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THIRD-PARTY CLAIMS AND/OR DIRECT-ACTION LAWSUITS AGAINST INSURERS – A STEP TOWARD SUSTAINABLE LIABILITY INSURANCE –

REVIEW ARTICLE

Abstract

This paper aims to provide a detailed analysis of how an injured party can assert their right to compensation in motor vehicle liability insurance. It covers the procedures for compensating damages both in extrajudicial (out-of-court) processes and in judicial proceedings. The goal is to examine the procedures, rights, and obligations of both the injured party and the insurer in the compensation process for motor vehicle liability insurance. The established procedure for compensation indicates that the Serbian legislator leans towards reducing the number of compensation lawsuits by mandating that the injured party first address the insurer in an extrajudicial (out-of-court) process by filing a claim for compensation.

Keywords: *direct-action lawsuit, claim, claim compensation, proceedings.*

I. Introduction

Recognition of the right for a third-party claimant to directly sue the insurer following the occurrence of the insured event, as well as the statutory regulation of the relationship between the "third party - insurer," is a hallmark of modern civil

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liability insurance.[2] Initially, in this type of insurance, injured parties could not directly approach the insurer. This stemmed from the "relative effect of contracts" principle. As the injured party was not part of the insurance contract, they lacked legal grounds to claim from the insurer. However, during the 20th century, as liability insurance grew in importance for protecting injured parties, this rule was abandoned. Despite not being a party to the contract nor a beneficiary, the law now recognizes the injured party's right to direct action.[3] The injured party thereby acquires two debtors. Importantly, obtaining insurance does not alter the nature of the injured party's claim against the tortfeasor. The tortfeasor remains directly liable to the injured party according to the general rules of liability for damages. However, the insurer's liability stems from the insurance contract, potentially limiting its scope compared to the tortfeasor's broader legal responsibility.[4]

The direct-action lawsuit represents a significant advancement in modern liability insurance, serving as a crucial link between this type of insurance and the principle of compensation for damages. This legal tool has earned widespread adoption, becoming nearly universal in motor vehicle liability insurance worldwide.[5] A defining feature of this approach is the injured party's direct right to claim compensation from the insurer. If the insurer fails to fulfill its obligation, either partially or fully, the injured party can resort to a direct-action lawsuit. This lawsuit can name either both the insurer and the insured party as defendants, or, more commonly, solely the insurer.

The primary benefit of direct action lies in its ability to accelerate and simplify the compensation process. By allowing the injured party to pursue claims against the insurer directly, it offers a more efficient path to compensation and facilitates recovery from a financially sounder entity.[6] Furthermore, it contributes to a higher degree of certainty in securing compensation for damages. By ensuring the effective operation of liability insurance, direct action helps enforce the principles of civil liability. These factors explain why the right to pursue direct claims against insurers is now universally recognized in compulsory motor vehicle liability insurance, and, in Serbia, it even extends to all forms of liability insurance. Importantly, the legal framework governing direct action defines it as a right inherent to the nature of the insurance itself, while also recognizing it as an independent right held by the injured party.

The Serbian Law of Contract and Torts outlines that in liability insurance, an injured party can directly pursue compensation from the insurer for damages caused

[2] Marija Karanikić Mirić, *Objektivna odgovornost za štetu*, Faculty of Law in Belgrade, 2021.

[3] Ivica Jankovec, *Obavezno osiguranje za štete od motornih vozila,* Savremena administracija, Beograd, 1977, p. 7.

[4] Mihajlo Konstatinovic „Odnos između prava na naknadu štete i prava na osiguranu sumu", *Annals of the Faculty of Law in Belgrade* no. 3–4, 1982, pp. 496–505.

[5] Vladimir Čolović, Ana Opačić, „Direktna tužba kod osiguranja od odgovornosti", Institute of Comparative Law, *Pravna riječ* 2015, pp. 142–143.

[6] Nataša Petrović Tomić, *Pravo osiguranja-sistem*, 2019 Beograd, Official Gazette, p. 576.

by the insured party. However, the compensation is limited to the agreed-upon insurance amount specified in the policy or the maximum liability of the insurer, whichever is lower. The injured party has an independent right to insurance compensation, so any later change that affects the insured's rights towards the insurer is irrelevant to the rights of the injured party.[7] The injured party has this right from the moment the insured event occurs. According to the law, the insurer and the insured are jointly and severally liable towards the third party.[8]

II. Similarities and Differences between Direct Claims and Direct-Action Lawsuits

Regardless of the insurance subject matter, in liability insurance, the injured party has the right to directly approach the insurer for compensation.[9] However, it is crucial to distinguish between a direct claim and a direct-action lawsuit. Direct claim refers to a compensation request the injured party submits directly to the insurer out of court. It aims to avoid litigation and serves as the initial step for seeking compensation.. In a direct claim, the injured party explains how the damage occurred, the extent of the loss, and demands the corresponding compensation from the insurer.[10]

A direct-action lawsuit is a legal action an injured party can take if the insurance company refuses their claim or only partially grants it. In this lawsuit, the injured party seeks the difference between the amount they requested and the amount paid by the insurer. Similarities between a direct claim and a direct-action lawsuit lies in the fact that in both cases, the injured party's goal is to receive compensation for their damages. The injured party has the choice to pursue either the insured or the insurer for compensation.[11]

A direct-action lawsuit can be filed against the insurer, the insured, or both. In the case where the lawsuit targets both parties, the insurer and the insured become jointly and severally liable. This means that the injured party, through the lawsuit, is requesting the court to oblige the defendants (insurer and insured) to jointly pay the amount of compensation for the suffered damages.

[7] Nataša Petrović Tomić, *Osiguranje od odgovornosti direktora i članova upravnog odbora akcionarskog društva,* Faculty of Law of the University of Belgrade, Centre for Publishing and Information, 2011, pp. 109–119.

[8] Law of Contract and Torts Art. 941 paragraph 1. (*Official Gazette RS* no. 18/2020).

[9] Vitomir Boić „Osiguranik kao umešač", Zbornik 17. savjetovanja o obradi i likvidaciji automobilskih šteta, Opatija 2009, 93–99.

[10] Predrag Šulejić, *Pravo osiguranja*, Official Gazette SFRY, 1980, p. 410.

[11] Additionally, the law may require the injured party to first attempt a peaceful resolution with the insurer through a claim for compensation. This is precisely what is mandated by the Serbian Law on Compulsory Traffic Insurance.

Analyzing the legal nature of a direct-action lawsuit reveals that it does not stem from the insurance contract itself, but rather from the tort liability of the insured party. However, the concept of a direct-action lawsuit and the rights of a third-party claimant wouldn't exist without the insurance contract, even though in some cases, the injured party can seek compensation even without a contract. Namely, the fundamental purpose of liability insurance is to allow the injured party to directly pursue compensation for damages (*actio directa*), including the procedural right to file a direct-action lawsuit against the insurer. This mechanism achieves the public interest in secure legal protection for third parties and fulfills the objective of liability insurance itself.[12]

While third-party injured parties stand outside the specific contractual relationship between the insured and the insurer, they are still protected. This highlights the importance of proper regulation and implementation of liability insurance contracts for the overall effectiveness of an insurance system within a country. It's crucial to note specific details regarding direct action lawsuits in court proceedings, particularly at the second-instance level when the defendant appeals. Even if the insurer's appeal against the initial judgment is successful, the insured's liability isn't automatically excluded. Indeed, there is a possibility that despite the insured's appeal being accepted, they may still be held liable. In the event that the insured's appeal, which absolves them of liability, is granted, the insurer will also be released from liability. It can be concluded that the insurer's obligation will exist only when the insured's civil liability is established.[13] If the insured is not liable, that is, if there is a ground for exclusion from insurance coverage, then the insurer will not be obliged towards the third party.

III. Legal Nature of a Third-Party Direct-Action Lawsuit in Motor Vehicle Liability Insurance

There are various interpretations regarding the nature of the direct-action lawsuit, and according to one interpretation, the direct-action lawsuit is a product of the insurance contract. This interpretation is unacceptable because the injured party is not in a contractual relationship with the insurer unless it involves insurance for the benefit of a third party. According to another interpretation, the source of the direct-action lawsuit is the suffered damage. Therefore, the legal nature of the direct-action lawsuit arises from the right to compensation for the damage suffered by the injured party caused by the insured.

[12] Law on Compulsory Traffic Insurance Art. 24 (*Official Gazette RS* no. 51/2009, 78/2011,101/2011, 93/2012 and 7/2013-decision of CC).

[13] N. Petrović Tomić (2019), p. 530.

The basis of a dispute initiated by a direct-action lawsuit is compensation for damages, the amount of compensation, and the insurer's liability.[14] In cases where both the insurer and the insured are named as defendants, they are not considered joint defendants but rather co-litigants. The insured and the insurer are independent parties in the proceedings, and if one party fails to take any action in the proceedings, it will neither benefit nor harm the other party. Even in the case of the insured admitting liability for the damage, the insurer may dispute that an insured event occurred.[15]

In motor vehicle liability insurance, a prohibition of objections to the injured party is established when they submit a claim for compensation to the insurance company. These are objections that the insurance company would not be able to raise against the insured due to non-compliance with the law or the contract.

An important question surrounding direct action lawsuits and the relationship between the insurer and the injured party is the issue of claim expiration. Specifically, the question arises as to whether general expiration rules concerning direct action lawsuits or expiration rules specified in insurance regulations apply in the relationship between the injured party and the insurer. A major concern exists due to potentially different expiration periods. This could lead to a situation where the injured party's direct-action lawsuit against the insurer expires sooner than their lawsuit against the insured party responsible for the damages. To address this issue, the Law of Contract and Torts prescribes the same expiration period for both the injured party's direct claim against the insurer and their claim against the insured party responsible for the damage.

IV. Right to Compensation and Filing a Direct-Action Lawsuit Even in the Absence of an Insurance Contract

Characteristic of motor vehicle liability insurance is the possibility for the injured party to be compensated for damages incurred in an insured event even when there is no insurance contract for motor vehicle liability. The Law on Compulsory Traffic Insurance provides for the possibility for the injured party to claim compensation from the Guarantee Fund.[16]

[14] Predrag Ćetković, Miloš Radovanović, „Veštačka tačka vezivanja za zasnivanje mesne nadležnosti za tužbu protiv osiguravajućeg društva", *Privreda i pravo* no. 7-9, 2017, 432–446; practice has given rise to a new basis for jurisdiction in disputes arising from motor vehicle liability insurance related to compensation for non-material damage. This is where the injured party has paid their lawyer a fee for drafting an out-of-court compensation claim. The idea is to secure the jurisdiction of a court based on knowledge of the inconsistent judicial practice regarding the amount of compensation for non-material damage, assuming that the chosen court will be more generous.

[15] The insurer bears liability for damage caused by the use of a motor vehicle only in cases where the civil liability of their insured is established.

[16] Marijan Ćurković, *Međunarodna karta osiguranja motornog vozila,* second revised and expanded edition, Zagreb, Croatia osiguranje, 1990, p. 16.

Article 73 and 74 of the Law on Compulsory Traffic Insurance define the Guarantee Fund as a legal entity responsible for the economic protection of passengers in public transport and injured parties when the damage is caused by a vehicle that is not insured or the responsible vehicle is unknown, as well as When the damage is the responsibility of an insurance company facing bankruptcy proceedings.[17]

The primary function of the Guarantee Fund is to compensate for damages resulting from a traffic accident caused by an uninsured vehicle.[18] Compensation is provided under the same conditions and to the same extent as if an insurance contract for motor vehicle liability had been concluded on the day of the traffic accident. The Law on Compulsory Traffic Insurance also defines the possibility of the Guarantee Fund's recourse claim against the vehicle owner who caused the damage, for the amount of the paid compensation, statutory interest from the date of payment, as the damage is considered to have occurred to the Guarantee Fund at that time, as well as the costs of the proceedings. The complete legal protection available to the injured party is reflected in the fact that the Guarantee Fund will compensate for the damage even in the case where the vehicle causing the damage is unknown. However, the Law on Compulsory Traffic Insurance states that in the event that the damage is caused by an unknown vehicle, the Guarantee Fund will only compensate the injured party if the traffic accident resulted in death, bodily injury, or impairment of health.

In all cases where there has been death, bodily injury, or impairment of health caused by an unknown vehicle, there may also be material damage. However, the law provides limited protection to the injured party in this regard..[19] The injured party is not entitled to compensation for material damage. Furthermore, the law regulates the situation when the damage is caused by a vehicle insured by an insurance company against which bankruptcy proceedings have been initiated.[20] In this case, the Guarantee Fund immediately compensates for the damage and subsequently becomes a creditor in the bankruptcy proceedings against the insurance company for the amount it paid to the injured party.[21] The Guarantee Fund becomes the holder of the injured party's rights against the insurer, or in other words, against the

[17] N. Petrović Tomić (2019), p. 535.

[18] There is a difference in calculating the statute of limitations for insurance claims in cases where the insurer has a recourse claim against the insured. Both law and judicial practice require proof of when the insured became aware of the insurer's recourse claim.

[19] Law on Compulsory Traffic Insurance Art. 92 paragraph 2.

[20] Compensation for damage caused by the use of an unknown motor vehicle is regulated by Article 92, paragraph 1 of the Law on Compulsory Traffic Insurance: "Damage resulting from death, bodily injury, or impairment of health caused by the use of an unknown motor vehicle, aircraft, or boat shall be compensated up to the amount to which the obligation of the insurance company for damage caused by the use of these means of transport is limited by this law, as of the day of the occurrence of the insured event."

[21] V. Čolović, A. Opačić, p. 154

bankruptcy estate. Until the bankruptcy proceedings against the insurance company are concluded, the Guarantee Fund can assert its claim.[22]

V. Conclusion

Based on the aforementioned advantages, it is clear that the position of the third-party claimant in motor vehicle liability insurance is much more favorable than if such insurance did not exist. The regulatory framework clearly encourages injured parties to file claims directly with insurers before initiating legal proceedings, which aligns with the principles of efficiency and sustainability of motor vehicle liability insurance. By injured parties filing claims, cooperation between the insurer and the injured party is enhanced, and traffic-related disputes are resolved more efficiently.

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[22] Law on Compulsory Traffic Insurance Art. 74, 75.

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