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## Insured v. Insured clauses in D&O policies under Greek law

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### Abstract

D&O policies often exclude from cover certain claims on the basis of standard wordings so as to adequately quantify the risks to be underwritten and subsequently ceded by the primary insurer to the reinsurer. An exclusion often met in said policies is the insured v. insured clause that specifically carves-out of cover direct or indirect claims among the persons insured. This clause has been historically drafted to limit the risks undertaken by the insurer in the event that the claim is collusive and the underlying goal of the claimant is to cover losses of the corporation for imprudent business decisions, i.e. mismanagement. However, it is often the case that such clauses are limited to claims within the US territory, while the insurer relies on statutory law to be released of its liability under the policy in the event of a collusive claim. Although Greek case-law has not dealt with such clauses, the extent of cover could be limited under Greek law either on the basis of the definition of the legal term of a “third party claim” or on the basis of the intentional provocation of the risk insured. As regards the legal nature of the clause itself and its effectiveness under Greek law to release the insurer of such liabilities, this relies on whether the wording has been drafted to carve back claims which cannot be attributed to the solicitation of the person insured, thereby implying a post-contractual duty of the person insured.

*Key words:* Directors & Officers (D&O) Liability Insurance, insured v. insured, third party claim

### 1. INTRODUCTION

Directors and Officers insurance policies (D&O) fall within the general concept of third party liability

insurance covers. The extent of such cover varies on the basis of the business of the corporation to which the directors and officers provide their services and the uniform (standard) wordings gradually formed by the insurance industry. Such standard wordings aim at adequately quantifying the risks to be underwritten and subsequently ceded by the primary insurer to the reinsurer. D&O policies often provide an exclusion to cover when claims are lodged by one insured against another, as this is deemed justifiable “to avoid collusion among insureds” (Kalis, Reiter, Segerdahl, 1997, 11 – 12). This exception to cover has gradually been carved back to allow for the inception of some risks excluded under the so-called “insured v. insured” clause. Although Greek case-law has not dealt with such clauses, the extent of cover could be limited under Greek law either on the basis of the interpretation of the legal term of a “third party claim” or on the basis of the intentional provocation of the risk insured. To this end, this paper focuses on the historical background of the “insured v. insured” clause, taking into account the standard wordings carving back such exclusion to allow for a methodological interpretation of the D&O coverage under Greek law.

### 2. HISTORICAL BACKGROUND

Interestingly, the provision of insurance cover against the liabilities of the directors and the officers for acts and omissions while executing the service assigned to them or (depending the wording of cover) on the opportunity of the services provided under their capacity as officers or directors of the entity did not evolve into a wide-spread insurance product until the 60s. This late booming of the D&O coverage is largely attributed to two main shifts in regulation by that time.

Firstly, indemnification of directors and officers for negligent acts and omissions by their corporation was deemed to be unethical and/or counterproductive for the benefits of the corporation (Monteleone, Conca, 1996, 573–634). However, gradually in the 40s and 50s

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it became apparent that a degree of protection of the personal financial interests of directors and officers should be allowed to ensure that decision making was not biased on fear of their personal losses. This moral concern is still envisaged, albeit limited in scope, in the general statutory prohibition of indemnity under an insurance liability cover of acts and omission attributed to the intent (in Greek: *δόλος*) of the insured according to article 25 of the Greek Insurance Contract Act (Law 2496/1997).<sup>1</sup> Moreover, it is in general acknowledged by Greek legal theory that a liability policy cannot cover administrative or criminal financial sanctions or penalties, as this is deemed to be contrary to Greek public policy (Rokas, 2006, 394–395).

Secondly, a shift on the regulation of securities market had attributed personal liabilities to the directors and officers in addition to the liability attributed to the company for infringements of market regulations. Thereafter, interest in insurance cover had increased significantly (Romano, 1989).

In general, D&O policies provide corporate cover, in which case the insurer undertakes to reimburse the corporation once the latter indemnifies the officer or director under a statutory obligation (where applicable) or on the grounds of its discretion to cover such losses (to the extent permissible by law). But it is also the case that a D&O policy provides, in addition to corporate cover, a direct cover to the insured, where the corporation lacks the resources required to pay in full such indemnification (whether said indemnification is statutory or discretionary).

However, the insured v. insured exception to cover was only introduced in the 80s, as a market respond to what was perceived to be an error in underwriting that had unwillingly exposed the industry to unquantifiable risks. It is henceforth widely acknowledged that the insured v. insured clause serves as a mechanism of avoiding liability where a claim is collusive and the underlying goal of the claimant is to cover losses of the corporation for imprudent business decisions, i.e. mismanagement. Similarly, the insurance industry carved-out of cover cross-claims among the insureds (redirection claims), although the latter exclusion is perceived as the industry's unwillingness to fund costly in-fighting among the management of the corporation, rather than collusive actions. Such a clause usually reads as follows: "The insurer shall not be liable to make any payment for loss in respect of any claim or any other payment under the policy, including

investigation costs which are brought by or on behalf of any insured or the company."

The interpretation of insured v. insured clauses is often litigated before US courts and the justification of the above exclusions is cited by certain US decisions in interpreting insured v. insured exclusions to limit their effects and disallow the insurer from releasing itself from liability under a D&O policy, where the wording of the exclusion is ambiguous (Ferrara, Abikoff, Gansler, 2005, para. 6.04[8]).

Certain carriers opt to limit the extent of the insured v. insured exclusion to the territory of US (so-called US claims) and therefore rely on statutory provisions to be released of liability under local law in the event of collusive action. In this case a common wording would provide the following: "The insurer shall not be liable under any Cover or Extension for any loss: arising out of, based upon or attributable to any US claim which is brought by or on behalf of any: (i) insured; or (ii) outside entity in which an insured person serves or served as an outside entity director."

Therefore, when the exclusion is limited to US claim, it is of most importance to understand the cover provided under local applicable law, before concluding that any claim among insured is indeed covered by the policy.

The insurance industry has also set out detailed wordings allowing for a specific carve-back so as to cover certain claims otherwise excluded by an absolute insured v. insured clause (such as derivative actions). For instance, such a wording would provide that: "The insurer shall not be liable to make any payment for loss in respect of any claim or any other payment under the policy, including investigation costs: which are brought by or on behalf of any insured or the company. This exclusion shall not apply to: (i) any employment practice claim brought by an insured person; (ii) any claim brought or maintained by an insured person for contribution or indemnity, provided that such claim directly results from another claim otherwise covered under the policy; (iii) any shareholder derivative action brought or maintained on behalf of the company without the assistance or participation of any director or the company; (iv) any claim brought or maintained by a liquidator, receiver or administrative receiver on behalf of the company without the assistance or participation of any insured."

The carve-back wording is conclusive of the fact that an insurer opting for an insured v. insured clause shall not in principle undertake to cover losses for any direct or indirect claims of a person insured under the policy unless specifically provided for in its terms and conditions. Nonetheless, it rests upon the clarity of the

<sup>1</sup> Νόμος 2496/1997, *Ασφαλιστική σύμβαση, τροποποιήσεις της νομοθεσίας για την ιδιωτική ασφάλιση και άλλες διατάξεις*, (Α'/87/1997).

wording of the insured v. insured clause for the insurer to be successfully released of its liability.

### 3. A THIRD PARTY CLAIM UNDER A D&O POLICY GOVERNED BY GREEK LAW

It is usually the case that Greek D&O policies provide for an insured v. insured clause, the effects of which, however, are mostly limited to so-called US claims. In the absence of clarity by the policy as regards non US-claims, the scope of cover should be examined in light of the statutory provisions of the Greek Insurance Contract Act. Article 25 of the Greek Insurance Contract Act provides that: “Liability insurance included expenses directly resulting from the defense and settlement of claims brought by third parties against the policyholder and which result from acts and omissions of the policyholder, for which cover had been agreed. No cover shall be provided if the acts or omissions arise from intentional act or omission on the part of the policyholder or the insured.”

Therefore, under Greek law, a third party liability policy covers financial losses resulting from claims of so-called “third parties.” However, article 25 of the Greek ICA does not define what constitutes a third party, nor has Greek case-law clarified this term any further with regards to D&O policies.<sup>2</sup>

It is beyond doubt that a third party should usually be construed to imply a person or entity or administrative body other than the policyholder, as he/she is a party to the insurance contract. It is, however, ambiguous whether a person insured (i.e. director or officer) in a policy stipulated by another (in this case the corporation acting as the policyholder) is indeed a “party to the contract” *stricto sensu* under the meaning of article 25 of the Greek ICA. To this end, article 1 paragraphs 1 and 2 of the Greek Insurance Contract Act further provides that:

<sup>2</sup> However, Greek case-law (Supreme Court Decision Nr. 427/2014 ΕΠΙΔΙΚΙΑ 2014, 319 and Supreme Court Decision Nr. 583/2014, ΕΠΙΔΙΚΙΑ 2014, 337) has dealt with the definition of the term “third party” under a compulsory motor liability insurance cover pursuant to article 7 of codified law 489/1976, as amended to transpose the provisions of article 3 of the Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ L 8, 11.1.1984, p. 17–20. (ΠροεδρικόΔιάταγμα 237/1986, Κωδικοποίησητωνδιατάξεωντου Ν.489/1976 (ΦΕΚ Α’331/76) περί υποχρεωτικήςΑσφαλίσεωςτησεξ’ ατυχημάτων αυτοκινήτων αστικήςευθύνης, όπωςσυμπληρώθηκε και τροποποιήθηκε απο το Ν. 1569/1985 (ΦΕΚ Α’/183/1985) και τα ΠροεδρικάΔιατάγματα 1019/1981(ΦΕΚ Α’/253/1981) και 118/1985 (ΦΕΚ Α’/35/85), Α’/110/1986)).

“1. Insurance is a contract by which, an insurance company (“the insurer”) undertakes to make payments or, if specifically agreed, make provision in kind to the other party (the policyholder) or to a third party, in return for a premium, on the occurrence of the event on which it has been agreed that the insurer’s obligation depends (“the insured event”).

2. The insurance contract shall specify at least the particulars of the contracting parties and the name of the person entitled to the insurance money, should that person not be the policyholder..”

On the basis of the above, it would be difficult to argue that a person insured (in this case an officer or director), if other than the policyholder (the corporation), is a party to the insurance contract under article 25 of the Greek Insurance Contract Act, *stricto sensu*. Unfortunately, the explanatory report accompanying the Greek Insurance Contract Act, does not clarify the issue any further. Be that as it may, Greek courts, in line with the above provisions, have also repeatedly held, that under article 25 of the Greek Insurance Contract Act, a liability insurance contract may be stipulated for the account of another person, which is not a party to the contract and that has an interest in the insurance, in accordance with article 410 and 411 of the Greek Civil Code.<sup>3, 4</sup> However, these court decisions focus on the right of direct action against the insurer rather than the definition of a third party claim in an insured v. insured claim. Therefore, the above case-law should not be considered as conclusive regarding the *stricto sensu* interpretation of article 25 of the Greek Insurance Contract Act.

Under a *lato sensu* interpretation, a third party could be defined as a party other than the party whose interests are insured by the contract. This latter interpretation, however, has not been tested with Greek courts. Arguably, given the necessity of the industry to specifically provide for an insured v. insured exclusion clause, it is unlikely that such an argument would allow the insurer to be released of its liabilities in the event of cross-claims among the insureds officers and directors, unless the policy specifically defines a third party claim to exclude claims of any person insured under the policy.

Notwithstanding the above difficulties, any claim filed by the corporation against its management would most definitely be excluded from cover under article 25 of the Greek Insurance Contract act, unless specifically covered by the wording of the policy.

<sup>3</sup> Προεδρικόδιάταγμα 456/1984, Αστικός Κώδικας και Εισαγωγικός του Νόμος, (Α’/164/1984).

<sup>4</sup> Thessaloniki Court of Appeal, Decision Nr. 2044/2013, Αρμενόπουλος 2014, p. 1336.

#### 4. EXCLUSION OF COVER IN THE EVENT OF COLLUSION AMONG THE INSURED

As noted above article 25 of the Greek Insurance Contract Act specifically prohibits cover of acts or omissions giving rise to a claim that are intentional on the part of the policyholder or the insured. Therefore, in the event of collusion among the insureds, the insurer can be released of its liability on the basis that the insureds intentionally provoked the occurrence of the insured event (claim) even if the policy does not include an insured v. insured wording. In other words, the mere absence of an insured v. insured clause does not entail absolute cover of such claims. In fact, given that a D&O policy is concluded for professional purposes, the parties to the contract can further limit the insurer's liability to cover claims attributed to slight negligence pursuant to article 7 paragraph 5 of the Insurance Contract Act which provides that: "The insured shall not be obliged to pay the insurance money if the insured event, in case of indemnity insurance, occurred due to an intentional act or omission or due to gross negligence on the part of the policyholder or the insured..."

According to Greek procedural rules, it is upon the insurer to plead and provide evidence that the claim is collusive to be released from its liability under articles 7 and 25 of the Greek Insurance Contract Act. The insured v. insured exclusion is hence included in a Greek policy by carriers so that the burden of proof of the collusive character of the claim does not fall upon the insurer. This inevitably raises concerns whether an insured v. insured clause is indeed a term adequately defining the risk undertaken by the insurer or a term releasing the insurer of its liability on the grounds of breach of a post-contractual duty of the insured.

Obviously, there cannot be a straightforward answer as regards the actual scope of the insured v. insured clause. Certain wordings do imply a post-contractual duty, such as the following: "The insurer shall not be liable under any Cover or Extension for any loss: arising out of, based upon or attributable to any claim which is brought by or on behalf of any: (i) insured; or (ii) outside entity in which an insured person serves or served as an outside entity director. This exclusion shall not apply to: (a) any claim against any insured person (i) pursued by any security holder or member of a company or outside entity; whether directly or derivatively, or pursued as a class action; and that has not been solicited or brought with the voluntary (rather than legally required) intervention, assistance or active participation of any director or officer or any company or any outside entity director, other than a

director or officer or outside entity director engaged in whistle blowing."

While others completely disregard the insured's conduct prior to the occurrence of the insured event (claim), in which case it can be concluded that the clause is merely descriptive of the extent of the cover. Should however, the clause be construed as a so-called implied post-contractual duty, the insurer cannot revoke cover under Greek law unless it can prove the collusive nature of the claim.

#### 5. INTERPRETATION OF THE INSURED V. INSURED CLAUSE UNDER GREEK LAW

As elaborated above, the insured v. insured clause was introduced to avoid the insurer's liability in the event of a collusive action. Greek courts do in general acknowledge the historical background of the standard terms of the insurance industry due to the specific characteristics of the insurance market, which is international by nature (especially as regards large risks). However, it is apparent that there is no uniform approach on the interpretation of such clauses by US courts. Moreover, Greek courts do not in principle apply the *contra proferentem* doctrine when dealing with contracts between business operations. Therefore, it is not absolute that an ambiguity of the standard insured v. insured wording will be interpreted to the detriment of the insured.

In interpreting such clauses, Greek courts apply articles 173 and 200 of the Greek Civil Code. Article 173 sets out a subjective criterion, i.e. that contracts should be construed according to the true intention of the parties, without adherence to the words. On the opposite, article 200 sets out an objective criterion pursuant to which contracts should be interpreted according to the requirements of good faith and business ethics. The subjective criterion allows the Court to reach a conclusion regarding the parties' true intention by also referring to evidence outside the "four corners of the document." The objective criterion, however, is applied insofar as the Court had failed to reach a conclusion regarding the parties' true intentions and thus the ambiguity must be fairly resolved according to business ethics. To this end, the historical background of the insured v. insured clause may shed light on the business logic for excluding cover of such claims.

## 6. CONCLUSION

On the basis of the historical background of the insured v. insured clause of D&O policies it is evident that said clauses aim to revoke cover where a claim is collusive. Under Greek law, however, such a collusive action may still release the insurer from its liabilities even in the absence of an insured v. insured exclusion. The insertion of an insured v. insured clause carving back certain risks on the basis that the claim triggering cover cannot be attributed to the solicitation of a person insured under the policy, would most likely entail the clause being interpreted as an imposition of a post-contractual duty of the directors and officers. In any event, in the absence of clarity from relevant case-law regarding the interpretation of the legal term “third party claim” under article 25 of the Greek Insurance Contract Act, the extent of the cover sought by the parties should be adequately defined by the policy.

## SUMMARY

D&O policies often exclude from cover certain claims on the basis of standard wordings so as to adequately quantify the risks to be underwritten and subsequently ceded by the primary insurer to the reinsurer. An exclusion often met in said policies is the insured v. insured clause that specifically carves-out of cover direct or indirect claims among the persons insured. This clause has been historically drafted to limit the risks undertaken by the insurer in the event that the claim is collusive and the underlying goal of the claimant is to cover losses of the corporation for imprudent business decisions, i.e. mismanagement. However, it is often the case that such clauses are limited to claims within the US territory, while the insurer relies on statutory law to be released of its liability under the policy in the event of a collusive claim. Although Greek case-law has not dealt with

such clauses, the extent of cover could be limited under Greek law either on the basis of the definition of the legal term of a “third party claim” or on the basis of the intentional provocation of the risk insured. As regards the legal nature of the clause itself and its effectiveness under Greek law to release the insurer of such liabilities, this relies on whether the wording has been drafted to carve back claims which cannot be attributed to the solicitation of the person insured, thereby implying a post-contractual duty of the person insured.

## REFERENCES

- Ferrara, R., Abikoff, K., Gansler, L. (2005). Shareholder Derivative Litigation: Besieging the Board, *Law Journal Press*, New York, paragraph 6.04[8].
- Kalis, P., Reiter, T., Segerdahl, J. (2003). *Policyholder's Guide to the Law of Insurance Coverage*, Aspen Publishers Online, supplement, 11–12.
- Monteleone, J., Conca, N. (1996). Directors and Officers Indemnification and Liability Insurance: An Overview of Legal and Practical Issues, *The Business Lawyer*, 51(3), 573–634.
- Greek Insurance Contract Act (Law 2496/1997).
- Νόμος 2496/1997, Ασφαλιστική σύμβαση, τροποποιήσεις της νομοθεσίας για την ιδιωτική ασφάλιση και άλλες διατάξεις, (Α/87/1997).
- Προεδρικό διάταγμα 456/1984, Αστικός Κώδικας και Εισαγωγικός του Νόμος, (Α/164/1984).
- Rokas, I. (2006). *Private insurance, the Greek law relating to insurance contracts and insurance enterprises*, 11<sup>th</sup> Edition. Athens – Komotini: Ant. N. Sakkoulas Publishers.
- Romano, R. (1989). *What Went Wrong with Directors' and Officers' Liability Insurance?* Faculty Scholarship Series. Paper 1949, available at: [http://digitalcommons.law.yale.edu/fss\\_papers/1949](http://digitalcommons.law.yale.edu/fss_papers/1949), citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *uri. dtnitd*, 394 U.S. 976 (1969) and *Escott v. Barchris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968). 5.11.2015.