Quarterly Update 1/2018
Germany
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Dear Readers,

The first edition of our 2018 Quarterly Update is here. We are extremely pleased by your interest and have, once again, put together many important developments and topics for you.

First some news about us: the new year starts with good news for our firm and our range of services. We opened the Dusseldorf office in September 2016, and we will soon be opening a second German office in Hamburg. The Hamburg team will add to our range of services, especially in the areas of marine, trade, and energy. We are confident this will let us provide even better service to our clients and further establish Clyde & Co as the world’s leading law firm in the field of (re-)insurance in Germany as well.

The start of the new year also brings with it new challenges. In particular, there will be important legislative projects with the General Data Protection Regulation and the IDD. The coalition agreement between CDU, CSU, and SPD also makes other developments probable, such as the much-discussed test case for declaratory judgment and a new corporate criminal law effort.

This newsletter will keep you updated on the most important developments. You can read more in-depth articles on the following subjects:

– Product liability and stricter supply chain recovery through Section 445 BGB
– D&O insurance: new insolvency case law on directors’ liability for damages
– IDD update on the implementation in Germany and Europe

In addition, as you’ve come to expect, you will find our hand-picked practice-relevant decisions and a summary of other important developments.

We are particularly pleased to announce our upcoming events in 2018. The following have already been scheduled:

– Financial Lines Days on 5 June 2018 in Munich and on 6 June 2018 in Dusseldorf, in particular on D&O and cyber
– Casualty Day on 11 October 2018 in Dusseldorf, focussing on product liability and product liability insurance
– Roundtable on supply chain risks in summer 2018 in Frankfurt

We look forward to seeing you at one or the other of these events. Please get in touch if you are interested!

Hoping you enjoy the update.

Henning Schaloske

Tanja Schramm
The law on reforming building contract law and on commercial liability for defects entered into force on 1 January 2018. Since then Section 439 para. 3 of the German Civil Code (Burgerliches Gesetzbuch, BGB) provides liability for the seller for damages for removing the defective item and installing a new one, regardless of whether the buyer of the defective item is a consumer or a business. We already reported on the background of this new rule and the resulting expanded liability of sellers in our Update 3/2017.

Another major innovation of the reform is moving the provisions on supply chain recovery, which previously was part of consumer goods purchasing in Sections 474 et seq. BGB, to the general part of the law of commercial warranty for defects. The new provisions in Section 445a BGB states:

“(1) When selling a newly manufactured object, the seller can demand compensation from the seller who sold him the object (supplier) for expenses which he had to pay in relation to the buyer under Section 439 para. 2 and 3 and Section 475 para. 4 and 6 if the defect asserted by the buyer was already present when risk passed to the seller.

“(2) For the seller’s rights against his supplier designated in Section 437, the time period that is otherwise necessary is not required for the defect asserted by the buyer if the seller had to take back the newly manufactured sold object as a result of its defect or the buyer reduced the purchase price. (…)”

Even though Section 445a para. 1 and 2 BGB essentially correspond to the provisions in the old version of Section 478 para. 1 and 2, the new systematic position of business recourse results in two major changes: under Section 445a para. 1, business recourse is now possible even if there is a business instead of a consumer at the end of the supply chain. For the manufacturer of a defective product who is in a subordinate position within the supply chain, this has the consequence that he is now at all times exposed to a risk of recourse. In addition, moving the old version of Section 478 para. 1 BGB to Section 445a para. 2 has the effect that both the final seller and all subsequent suppliers in the supply chain can immediately assert their rights under Section 437 BGB, regardless of whether the purchase agreement in the last relationship was made with a consumer or business. The general principle by which a deadline is required to assert commercial warranty rights no longer applies. This has the result that price reduction, rescission, and damages in the supply chain are possible without setting a deadline and thus the respective sellers lose their right of second offer. Only in the relationship between the final seller and the end customer does the necessity of setting a deadline remain.

The new rules thereby increase the risk of recourse in the supply chain and underscore the importance of corresponding contract and risk management. Additionally, it must frequently be considered in supply chain recourse that other legal systems can be addressed for foreign suppliers. Thus the legal systems may diverge that apply, say, for the last contract and the upstream buyer relationships. This can make it significantly more difficult to assert claims against suppliers in case of contrary rules for recourse. In any case, this question should be addressed early on in any claim. For insurers, too, this brings the need for complex risk assessments. As part of our Global Product Liability/Recall Practice Group, we support insurers and their policyholders in Germany and internationally with more than 50 offices as defense, coverage, and monitoring counsel when handling the legal liability and coverage aspects of complex claims, and when enforcing recovery claims.

Dr. Isabelle Kilian
Directors’ liability for payments made in a state of de facto insolvency is among the greatest liability risks and regularly presents great challenges to D&O insurance. This is because defending the bodies affected by the liability involves detailed work on the dates asserted for the inability to pay/overindebtedness, in addition to the individual allegedly improper payments made thereafter. The Federal Court of Justice (Bundesgerichtshof, BGH) provided additional practice-relevant specifications of the liability to pay damages in two recent decisions:

BGH, decision of December 19, 2017 – II ZR 88/16 – Inclusion of Liabilities II when determining insolvency

Showing insolvency requires a reporting date-based comparison of the relevant amounts payable and the liquid funds of the debtor, such as in the form of a liquidity balance sheet. Since a landmark decision by the BGH from 2005, insolvency must regularly be presumed if the debtor’s liquidity gap is 10 percent or more, unless it can be expected with a probability bordering on certainty in an exceptional case that the liquidity gap will soon be completely or nearly completely closed and the creditors can reasonably be expected to wait patiently, according to the specific circumstances of the individual case. The liquidity on the reporting date and received within three weeks must then again be compared to the debts payable on the reporting date. However, the BGH to date has not answered the question of whether the debts that become newly payable within three weeks must also be included in addition to the debts payable on the reporting date. As early as 2007, the BGH’s 1st Criminal Division expressed the idea that viewing the funds to be made liquid during the three-week period should precisely not be taken to signify any legal constriction of the insolvency concept; rather, looking at this period helps to examine whether solvency can be restored promptly.

The clarification by the 2nd Criminal Division has now essentially confirmed this and will generally make it easier for bankruptcy administrators to show that companies in crisis are insolvent. By contrast, it may be possible to exonerate directors of companies that were already insolvent before publication of the decision if they determined the insolvency by the previous interpretation, i.e., with the bow wave. The BGH additionally clarified that directors are still responsible for the completeness and accuracy of accounting even after the opening of insolvency. If the accounting records indicate de facto insolvency, a director must therefore show proof that they are inaccurate in order to dispute the insolvency. This, too, will involve difficulties in the individual case.

The BGH has now rejected this model (also called the bow wave theory), making it clear that the debts becoming payable within three weeks must also be included in addition to the debts payable on the reporting date. As early as 2007, the BGH’s 1st Criminal Division expressed the idea that viewing the funds to be made liquid during the three-week period should precisely not be taken to signify any legal constriction of the insolvency concept; rather, looking at this period helps to examine whether solvency can be restored promptly.

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BGH, decision of July 4, 2017 – II ZR 319/15 – valuable compensation for asset-reducing payments only in exceptional cases

The concept of so-called asset-reducing payments within the meaning of Section 64 of the Limited Liability Companies Act (GmbHG) has already been specified several times in past case law. In the past, the BGH had clarified that there is no reduction of bankruptcy assets if a payment that reduces assets per se is directly balanced out. This can be presumed for an exchange of assets in which there is no payment with an economic result of being detrimental to the assets. In 2015, the BGH further specified that payments which were necessary in order to prevent the immediate collapse of the enterprise are also privileged.

In the facts of the case underlying the decision by the BGH of July 4, 2017, the director in particular had paid for wages, energy and water, and telecommunication and internet invoices after the company had become de facto insolvent. For this the bankruptcy administrator asserted a claim against the director under Section 64 GmbHG. While the BGH’s case law has mostly been understood in recent years to limit the elements constituting Section 64 GmbHG based on the liability-reducing consideration of the counterperformance, this decision again exposes directors to greater risks. This is because the BGH qualified the payments for energy, water, telecommunication, and internet as being contrary to care and diligence since they do not increase the exploitable assets for the creditors. Previously energy and telecommunication costs were considered to be essential obligations and payments made for them were therefore not considered to trigger any repayment obligation. Regarding the payment of wages, the 2nd Criminal Division also rejected the equivalency of the counterperformance since it likewise did not increase assets. This, too, was disputed in the past since an equivalent value flows to the bankruptcy assets in the form of work when employees are compensated. Since an enterprise cannot continue without (paying) employees, this aspect of the decision in particular is likely to result in even stricter liability of directors and make their defense more difficult.

Dr. Daniel Kassing, LL.M.
After years of preparation, the time has come: since 23 February 2018, the new rules for insurance sales implementing the Insurance Distribution Directive (IDD) have been applicable, at least in Germany. In addition, requirements will be specified in delegated regulations by the EU Commission and supplementary national requirements, some of which are still in development.

New rules apply since the end of February

In December 2017 the EU Commission had proposed delaying the start of the IDD by seven months, from 23 February 2018, to 1 October 2018. The European Parliament and the European Council have now agreed to this proposal. Implementation of the Directive must now take place by 1 July 2018. Postponing the start of the Directive is explained by the fact that the affected insurance sellers (insurance companies and insurance intermediaries) must be given more time to better prepare for proper and effective implementation of the IDD while also complying with the delegated regulations published by the EU Commission in September 2017 which, without delaying the start, likewise entered force on 23 February 2018.

Nevertheless, implementation in Germany remains unimpaired by these initiatives. German lawmakers have provided that the new rules should apply starting 23 February 2018, based on the original implementation period. Individual rules, in particular such as the legal establishment of the prohibition against passing on commissions laid down in the Insurance Supervisory Act (VAG - see Section 48 b) have even been in force since summer 2017.

New insurance intermediary regulation probably not before summer 2018

In addition to the key legal rules in the business code, insurance contract law and insurance supervisory law, the insurance intermediary regulation (Versicherungsvermittler-Verordnung, VersVermV) will further specify the requirements for insurance sales in the future. According to current press reports, the regulation is not expected to be dealt with in the cabinet until spring at the earliest. Since the IDD implementation act provides an exceptional so-called parliamentary prerogative for this regulation, there will then be discussions in the Bundestag and Bundesrat, meaning any decision regarding the regulation is not expected until June 2018 at the earliest.

BaFin circular specifies supervisory practice for insurance sales

To date the Federal Financial Supervisory Authority (Bundesanstalt fur Finanzdienstleistungsaufsicht, BaFin) has summarised its positions on insurance sales in a circular (Circular 10/2014 on cooperation with insurance intermediaries, risk management in sales). In the course of the IDD implementation, on 11 January 2018, BaFin provided a revised version of that circular for consultation. Opinions could be submitted until 21 February 2018. The draft gives a glimpse of the likely supervisory practice, not least with regard to the supervisory agency’s interpretation of statutory provisions. Even though a circular from the supervisory agency does not have binding legal effect, BaFin is thereby establishing a framework in which market participants can, and generally should, ultimately find factual orientation at least.

It should be noted, for instance, that BaFin apparently pursues a rather stringent approach with respect to the prohibition against passing on commissions laid down in the Insurance Supervisory Act (VAG - see Section 48 b) have even been in force since summer 2017.
adapting existing agreements. The agreements made with intermediaries must be adapted for the new requirements at every opportunity that arises. This particularly affects the case of selling a new product. Where the agreements contain adjustment clauses, they should be adjusted in a timely manner.

Regarding referrers, BaFin supplements its previous statements and clarifies that insurance companies should make it clear to referrers that as such they can act only in a very narrow area and in particular may not provide consulting to customers or accept orders. In case of doubt BaFin refers to an arrangement with the relevant Chamber of Commerce and Industry.

**Rule on product approval procedure and notification requirements and regulations by the EU Commission**

There are also rules providing concrete specification of the IDD at the European level in the form of the directly applicable delegated regulations from the Commission of September 2017 mentioned at the beginning on the product approval process under Section 23 para. 1 (a) (new version) (VO 2017/2358) and on notification requirements and good conduct rules in the sale of insurance investment products (VO 2017/6229).

In addition, the EU Commission has defined standards for a product information sheet (Insurance Product Information Document – IPID) with an implementation regulation of 11 August 2017 (VO 2017/1469). This is implemented in Germany through a change in the regulation on notification duties of the Insurance Contract Act (VVG-InfoV). With a view to the applicability of the product information sheet, it should be noted in this regard that, even if the IDD and implementation regulation speak only generally of "customers," a product information sheet as in the form planned by the EU Commission should also be binding in Germany in the future only toward consumers (see current rule in Section 4 VVG-InfoV). The fact that product information sheets are not intended to be mandatory in business traffic, as is currently the case, can be seen in a first draft for adjusting VVG-InfoV from October 2017. According to reports, adoption of the change regulation can be expected soon.

All this shows that the phrase "IDD implementation" covers a large number of provisions that insurance companies and insurance intermediaries must pay attention to. In addition to this challenge comes the fact that various provisions are still under development. Companies therefore still face the need to continuously fine-tune their processes.

Dr. Kathrin Feldmann
Case law

Federal Court of Justice (Bundesgerichtshof, BGH): Claim for damages due to failure to provide consumer information on time

The period for canceling an insurance policy begins upon receipt of the cancellation instruction and the complete consumer information, even if the insurer did not provide the consumer information to the policyholder prior to the declaration of agreement. Furthermore, failure to provide the policy terms and consumer information on time prior to the declaration of agreement may establish a damage claim for the policyholder for violation of notification duties. The Federal Court of Justice (Bundesgerichtshof, BGH) established this in its decision of 13 December 2017.

The policyholder sought a refund of insurance premiums from the defendant, a mutual insurance association. She applied to the insurer for a pension policy on 21 July 2009. The insurer accepted the application and sent her the insurance certificate along with additional information on the policy in a letter dated 24 July 2009. The accompanying letter contained cancellation instructions printed in boldface. From then on the plaintiff paid the insurance premiums. In a letter dated 19 March 2013, she declared cancellation, or alternatively termination, of the policy. The insurer then refunded a portion of the insurance premiums. In the statement of claim the plaintiff demanded a refund of all the insurance premiums she had paid.

The lower courts rejected the plaintiff’s premium refund claim against the insurer as unjustified enrichment. The BGH determined that, while the plaintiff’s cancellation had a deadline, nevertheless a violation of the legal duty under Section 7 para. 1 sentence 1 of the Insurance Contract Act (Versicherungsvertragsgesetz, VVG) can trigger a damage claim for rescission without the cancellation rules in Sections 8, 9 VVG blocking this. In the BGH’s view, the insurer objectively violated this duty by providing the policy terms and other information late.

BGH: Formal requirements for instructions on the legal consequences of violating a reporting duty

In a ruling of 6 December 2017, the BGH specified the formal requirements for instructions concerning the legal consequences of violating a reporting duty.

The plaintiff brought action against the defendant insurer for payment of a disability pension, seeking a declaration that the insurance policy was not modified by a contract adjustment demand from the insurer under Section 19 para. 4 sentence 2 VVG. The plaintiff purchased a risk insurance policy in 2009 with a disability rider. His application was taken by an insurance agent from the defendant insurer on his laptop and then printed out for signature. On page 2 of the application there was a section before the health questions with the heading, “Notice of the legal consequences of violating the pre-contractual reporting duty,” which was not typographically distinct from the other headings in the application. The text of the notice, too, was not graphically emphasised. The fifth to last section before the signature block on page 4 was headed “Declaration” and beneath that contained the declaration (also in bold type) that the notices as to the legal consequences of a pre-contractual violation of the reporting duty had been read and understood.

The plaintiff answered no to all health questions except one question on smoking. However, he failed to inform the insurer that he had consulted a radiologist in 2005 because he had had a pulmonary embolism seven years earlier.

The suit was successful in the lower courts. The Thuringian Higher Regional Court assumed that the insurance contract had not been retroactively modified based on the contract modification demand according to Section 19 para. 2 sentence 2 VVG. The insurer did not show that the notice of the legal consequences of violating the pre-contractual reporting duty satisfied the legal requirements under Section 19 para. 5 sentence 1 VVG.

1 BGH, decision of 13 December 2017 – IV ZR 353/15.
2 BGH, decision of 6 December 2017 – IV ZR 16/17.
The BGH declared that in cases where the insurer did not notify the policyholder of the consequences of violating a reporting duty in a document separate from other declarations, the requirements of Section 19 para. 5 sentence 1 VVG are satisfied only if the instruction is typographically designed in such a way that it stands clearly apart from the other text and cannot be overlooked by the policyholder. A section heading of “Statement” also fails to meet the requirements.

The BGH rejected the insurer’s appeal.

**BGH: Liability of attorney-mediator**

In a decision of 21 September 2017, the BGH determined the standards for liability of an attorney-mediator.3

A married couple visited a mediation service operated by the defendant mediator to perform an amicable and low-cost divorce. To speed up the divorce, the couple’s asset settlement was to take place outside the divorce proceedings as part of a divorce agreement. The defendant gathered the necessary information for the divorce petition and forwarded it to the attorney hired by the husband for the divorce. The attorney submitted a divorce petition to the Local Court, the content of which provided that there should be no pension rights adjustment. The divorce petition was discussed at the divorce hearing. The plaintiff appeared for the first time at the divorce hearing, representing the wife as attorney in the divorce proceedings. The wife verbally authorised the plaintiff to represent her for the pension rights adjustment, with a release from all liability. The couple’s legal representatives then waived performance of the pension rights adjustment, and this was recorded by the court.

The information obtained following the hearing on the pension rights adjustment showed assets to be equalised with a cash value of approximately EUR 95,000 in the wife’s favor. The wife asserted a claim for damages against her attorney in the preliminary proceedings. He undertook to pay a settlement and asserted a claim against the mediator hired by the couple by way of a settlement among joint and several debtors.

The BGH decided that the plaintiff was entitled to compensation from the defendant. The defendant as mediator made herself liable to pay damages to the wife because no pension rights adjustment had been performed in the divorce proceedings, to her disadvantage. In the BGH’s opinion the mediator had taken on the obligation to reach a divorce agreement conforming to both parties’ interests. The mediator violated this obligation to the wife.

The BGH made it clear that an attorney-mediator must be judged according to the stringent standard of attorney liability. This applies at least when he prepared individual legal solution proposals. As an attorney-mediator, the defendant was required to provide the instructions and notices which an attorney must provide in the concrete situation, and must be responsible for the accuracy thereof.

**BGH: No third-party notice in test case (KapMuG)**

In a decision of 19 September 2017, the BGH decided that intervention by third-party notice or intervention as part of the test case is not permitted under the Capital Investor Test and Model Cases Act (Kapitalanleger-Musterverfahrensgesetz, KapMuG).4

The parties disagreed regarding the violation of notification duties under the Securities Trading Act (Wertpapierhandelsgesetz, WpHG). In the suspended initial cases, individual and institutional investors asserted claims for damages against a company and in some cases its former chairman and finance director. In the test case trial court, the company gave third-party notice to former members of the Managing Board and Supervisory Board. The Munich Higher Regional Court served the third-party notice. Some recipients of the third-party notice then intervened in the test case on the company’s side. In 2014 the Higher Regional Court issued a model decision, against which both the plaintiffs and the defendants filed appeals.

In the appeal the company’s representative submitted a third-party notice by which for the first time a dispute was to be declared against a third-party and the third-party notice already issued in the trial court against the Managing Board and Supervisory Board members was to be repeated. The BGH rejected service of the third-party notice on the grounds that the test case did not allow intervention under KapMuG. Intervention relating to the case segment of the test case and a third-party notice relating to the case segment of the test case was not permissible. The test case was not a place for litigating a specific legal dispute; rather, only the binding effect for all suspended cases was decided through a pattern of legal questions and facts. By contrast, intervention and third-party notice could not be limited to a specific time segment of the case.

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3 BGH, decision of 21 September 2017 – IX ZR 34/17.
4 BGH, decision of 19 September 2017 – XI ZB 13/14.
Federal Constitutional Court: Unsuccessful petition by a car maker to suspend special audit in connection with the exhaust issue

In a decision of 20 December 2017, the Federal Constitutional Court rejected the petition by VW to issue a temporary order against the action of a special auditor.\(^5\)

In its constitutional complaint VW challenges the appointment of a special auditor by the Higher Regional Court of Celle based on Section 142 para. 2 of the Stock Corporations Act (Aktiengesetz, AktG). The auditor is supposed to examine whether the managing bodies of the company violated duties in connection with the so-called exhaust issue and in particular violated the ad hoc publicity duty.

VW feels its basic rights were violated by the order of the special audit. Particularly in the course of its proportionality review the Celle Higher Regional Court did not adequately consider the car manufacturer’s basic right to professional freedom. VW additionally argued that there were thousands of cases being litigated worldwide in connection with the exhaust issue, with investors alone currently asserting claims of EUR 9 billion. Commencing the special audit triggers procedural risks of extraordinary size because the plaintiffs speculate on information from the special audit reports and are therefore only willing to conclude trial settlements on significantly poorer terms for VW. VW also stated that the documents provided to the special auditor which are subject to the protection of “legal privilege” would “potentially” lose that protection.

In the view of the Federal Constitutional Court, the arguments presented did not represent a sufficiently serious disadvantage for the event that a temporary order would not be issued but the constitutional complaint would later be successful. Furthermore it was pure speculation that the special audit would result in additional lawsuits. Furthermore, the risk of being confronted with frivolous lawsuits was a general risk of life that must be accepted. At any rate, an immediate decision was not necessary since even if VW suffered serious disadvantages, they would not be clear until the special auditor’s report was available.

Frankfurt am Main Higher Regional Court (Oberlandesgericht, OLG): financial auditor must partially refund fee to Arcandor

In a decision of 17 January 2018, the Frankfurt am Main Higher Regional Court rejected damage compensation claims by the insolvency administrator of Arcandor AG against a financial auditing firm.\(^6\)

Arcandor’s insolvency administrator demanded damages and a refund of fees received from the defendant financial auditing firm. The financial auditor had advised Arcandor in the year prior to the opening of insolvency proceedings regarding a planned restructuring of the company on the basis of two agreements. The financial auditor delivered a restructuring plan to Arcandor on 20 May 2009. On 9 June 2009, Arcandor filed for the opening of insolvency proceedings. The insolvency administrator accused the financial auditor of violating his duties by failing to point out the company’s de facto insolvency. The delay in filing the insolvency petition resulted in damages of approximately EUR 82 million. Furthermore the insolvency administrator demanded a refund of approximately EUR 3.5 million in fees paid by Arcandor to the financial auditor.

The Regional Court had rejected the insolvency administrator’s claim. The Higher Regional Court, too, rejected the asserted damage compensation claims. Failure to pay a demand that is due cannot be taken as a schematic indication of a company’s insolvency. The financial auditing firm also had no obligation to examine the de facto insolvency since this was not provided for in the consulting agreement. The obligation to independently examine a possible de facto insolvency does not follow from the preparation of a restructuring plan, which ultimately can make sense only if there is no de facto insolvency of the company.

Regarding repayment of the fees received, the Higher Regional Court decided that the fees paid since 20 May 2009, in the amount of approximately EUR 2 million had created a disadvantage for the other creditors and for this reason were subject to revocatory action. Previous payments, however, were not subject to revocatory action and did not have to be refunded by the financial auditing firm.

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\(^5\) BVerfG, decision of 20 December 2017 – 1 BvR 2754/17.

\(^6\) Frankfurt am Main Higher Regional Court, decision of 17 January 2018 – 4 U 4/17.
Munich Higher Regional Court: Director’s liability for asset-reducing payments

In a decision of 22 June 2017, the Munich Higher Regional Court dealt with the liability of a director of a limited liability company for asset-reducing payments. As insolvency administrator, the plaintiff asserted a claim against the former director of the debtor for the assets of a company under Section 64 sentence 1 of the Limited Liability Companies Act (GmbHG). The plaintiff alleges that the defendant made payments totaling approximately EUR 400,000 to various suppliers, employees, and public carriers after the company’s insolvency, even though their demands were for goods and services provided before the de facto insolvency occurred. The Passau Regional Court upheld the complaint.

The appeals court largely rejected the defendant’s appeal. The defendant’s argument that the reduction in assets caused by the payments was counterbalanced in a direct connection with it was not acceptable. Even if it was not necessary according to the case law of the BGH for the object of the increase in assets to still be present even after the opening of insolvency proceedings, the director’s liability for damages under Section 64 sentence 1 GmbHG can be ruled out only if an asset available to the creditors is added. The fact that the company acquired a demand based on the legal transaction underlying the payment also does not represent “consideration” for the payment.

In the view of the Munich Higher Regional Court, the consideration added in connection with a reduction of company assets must be subject to potential access by the creditors in order to negate a payment within the meaning of Section 64 sentence 1 GmbHG. The court thereby deviates from a decision by the Dusseldorf Higher Regional Court, which said that a payment ordered by the director does not have an asset-reducing effect if the company receives consideration of at least equal value in direct connection with the payment when viewed economically.

The defendant’s appeal is currently pending at the BGH.

Higher Regional Court of Dusseldorf: attribution of fraud to an insurance broker

The Dusseldorf Higher Regional Court ruled in a decision of 10 March 2017, that in some circumstances the policyholder must accept attribution of the fraudulent conduct of his insurance broker.

The plaintiff asserts claims against the insurer for the existence of a health insurance policy. The plaintiff, who has had heart problems since 2010, first had health coverage from another insurer. An acquaintance who worked as an insurance broker told the plaintiff that it would hardly be possible to find lower-cost insurance coverage due to the heart condition. In an application for health insurance from 2011, all health questions were answered in the negative except the question about ametropia. The insurance broker submitted the application to the defendant and terminated the insurance policy with the original insurer in the name of the plaintiff. In a letter of 5 August 2014, the defendant declared the challenge due to fraudulent misrepresentation and rescission of the insurance policy, and demanded a refund of payments.

The Regional Court rejected the plaintiff’s claims for insurance benefits and a determination that the insurance policy continued in force. The Dusseldorf Higher Regional Court affirmed the Regional Court’s view that the insurer had a valid challenge due to fraudulent misrepresentation. Therefore the policyholder must fundamentally assume reporting duties of the insurance broker. A different assessment may be justified if the insurance broker can possibly be considered a third party within the meaning of Section 123 para. 2 sentence 1 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) in the specific case. This would have the result that a challenge would be successful only if the policyholder was aware or should have been aware of the insurance broker’s fraud. The concept of third party, however, must fundamentally be interpreted narrowly.

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7 Munich Higher Regional Court, decision of 22 June 2017 – 23 U 3769/16.
8 Dusseldorf Higher Regional Court, decision of 1 October 2015 – I-6 U 169/14.
9 Dusseldorf Higher Regional Court, decision of 10 March 2017 – 4 U 191/15.
Current developments

Coalition agreement: New consumer test case procedure for declaratory judgment and “corporate criminal law”

In the course of their coalition negotiations the CDU/CSU and SPD have agreed to introduce a test case for a declaratory judgment. It is intended to make it easier for consumers to enforce their rights against large companies. To avoid creating a “lawsuit industry,” only specified qualified institutions such as consumer organisations should have standing to sue. The new law is already supposed to take effect on 1 November 2018, since many parties harmed in connection with the VW exhaust scandal have claims that are about to lapse at the end of 2018.

In addition to the test case for a declaratory judgment, in their coalition agreement the CDU/CSU and SPD also announced their intention to step up the fight against white-collar crime with a new version of the penalty rules for companies. It is currently at the discretion of the competent agency whether the company itself is prosecuted in addition to the employees charged with misconduct. Moving away from this “opportunity principle” under the currently applicable rules of administrative offenses and towards a “legality principle” should create a uniform nationwide legal approach. At the same time the amount of fines is to be adjusted and will, in the future, be based on the economic strength of the company. The current cap of up to EUR 10 million is too high for small companies and too low for large corporate groups. Companies with business volumes of more than EUR 100 million should in the future be subject to penalties of up to 10 percent of their business volume.

European supervisory agencies: BaFin to fundamentally adopt all guidelines and Q&As into its administrative practices

The Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) reported on 15 February 2018, that in the interest of European harmonisation of supervisory law it generally endeavours to adopt guidelines and questions and answers from the European Supervisory Agencies (ESAs) into its administrative practices as far as possible. Under legally binding regulations, the ESAs also take nonbinding measures, primarily including guidelines, opinions, and questions and answers.

To date BaFin has rejected these in only a few cases where special elements of German supervisory law stood in the way of adopting them. If BaFin does not adopt a guideline or questions and answers in the future, it will state so explicitly on its website.

EU commission: Effects of Brexit on the (re)insurance industry

The European Commission stated an opinion on the effects of Brexit on the insurance and reinsurance industry in a notice dated 8 February 2018.¹

Following the planned exit of the United Kingdom, European Union law will no longer apply in the United Kingdom. The United Kingdom will become a third country as a result of the exit. The European commission used this opportunity to point out the consequences of Brexit for the protection of policyholders and the brokering of insurance products.

¹ European Commission, Notice to Stakeholders on the withdrawal of the United Kingdom and the EU rules in the field of insurance/reinsurance, 8 February 2018
Insurance companies headquartered in the United Kingdom will lose their license under the Solvency II Directive and consequently their permission to provide services in the EU. Branch offices located in the EU of insurance companies headquartered in the United Kingdom will also be treated as branch offices of insurers from third countries. They will require a license from each EU member state in which they wish to do business. However, a permit in one member state does not mean that the insurer can also operate through branches in other member states. So-called EU-27 subsidiaries, i.e., legally independent companies established in a member state that are controlled by a company headquartered in the United Kingdom or integrated elsewhere may continue to operate on the basis of their current permit. Reinsurance companies headquartered in the United Kingdom must adhere to the requirements of the individual member state where they wish to conduct their reinsurance business. This must not give them any advantage over reinsurance companies from EU member states; notwithstanding any equivalency decisions, however, the requirements may be more stringent.

Loss of the license in the EU may also have effects on fulfillment of contracts. The Solvency II Directive requires companies to take appropriate steps so that they can continue contracts. For this reason the European commission recommends that insurers carefully review their existing contracts to identify and mitigate any risks.

Furthermore, the Solvency II and insurance sales directives urge insurance companies to inform policyholders of the effects of Brexit on their policies. The United Kingdom’s exit from the EU also has effects on insurance intermediaries. In the future it will no longer be possible to conduct insurance business in the EU on the basis of a license from the United Kingdom.

**EIOPA consultation on minimum amount for professional liability**

On 30 January 2018, The European Insurance and Occupational Pensions Authority (EIOPA) submitted a technical regulatory standard for consultation for adjusting the minimum amount for professional liability for insurance intermediaries under Art. 10 of the Insurance Distribution Directive (IDD). The IDD provides that insurance and reinsurance intermediaries should have professional liability insurance or a similar guarantee in force for the entire territory of the European Union. The IDD leaves it up to the supervisory authority to elaborate the technical regulatory standards. The deadline for submitting a standard to the European commission expires in June 2018. Opinions on the draft may be submitted to EIOPA through 27 April 2018.

**New EU financial markets directive MiFID II**

The new EU financial markets directive MiFID II has been in force since 3 January 2018. It updates the MiFID directive on markets for financial instruments, which took effect on 1 November 2007.

Among other things, MiFID governs the requirements for the management and organization of securities directives, licensing requirements for regulated markets, and licensing regulations for financial instruments for trading. It further represents the foundation for regulatory reporting to prevent market abuse.

MiFID II contains several new requirements for trading in financial instruments. Accompanying it is the financial markets regulation MiFIR (Markets in Financial Instruments Regulation), which particularly contains market transparency requirements.
MiFID II gives top priority to consumer protection. One of the innovations in this context is that it must be clear which target market a product is intended for even during the development phase. In other words the potential customer group must be defined from the beginning.

For customers, the innovations will be particularly noticeable in investment consulting. Instead of a simple consulting log, investment consultants will have to prepare a harmonised European suitability statement containing statements as to why the product matches the customer’s risk profile and investment goals. In addition, external and internal telephone calls in connection with customer consultation are recorded and customers are informed unbidden and in greater detail concerning the overall costs of products and services and their effects on returns.

**New PRIIP regulation to enter force**

The PRIIP regulation also entered into force on 1 January 2018, in addition to the EU financial markets directive. PRIIPs (Packaged Retail and Insurance-based Investment Products) are packaged investment products for small investors and insurance investment products carrying an investment risk. All investment products and agreements are “packaged” in which the investor does not invest the money on the capital market directly but rather only indirectly or where the redemption right otherwise depends on the growth of certain securities or reference factors. In addition to structured financial products and derivatives, this also includes capital-forming life insurance policies and private pension insurance policies.

Since 1 January 2018, consumers have been entitled to a basic information sheet in these sectors. This information sheet or key information document (KID) must notify the consumer of the major features of the individual product on no more than three A4-size pages. Among other things, these include the product description specifying the target investor and purpose of the investment, warning notices if applicable, an indicator of overall risk illustrating the market and credit risk and informing the consumer of the salability of the PRIIP, and information on the consequences of early sale or termination of the product.
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