INSURANCE - GERMANY

Small differences matter: pre-contractual duty of disclosure and lack of knowledge due to negligence

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In a decision dated 25 September 2019 (Case IV ZR 247/18), the Federal Court of Justice once again stressed the difficulties in and the importance of obtaining a precise legal subsumption of the established facts where the pre-contractual duty of disclosure is concerned.

Facts

The subject matter of the dispute was an exclusion clause, which the insurer had added in 2014 to a 2009-dated occupational disability insurance contract because of an alleged breach of the pre-contractual duty of disclosure. The insured filed a claim against the insurer to have the exclusion clause removed and the changes resulting therefrom reversed.

At the first instance, the Landshut Regional Court established that in 2008 (ie, before the conclusion of the contract) the insured had suffered a fracture, which had affected his outer ankle and fibula. Due to the nature of the fracture, the insured – either innocently or with the slightest negligence – had been unaware that he had fractured his outer ankle, which, according to the insurer's pre-contractual questionnaire, he needed to disclose. While the insured had been aware of the fibula fracture, disclosure of this fracture was not required.

Both the Landshut Regional Court and the Munich Higher Regional Court (at second instance) regarded this as an innocent or slightly negligent breach of the duty of disclosure. However, they both allowed the insured's claim due to the five-year time limit set out in Section 21 of the Insurance Contract Act. This time limit had expired unless the breach was committed intentionally or an insured event happened within the time limit.

The first-instance court found that no insured event had happened that prevented the time bar from expiring and that the insured had not intended to commit the breach. In contrast, the second-instance court found that in 2013 – four years after the contract's conclusion – an insured event had happened; however, this was completely unrelated to the event that required disclosure.

The second-instance court went on to discuss in length the question of whether an insured event which occurs before the time limit prescribed in Section 21(3)(1) of the Insurance Contract Act always prevents the time limit from expiring (which was the main opinion of German academics) or whether this is not always the case (ie, where the breach of the duty of disclosure concerns a fact that would not be causative for both the occurrence and ascertainment of the insured event and the scope and ascertainment of the insurer's obligations). The latter was the opinion of the second-instance court and the reason why it allowed the insurer's appeal to the Federal Court of Justice.

Decision

The Federal Court of Justice stated that in order to rule on the abovementioned question, it had to determine whether the insured had breached his duty to disclose to the insurer the risk-relevant facts of which he had known when he concluded the insurance contract (Section 19(2)(1) of the Insurance Contract Act). In contrast to the lower instances, the Federal Court of Justice ruled that this requirement had not been met.

The Federal Court of Justice explained that pursuant to Section 19 of the Insurance Contract Act as an element of the objective facts of the breach of the duty of disclosure, insureds must be aware of

the risk-relevant facts that need to be disclosed. The burden of proof for this is borne by the insurer.

In the present case, the Federal Court of Justice stated that according to the facts established by the lower instances, the insured had not known of the risk-relevant facts that required disclosure. However, a negligent lack of knowledge cannot replace required, yet lacking, knowledge of facts. Therefore, the insured had not breached his duty of disclosure.

Consequently, the Federal Court of Justice dismissed the insurer's appeal, as the question regarding the time limit was irrelevant to the decision.

Comment

Since the insurance contract in dispute fell under Chapter 1 of the Insurance Contract Act (rules applicable to all insurances covered by the Insurance Contract Act), this decision is relevant for all insurance contracts that fall under the act, although special regulations exist (eg, for life insurance (Section 157 of the act)). Differing agreements must be measured on the specific requirements of Section 32 of the act – unless the insurance concerns, for example, a large risk (Section 210 of the act) – and, where applicable, Section 305(ff) of the Civil Code.

The decisions show that where the subsumption of the established facts is a matter of small details, cases can have varying outcomes. In this case, three courts came to three different conclusions because of small differences.

The Federal Court of Justice confirmed its jurisdiction and highlighted the utmost importance of a clear differentiation between:

- a negligent lack of knowledge of risk-relevant facts; and
- the negligent non-disclosure of risk-relevant known facts.

While the first bullet point would not be considered a breach of the duty of disclosure, the second bullet point would and the negligence would be relevant to the consequences.

As the Federal Court of Justice did not mention the boundaries of the concept of a negligent lack of knowledge, it can be assumed that the case gave no indication for this. However, under German law, insureds cannot turn a blind eye to the relevant facts in bad faith. Moreover, insureds cannot "not know" facts that they could have remembered had they tried.

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