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On the serial claims clause in the professional indemnity insurance of auditors

In the decision 7 Ob 20/22z, the Supreme Court dealt with the applicability and interpretation of the serial claims clause in the professional liability insurance of auditors and the question.

INSURANCE OBLIGATION OF AUDITORS

The liability of the auditor is governed (at least with regard to the mandatory audit pursuant to Section 268 UGB) by Section 275 UBG, which regulates the details of the liability of the auditor of the annual financial statements as a lex specialis to general tort law.[1]

The auditor's liability is limited in the event of a negligent breach of duty, whereby this limit applies **per audit**. The auditor is liable for the dutiful fulfilment of the independent audit contracts in each year.

Pursuant to Section 11 of the Austrian Public Accounting Professions Act 2017, persons authorised to exercise the profession are obliged to take out financial loss liability insurance with an insurance company for damages arising from their activities. In addition to this individually concluded liability insurance, there is a related insurance cover based on an excess liability insurance contract concluded with the Chamber of Tax Consultants and Auditors. This provides cover in the event that the benefits provided by the individual liability insurance policy are insufficient in the event of a claim.[2]

FACTS OF THE CASE

The decision in question is based on an action for cover brought by an auditor who sought a declaration that the same excess insurer was obliged to provide the sum insured five times on the basis of five consecutive audit years.

The proceedings were based on the following facts: The plaintiff had audited the annual and consolidated financial statements of an AG operating in the teakwood industry for several

[1] *Dellinger/Told* in *Zib/Dellinger*, Unternehmensgesetzbuch (2015) § 275 UGB Rz 1 ff.
[2] RIS-Justiz RS0080944

consecutive financial years on the basis of annual audit contracts. After insolvency proceedings were opened over the assets of this AG several years later, the insolvency administrator and several bond creditors filed claims for damages totalling millions and accused the plaintiff audit firm of having wrongfully issued unqualified audit opinions in several consecutive financial years.

The specific audit deficiencies were comparable in terms of content, but diverged in the individual audit periods. Each year, the plaintiff focussed on different aspects of the audit, whereby these only emerged during the planning of the audit. It was alleged, among other things, that the plaintiff did not carry out any original audits of the "actually planted area", but instead relied on the results of a network partner in Costa Rica that it had commissioned.

The defendant excess insurer relied on a serial claims clause agreed in the applicable GCI (AHVB-KWT 2016) and argued that the inspection error was attributable to the same or at least a similar cause in each case with regard to all annual financial statements. Due to the legal and economic connection between the annual audit activities, only limited cover was to be granted in application of the serial claims clause.

While the court of first instance upheld the claim, the court of appeal amended the judgement to dismiss the claim. The Court of Appeal reasoned that the insurer was entitled to invoke the serial claims clause as there was balance sheet continuity between the annual financial statements. As there is no case law on the serial claims clause relevant here, the Court of Appeal allowed an ordinary appeal.

The Supreme Court restored the initial judgement in favour of the plaintiff and confirmed that the sum insured is generally available separately for each audit.

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SERIAL CLAIMS CLAUSE

In the case in question, the Supreme Court had to examine in particular the applicability and interpretation of clauses Art 2.2.2 and Art 2.2.3 AHVB-KWT 2016 (in this respect identical to the German equivalent[3]) to be assessed. Accordingly, all consequences *of several breaches based on the same cause* (Art 2.2.2 AHVB-KWT 2016) or *several breaches based on similar causes, if there is a legal, technical or economic connection between these causes* (Art 2.2.2 AHVB-KWT 2016) are also deemed to be one insured event. If there is a serial loss in this sense, the sum insured is only available to the policyholder once.

[3] Vgl *Wilhelmer*, Zur Serienschadenklausel in der Berufshaftpflichtversicherung des Abschlussprüfers, VersR 2023, 1205 (1206) mit Verweis auf das deutsche AVB-Recht und §54 Abs 2 WPO.

The purpose of a serial claims clause is to use a fiction to treat several insured events as one insured event under certain conditions and thus to make the agreed sum insured available only once.[4]

In the present case, the Supreme Court denied the application of the serial damage clause. It held that the applicability of the so-called *pure cause clause pursuant* to Art. 2.2.2 AHVB-KWT 2016 is determined by the traceability of the breach to the same cause (i.e. identity of cause). However, an identity of causes is only given if it is a mere multiplication of the cause without an independent implementation process.[5] However, this required identity of causes did not exist in this case, as the plaintiff's incorrect audit opinions were attributable to separate audit procedures each year.

The Supreme Court also rejected the application of the extended *causation clause* in accordance with Art 2.2.3 AHVB-KWT 2016. Unlike comparable conditions for members of other chambers, for example, the clause in question is based on the legal, technical or economic connection relating to similar "*causes*".[6] As there may be a temporal but no economic or legal connection between "*causes*",[7] the Supreme Court interpreted the clause to mean that there must be an economic or legal connection between the acts giving rise to the respective infringements, in this case between the audits carried out by the plaintiff.

The Supreme Court denied this economic connection. It held that "*synergy effects*" resulting from the repeated engagement of the same auditor do not establish an economic connection, as it may be that the auditor's workload is reduced in subsequent years if the auditor is re-engaged, but the auditor is obliged to fulfil the independent audit contracts in accordance with its duties every year.[8]

The fact that the annual financial statements of one year are necessarily based on those of the previous year (*balance sheet identity*) or that once selected classifications and designations or once selected valuation and accounting methods are generally to be retained (*balance sheet continuity*) does not establish an economic connection, as otherwise there would always be an economic connection in the case of incorrect audit opinions based on similar "*causes*".

CLOSING WORDS

As it is common for auditors to audit the annual financial statements of the same company for several years in succession - within the limits of Sections 270 et seq. of the Austrian Commercial Code (UGB) - this clarifies the legal situation with regard to the existence of a serial loss and was

[4] RIS-Justiz RS0133573.

[5] *Rintelen* in Beckmann/Matusche-Beckmann, Versicherungsrechtshandbuch3 § 26 Rn 3332;

[6] Vgl nur die Serienschadenklausel im Rechtsanwalts-Exzedentenversicherungsvertrag nach Art 3.1.c AVBV idF 1992, wo sich der rechtliche oder wirtschaftliche Zusammenhang auf die „betreffende Angelegenheiten" bezieht, vgl OGH 24.02.2021, 7 Ob 17/21g.

[7] OGH 25.05.2022, 7 Ob 20/22z [T40] unter Verweis auf *Fenyves*, Die rechtliche Behandlung von Serienschäden in der Haftpflichtversicherung [1988] 36.

[8] Vgl OGH 24.02.2021, 7 Ob 17/21g zum wirtschaftlichen Zusammenhang in Bezug auf „*Angelegenheiten*".

welcomed unreservedly by the doctrine.[9] Although the auditor's liability is limited in accordance with Section 275 (2) UBG, this limitation applies per audit. In this respect, this decision clarifies that the insurance cover ultimately corresponds to the liability of the auditor (cf. Section 149 VersVG).

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[9] *Wilhelmer*, Zur Serienschadenklausel in der Berufshaftpflichtversicherung des Abschlussprüfers, VersR 2023, 1205 ff; *Michtner*, Kein Serienschaden bei jährlicher Abschlussprüfung, ZVers 2022, 204;