

Final Test Sept. 2017

1 hour working time. Since all questions are supposed to be equally difficult, you should take about 25 -30 minutes for each. Please write your name on top of each page and answer in English as far as possible. One or more proposed answers can be correct. Do not answer simply yes or no, but always explain some reasons why and refer to legal authorities as much as possible. Answers in German will be accepted by half value, if they do not exceed 50% of the full text.

I. Irer. I denied cover for a fire damage of an apartment in a building which had burned down because of an explosion of an undetected fire bomb of the 2nd world war. Ired. P told the agent of I that he had turned of a gasfire, which in fact he had forgotten to do. By not telling the truth he wanted to accelerate the regulation of the damage, because futher allegations of having raised the damage risk would be expected to cause additional examinations. In fact the bomb was reason enough to have caused the whole damage alone.

1. Does I have a right to deny cover under the Insurance Contract Act 2015 (ICA)?
2. Do you know about more recent case law to this question?
3. Comparative aspects to German law?

Possible answers:

1. Legal basis could be sec. 12 (2a) ICA providing for deny of liability in cases of fraud. Relevant fraud actions are all fraudulent events giving "...rise to the insurer's liability". The lie on the fact of having switched off the fire place in the apartment of P did not have the intent to cause a damage to the insurer, but could have had such a consequence, because Irer. was hampered to seek for different circumstances of the fire causation. By strict interpretation of the ICA-provision one could decide for a right to deny cover.

2. The SC, in a decision of 2017, decided that one has to make differentiation between regular and "collateral" events of fraud. The decided case was quite similar. There was a heavy storm leading to a havary of a ship, no matter whether the personal on board would have been warned by an alarem clock or not. So the lie on the question of a ringing alarm clock was mostly irrelevant. The SC, therefore, did not allow the denial of cover, reasoning that the lie was not relevant as intended by the law for liability exemptions in cases of fraud. "Collateral" fraud events have to be differentiated from regular ones. The lie on the alarm was meant to be collateral.

The case is older than the ICA 2015/6, but one could argue for an overruling of the broad wording of the ICA ("give rise to..."), as quoted. The SC-decision is more recent than the act is. On the other hand, the case which the decision of

2017 refers to, is elder than the ICA is. An overruling effect in terms of legal precedence must be denied, therefore. There will be, however, some importance of the decision for the future interpretation of the consequences of fraud provisions under the ICA. At least, one could not argue – as very common in the past – : “a lie is a lie” Restrictions on relevance must be made.

3. VVG 2008 did not overrule the elder Relevanztheorie of the BGH totally, but in cases of “Arglist” (fraud with intension to cause a damage) Relevanztheorie was never applied, and § 28 III.2 VVG makes an exemption of the causality test. There is, however, a precondition of notification (§ 28 IV).

The asked question does not refer to Arglist in strict sense, but to a willful lie with intent to accelerate the regulation. If a notification of consequences of lies has been done, the question of causality would have to be answered. In this respect, it is not only a question of causality in sense of natural consequences, but of normative links (“normative Kausalität”). Does the law intend to give exemptions of cover in cases of lies as such, or shall it be restricted in lines of responsibility?

(The question is not yet answered in the German case law. The student was not expected to go into details of it; and even rough aspects to this matter will lead to extra points).

II.1. Does the Ired. have a damage claim by reason of late payment for a covered insurance event?

2. Are you aware of elder case law having been overruled by a more recent provision of statutory law?

3. Comparative aspects to German law?

Possible answers:

Sec. 13 A/16A Enterprise Act (EA 2016) was not attached to the preparatory paper, but Sprung has been discussed (p. 82 s.); also the fact that the EA has overruled Sprung.

1. Under the new legislation, there is legal basis to a claim of the Ired., if Ired. is late and does not have good reasons for having needed longer time to make further examination to the details of the damage. “Reasonable time”, as provided for in the EA, can be up to 4/5 month

2. Elder case law (Sprung) is overruled for cases after May 2017. While the SC, in Sprung, has argued that an insurance contract covers risks of damages of third persons, not risks of late payment by the Ired. as contract partner, the Law Commission held this decision as decided wrongly. Insurance contracts do not

give privileges to Irsers, referring to late payments which would be normal breaches of contract under common contract law.

3. In cases of late payment (Schuldnerverzug, § 286 BGB), the creditor has a damage claim for caused interest damages and insolvency consequences of the breach of contract, provided that the breach is negligent. The time of necessary payment is provided for in § 14 I VVG (end of necessary examination (“notwendige Erhebungen”), depending of the complexity of the case).

(Punkte werden auch schon dann vergeben, wenn der Teilnehmer erkennen lässt, dass er allgemeines Schadensersatzrecht für anwendbar hält; § 823 I BGB ist zwar falsch, aber die dazu erheblichen Rechtsgutsvoraussetzungen wurden im Kurs nicht erörtert, so dass insofern kein schwerwiegender Fehler angerechnet wird, wenn diese Vorschrift herangezogen wird).

Nbg. d. 25.9.2017

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