points:

1. main legal consequences if payment is not made;

In principle, there is no cover without exact premium payment in time. Contractual clauses, however, can postpone payment time until the end of the days of grace (dog.). No duty of payment of interests if the debtor pays late, but within the dog. After the end of the dog., the insured runs the risk that the insurer cancels the contract and that he denies liability because of the non-payment. Also, the right to get prolongation will not become void, if payment is done within the time span of the dog.

As different from German law (§ 37 VVG 2008), negligence of non-payment is not provided for.

The termination of an insurance contract causes commercial disadvantages in cases of life insurance contracts, because the insured will not get back the paid premium amount with interest, but the redemption value, calculated with reductions for payments to the agent or broker for his intermediation of the contract.

2. main legal consequences if payment is made during days of grace.

If payment is done during the dog., the insured can claim for cover of damages caused by insured events. He also keeps having the right of prolongation of his contract. No interruption between the old and the new contract in cases of prolongation. Consequence: no information duty about increased risk.

3. main legal consequences if payment is made during days of grace, but after the insured event has happened?

In cases of life insurance, cover claims are possible after payment within the dog. even if the risk has occurred, already (different in cases of property insurance and liability insurance). Premiums of life insurances that are part of the assets of an insolvent person or enterprise, can be paid by the insolvency manager without suffering of the disadvantages of the redemption values (see no. 1).

4. Do you think there is an equivalent in German statutory law?

§§ 37 s. VVG are comparable insofar as there is no cover without due payment of premiums, but the statutory law provides for much more consumer protection:

a. In accordance with § 38 VVG the insurer has to announce some further time span for payment of the second and the following premiums after the date of due payment, and he must give information – at least in text form - about his eventual right to deny cover after the dog.

b. Negligence provision (see no. 1).

c. In cases of following-up premiums, the insurer must set some reasonable extra time of maximum late-payment (statutory dog.).