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PROPERTY INSURANCE AS AN INSTRUMENT FOR PROTECTING PROPERTY ASSETS

REVIEW SCIENTIFIC PAPER

Summary

The author examines property insurance with a particular focus on its indemnity nature, which is a fundamental component of insurance legislation. According to the author, property insurance creates a *win-win* situation for individuals who choose this form of protection for their material interests. Based on practical experience, it can also be argued that the insurance industry holds a natural monopoly, as there is no alternative instrument that offers such comprehensive protection under comparably favorable financial conditions. Special attention is given to the relationship between property insurance and the principle of indemnification. To fully leverage the benefits of insurance coverage, it is essential to adopt a strategy for promoting property insurance and enhancing public literacy in this area. Someone who invested in insurance is in a more advantageous position than one who has neglected to do so.

Keywords: assets, property, insurance, protection, indemnity principle, literacy

I General remarsk on property insurance

Term *insurance* is most commonly associated with *insurance contracts concluded for the purpose of protecting property from various risks that can lead to loss or damage of assets belonging to individuals or legal entities*.[2] Legally speaking, property

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[2] For more details on the history of insurance: Ivana Soković, „Značaj osiguranja i perspektive razvoja u Srbiji", *Tokovi osiguranja*, No. 2/2024, 265–279.

insurance encompasses various types of insurance contracts aimed at compensating damage incurred due to loss or damage of the policyholder's or insured's assets.[3] The most significant classification within property insurance divides it into two major and quite different areas: *insurance of things* and *liability insurance*. This is a common classification not only among insurance law theorists but also among practitioners, and it is supported across many legal systems. Why is it important to mention the difference between insurance of property and liability insurance right from the start? For several reasons, main among them is the fact that damage manifests differently in these subtypes of property insurance. Additionally, there are numerous other distinctions between these types of property insurance.

Insurance of property refers to a subcategory of property insurance that provides compensation in the event of loss, destruction, or damage to insured properties.[4] The insured subject matter is a specific object or part of the insured's assets, exposed to various risks: regardless of whether the property is movable or immovable, corporeal or incorporeal (such as receivables).[5] As for risks related to the insured property, they may involve fire, flood, machinery breakdown, theft, and others.[6] Notably, for property insurance purposes, a risk does not necessarily have to cause physical damage, as in the case of theft, where a property may be lost without being physically damaged… What is crucial in insurance of property is that, in order to insure any subject matter, the insured must have an insurable material interest. When the term insurable material interest is mentioned, one naturally first thinks of the owner of the property, but this term in modern insurance law allows a wide range of persons to conclude some form of insurance of property.[7] The only condition is that they have a legally recognized material interest to the insured property, so they can suffer damage due to its loss or damage. Simply put, *insurance of property enables compensation to the person who has suffered damage to the insured property*. In this sense, insurance is seen as an instrument that contributes to the protective function through efficient compensation for damage to insured property. Instead

[3] More on the insurance contract: Marija Karanikić Mirić, „Forma ugovora o osiguranju", *Tokovi osiguranja*, No. 1/2025, 22–25. Insurance of apartments, cars, industrial facilities, professional liability insurance, vacation rain insurance, business interruption insurance, etc., are just some of the various forms of property insurance.

[4] On the risk in insurance: Slobodan Ilijić, „O pravnim aspektima rizika i polise osiguranja u prednacrtu Građanskog zakonika Republike Srbije (2015)", *Tokovi osiguranja*, No. 2/2018, 31–41.

[5] Nataša Petrović Tomić, *Pravo osiguranja*, *Sistem, Knjiga prva*, Službeni glasnik, Belgrade, 2019, 437.

[6] On how changes in risk affect the liabilities of the insured: Katarina Ivančević, „Pravne posledice promene rizika u toku trajanja ugovora o osiguranju imovine", *Evropska revija za pravo osiguranja*, No. 3/2021, 10–22.

[7] On the difference between the traditional and modern understanding of insurable interest, especially regarding banks' interest in offering insurance to their clients as part of benefit programs: Nataša Petrović Tomić, Nenad Grujić, "Kolektivno ugovaranje osiguranja od strane banaka – kanal distribucije i faktor finansijskog opismenjavanja korisnika osiguranja", *Osiguranje, Hrvatski časopis za osiguranje*, No. 12/2025, 17–23.

of going through the damage compensation process, which involves initiating appropriate proceedings against the person responsible for the damage, the holder of material interest in the insured property can directly address the insurer, who, in accordance with the Insurance Law[8] and the Guidelines of the National Bank of the Republic of Serbia,[9] is obliged to settle claims fairly and properly.[10] Although not legally binding, the Guidelines were adopted by the insurance market supervisory authority as recommendations, thus becoming part of *the insurance professional standards*, and indirectly part of positive law, considering the insurer's obligation to act according to *insurance professional standards* pursuant to the provisions of the Insurance Law. Moreover, the supervisory authority (National Bank of the Republic of Serbia) closely monitors whether insurers' conduct during contracting, after contracting, and especially when handling claims complies with the minimum standards set by the Guidelines.[11] Insurers are expected to ensure the protection of consumers by applying and complying the standards prescribed by the Guidelines.[12]

This means that a person who invests in insurance enjoys a dual benefit compared to those who leave their property uninsured: compensation from a solvent co-insurer whose liquidity and solvency is supervised by the National Bank of Serbia, and guarantees of fair and proper treatment, which cannot be expected in proceedings initiated against the liable party. **Property insurance, therefore, creates a win-win situation for those who opt for this type of protection of their material**

[8] Insurance Law, *Official Gazette of the Republic of Serbia*, Nos. 139/2014 and 44/2021 (hereinafter referred to as ZO).

[9] National Bank of Serbia, Guidelines on Minimum Standards of Conduct and Good Practices for Participants in the Insurance Market dated April 20, 2018 (hereinafter referred to as: *Guidelines*).

[10] The social, economic, and broader societal significance of the insurance activity requires insurance companies, when fulfilling rights and obligations, to consider not only their own interest but also the interest of insurance service users: "An insurance company, insurance brokerage company, insurance agency company, insurance agent, and legal entities from Article 98, paragraph 2 of this law, which perform insurance agency activities based on prior consent from the National Bank of Serbia (hereinafter: legal entities from Article 98, paragraph 2 of this law), are obliged to ensure the protection of the rights and interests of the insured, the policyholders, the users of insurance, and third-party injured persons (hereinafter: users of insurance services), in accordance with regulations, professional standards, and good business practices" (Article 15 of the Insurance Law).
To emphasize: insurance companies are required to protect the rights and interests of service users in accordance with *regulations, insurance professional standards, and good business practices*. Users of insurance services generally do not have sufficient knowledge about the insurance service they acquire, which is why insurers, as the stronger party, have numerous obligations before and after contract conclusion aimed at protecting the trust of the users of insurance services. Without protecting this trust, insurance, which has an important economic, social, and societal function, cannot fulfill its purpose.

[11] Ivan D. Radojković, Aleksandar V. Kostić, Maja T. Aleksandrović Gajić, „Načela prihvata rizika i tehničke osnove osiguranja poljoprivrednih kultura", *Tokovi osiguranja,* No. 3/2021, 93.

[12] Herman Cousy, „Changing Insurance Contract Law: An Age-Old, Slow and Unfinished Story", *Insurance Regulation in the European Union: Solvency II and Beyond* (eds. P. Marano, M. Siri), Palgrave Macmillan, London, 2017, 32.

interests.[13] Furthermore, based on practical experience, it can be argued that insurance as an activity holds a natural monopoly, since there is no instrument that provides property protection in such a comprehensive way.

Liability insurance is a contract under which the insurer covers the financial consequences of the insured's liability instead of the insured. As can be seen from the definitions, the fundamental difference compared to insurance of property, which leads to a different legal regime, is the insured subject matter: while the insured subject matter of insurance of property is the insured's *property*, the insured subject matter of liability insurance is the insured's *liability*. The protective function of insurance of property is directed towards the insured who suffered the damage; in liability insurance, the insured who caused damage to another is protected by paying compensation on their behalf, which leads to the emergence of so-called third-party injured persons towards who benefit from the protective function of insurance liability.

II Indemnity principle as the supreme principle of property insurance

When we talk about property insurance, it is typically understood as compensation for damage through insurance, that is, indemnification by the insurer. The principle of full damage compensation**,** one of the most important principles of the law of obligations in the insurance domain, is manifested specifically through the indemnity principle**.** "The awarded compensation must neither serve as punishment for the tortfeasor, nor as a source of enrichment for the injured party."[14] The purpose of indemnity principle in modern insurance law is more than clear: on the one hand, it ensures a moral framework for property insurance by preventing it from going beyond the limits of compensation law.[15] On the other hand, it clearly distinguishes property insurance from insurance of persons.[16] Property insurance contract is

[13] Generally speaking, insurance today is a **highly regulated financial transaction, which has become not only a normal but also a necessary segment of modern social and economic life.** There is intense regulatory activity both by the legislature and supervisory bodies, all aimed at ensuring adequate protection for users of insurance services. *Ibid*., 35.

[14] Marija Karanikić Mirić, *Obligaciono pravo*, Službeni glasnik, Belgrade, 2024, 94–96.

[15] If the insured could receive insurance compensation exceeding the damage they have suffered and proven, insurance would become an object of interest for unscrupulous individuals seeking to exploit it. The legal system cannot accept this, which is why strict application of the principle of indemnity is insisted upon.

[16] Historically, the principle of indemnity played a key role in the development of the insurance business and its acceptance by those who were initially sceptical about this contract due to its aleatory nature, which, out of ignorance, they confused with gambling and generally suspicious transactions. The fear that insurance was not significantly different from speculative activities, on one hand, and suspicion that

concluded with the aim of protecting the insured party, or in some cases, a third injured party against damage. Accordingly, the insurer's liability must be limited to the actual amount of the damage suffered**.** The insured is entitled to be compensated for "the damage, and nothing beyond the actual damage suffered".[17] "In this way, the protective function of property insurance is directly tied to damage indemnification, while also preventing unjust enrichment of dishonest insured parties.[18] On one hand, the insured individuals cannot receive more from the insurer than the value of the damage actually suffered. On the other hand, claims arising from intentionally caused insurance cases are explicitly excluded. All of this is regulated by mandatory norms. Therefore, an insured party is not motivated to intentionally cause damage to the insured property, as in such cases they are *ex lege* deprived of coverage. Only in cases where the damage occurs independently of the insured's exclusive intent, the insured has the right to damage compensation, and even then, only up to the actual amount of the damage**,** taking into account the relation between the sum insured and the actual value of the insured property. This makes property insurance, first and foremost, an economically desirable and then socially acceptable institution."[19]

The application of indemnity principle is particularly important in insurance practice, as it directly affects the claims settlement process**.** Unlike in life insurance, where the insurer, upon receiving notice of the insurance case and relevant documentation, pays out a pre-agreed amount, in property insurance there is *a process for assessing the insurance compensation* that precedes the actual act of indemnification. By its nature, this valuation involves multiple procedural steps and can significantly extend the timeframe of compensation**.** For this reason, one of the main distinctions between property and insurance of persons lies in the burden of proof, accompanying the realization of rights under property insurance is incomparably heavier than in insurance of persons.

What does the term valuation of indemnity exactly mean? When a loss to the insured's property occurs, the first step is to *determine the damage caused*. The burden of proof lies with the insured or the beneficiary, and depending on the case, this can be quite demanding. In transport insurance**,** for example, it is common to engage specialized loss adjusters**,** whose task is to formalize the process and draft

the insured might abuse the insurance contract, on the other, led to the development of the rules and principles characterizing insurance law. This refers to the concepts of insurable interest, the principle of indemnity, and the principles of good faith and fairness. Nataša Petrović Tomić, Mirjana Glintić, "The Hybridization of the Regulatory Framework of Insurance Contract Law: Elements of a New Setting", *Annals of the Faculty of Law*, No. 2/2024, 223–250.

[17] M. Karanikić Mirić (2024), 94.

[18] Historically, the principle of indemnity was established with the aim of preventing the intentional causing of insurance cases. By limiting the insurer's liability to the amount of the actual damage suffered, it became economically unfeasible for the insured to deliberately cause an insurance case.

[19] N. Petrović Tomić (2019), 438–439.

an appropriate report or document accepted by the insurer.[20] According to the main principle of tort and contract law, damages in property insurance should include both the actual damage (*damnum emergens*) and the profit lost (*lucrum cessans*). However, under positive law, the insurer's liability in property insurance is limited to compensation for actual damage**,** while lost profits are only covered by special agreement. This effectively means that, in property insurance, the statutory principle of full compensation for financial loss from the Law on Contract and Torts (ZOO) does not apply *ex lege*.[21] What does this mean for the insured? This is not a favorable solution, because the insured parties would benefit more if they could rely on coverage for the entire loss suffered, rather than having to separately negotiate coverage for the profit lost.[22] In practice, unless otherwise explicitly agreed, the insured will not be in the same financial position as if an insurance case had not occurred. They will receive compensation only for actual damage, which implies partial indemnification. As a result, for the portion of the loss that corresponds to the profit lost, the insured effectively becomes their own insurer. This sends a discouraging message to insured parties, as they are unable to recover the full compensation they expected. An exception exists in crop insurance, where the value of the insured property is determined in a specific manner. In such cases, compensation is not based on the value of crops at the time of damage, but rather at the time of harvest (unless otherwise provided by contract). This approach acknowledges the need for tailored protection in this unique case. The insured has an interest in insuring crops at their harvest value (which includes the profit lost!), as that is when they reach their highest economic value.

The assessment of insurance compensation also involves taking into account the *sum insured*, as it represents the upper limit of the insurer's liability. However, the sum insured does not constitute proof or presumption of the value of the insured subject matter at the time of the insurance case, unless the insurance is concluded on an agreed value basis. The actual value of the insured object at the time of the damage cannot be disregarded. Insurers cannot calculate compensation in accordance with the principle of indemnity without considering the value the insured object held at the moment of the insurance case . The burden of proving the value rests with the insured.[23] The principle of indemnity leads to the application of two

[20] Nataša Petrović Tomić, *Osiguranje robe u međunarodnom pomorskom prevozu*, University of Belgrade Faculty of Law, Belgrade, 2009.

[21] For more detail: Marija Karanikić Mirić, *Krivica kao osnov deliktne odgovornosti u građanskom pravu*, Faculty of Law, University of Belgrade, Belgrade, 2009, 177 and following.

[22] Nataša Petrović Tomić, *Posebna pravila koja se odnose na osiguranje imovine i osiguranje od odgovornosti, Priručnik za obuku za polaganje ispita i sticanje zvanja ovlašćenog posrednika i ovlašćenog zastupnika u osiguranju*, Privredna komora Srbije, Belgrade, 2024, 89–90.

[23] Various methods of determining the value of an property may be taken into account: market value, use value, agreed value, and new value. *Ibid*., 90–92.

rules. First, the insured cannot collect more than the value of the insured object at the time of the damage occurrence, even if multiple insurance contracts have been concluded for the same object. Second, the insured cannot receive more than the actual value of the property, regardless of the sum insured under the policy. As these rules make clear, the value of the insured object acts as a limiting factor in the process of assessing compensation.

The Law of Contract and Torts (ZOO) specifies that rights from an insurance contract belong only to those who, at the time of the damage occurrence, held a material interest in the insurance case not occurring. This introduces the requirement of insurable interest into property insurance, distinguishing it from insurance of persons.

The concept of insurable interest is closely linked to *the purpose of property insurance: it must benefit the party taking out the insurance or the person on whose behalf it is taken*.[24] If insurance contracts and the exercise of insurance rights were allowed without the existence of an insurable interest, it would pave the way for lump-sum (or arbitrary) payouts. Moreover, *the existence of insurable interest determines who qualifies as the insured*. It consists of the need to secure economic protection against specific risks through the payment of insurance compensation. In the context of insurance of property, anyone who stands to suffer damage due to the destruction or deterioration of the insured property is considered to have a valid insurable interest in concluding an insurance contract (such as the owner, co-owner, depositary, lessee, or pledgee). In liability insurance, any person exposed to legal liability and seeking protection against potential damages caused to others is considered to have an insurable interest.

III Efficacy of indemnification – payment of insurance compensation

As highlighted in theory, the factors influencing the assessment of insurance compensation are: 1) the amount of the damage caused; 2) the sum insured; and 3) the value of the insured subject matter.[25] From the perspective of the practice, each of these three elements may represent a limit, i.e. the upper boundary of the insurer's liability.[26] None of them is generally more important than the others, but specific circumstances may make one particularly relevant. For instance, if the value of the insured subject matter and the sum insured match, the insured will receive compensation equal to the amount of damage sustained, provided no deductible (franchise) has been agreed upon. If the value of the insured subject matter exceeds

[24] N. Petrović Tomić (2019), 446.
[25] *Ibid*., 447.
[26] *Ibidem*.

the sum insured, the insurance compensation will not cover the full extent of the damage. On the other hand, if the sum insured is greater, the damage itself becomes the upper limit of the insurer's liability.

The sum insured is significant in determining insurance compensation, as it represents the amount by which the insured has covered the insured risk. The sum insured corresponds to the value of the insurable interest in the specific property, and therefore serves as the upper limit of the insurer's liability in the event of total loss. In most cases, *the sum insured in property insurance has a purely technical function*.[27] It is neither proof nor a presumption of the value of the insured subject matter at the time of the insurance case, unless the insurance contract was concluded on an agreed value basis. Special rules apply if the sum insured is greater than the property's value (overinsurance) or lower (underinsurance).

When discussing the value of the property, the complexity of property insurance becomes immediately evident. In insurance practice, a distinction is made between the value at the time the insurance contract is concluded and the value at the time the insurance case occurs.[28] Logically, the property's value at the time of contracting is relevant for calculating the insurance premium (*value for insurance*). The higher the market (or use, or other) value of the property, the higher the premium. Since it is expected that the property will lose value through regular use or simply over time, the same value is not used when calculating compensation. Thus, the property's value at the time of the insurance case serves as the basis for calculating insurance compensation (*value for compensation*). The compensation that the insured may receive depends on the value of the damaged or destroyed property at the time of the insurance case.

By introducing two types of property value, insurers intended for insurance to cover only the *actual damage* sustained by the insured.[29] When paying out indemnity, depreciation is considered, most often due to wear and tear from regular use, but other elements that contribute to the depreciation of the insured property may also be considered.

The amount of compensation also depends on whether some form of the insured's participation in the loss has been agreed upon (a deductible or mandatory participation, i.e. insured's retention). There are significant differences between these two modalities. "Mandatory participation in the damage, as the term implies, refers to the portion of the damage that remains at the policyholder's expense, regardless of the cause or the amount of the damage. The arrangement of self-retention means

[27] Unlike in property insurance, in insurance of persons the sum insured is an important element and, as such, cannot be omitted. If the contracting parties fail to specify the amount of the insured sum, the contract does not produce legal effect.

[28] N. Petrović Tomić (2019), 451.

[29] Branko Jakaša, *Pravo osiguranja*, Informator, Zagreb, 1972, 178.

the insured is not provided with full coverage. It is mandatory in the sense that the insured may not insure it with another insurer. Thus, mandatory participation (insured's retention) is a *condition of coverage*."[30] Deductibles were introduced to reduce the frequency of so-called minor (trivial) claims or discipline insureds by making them bear a certain percentage of the loss in every case. In addition, deductibles have two other significant effects: 1) reduction of administrative costs: they make it possible not to pay out minor claims, which, due to their frequency, increase the cost of processing claims as well as the insured's costs related to reporting and managing the claims process; and 2) reduction of the insurance premium: as a general rule, the higher the deductible, the lower the insurance premium.

When determining the amount of insurance compensation, in addition to the time of the insurance case, significant importance is also given to the location at which the value of the insured property is assessed. The place of damage assessment is usually stipulated in the insurance terms and conditions, and may be: the location of the insured property (commonly for real estate), the place of dispatch of goods, the destination point, the place where the damage occurred, the residence of the insured, etc.

Indemnity does not only include the amount of the damage itself, but also repair costs, salvage expenses, and in liability insurance - legal defense costs, court expenses, and similar. The amount of compensation to be paid, as well as the future status of the insurance contract, depends on whether the damage is classified as total or partial.

The term total loss refers to the *complete disappearance of the insured property* due to the occurrence of an insurance case (destruction or disappearance of the property as such). In property insurance, in the event of a total loss, the compensation cannot exceed the property's value at the time of the insurance case.[31] The compensation amount is calculated by deducting the residual value from the value of the insured property as determined in the contract. Since the subject matter of insurance no longer exists, the legal relationship established by the insurance contract ceases to exist as well. The insurer retains the right to the premium for the current insurance year.

The term *partial loss* encompasses all cases of damage to the insured property. The assessment method and the indemnity owed by the insurer depend on whether the damage can be repaired. The idea is to pay an *indemnity equal to the cost of repairs*, in order to restore the property to its original, i.e. functional condition. This introduces the concept of replacement value, which represents the limit of the insurer's liability in the case of partial loss. Thus, a distinction is made between an insurance case resulting in damage that can be repaired and one causing irreparable

[30] Nataša Petrović Tomić (2019), 458.

[31] Yvonne Lambert-Faivre, Laurent Leveneur, *Droit des assurances,* Dalloz, Paris, 2017, 420.

damage. In the first case, the indemnity corresponds to the *costs of repair,* i.e. the expenses necessary to restore the property to its original state. If the repair costs exceed the value of the insured property at the time the insurance case occurred, the situation is treated as an economic total loss. The principle of cost-efficiency and the protection of the insured's interests require the application of rules governing total loss settlements, even if the damage is formally classified as partial. In property insurance, replacement value refers to the purchase value of the property reduced by the depreciation percentage. In liability insurance, the replacement value is determined for each property *in concreto*, and primarily depends on the property's condition and maintenance.

Since partial loss may occur multiple times during the insurance period, the question arises as to how this affects the insurance contract. From the insured's perspective, it is essential to determine whether the insured object remains covered after a partial loss, proportionate to their remaining value, and whether the sum insured will be modified.

The solution provided under the Law on Contract and Torts (ZOO) represents one of two possible approaches to the issue.[32] According to domestic law, if multiple insurance cases occur consecutively within the same insurance period, compensation for each event is determined and paid in full based on the total sum insured, without reduction for any amounts previously paid during that period.

IV Relationship between property insurance and the right to compensation for damage

In practice, it is not uncommon for the occurrence of an insurance case to give rise to extra-contractual civil liability. In such cases, the insured acquires rights on two separate legal grounds. First, in the capacity of an injured party (claimant), they may request compensation for damage from the tortfeasor. Second, in the capacity of the insured, they may claim compensation from the insurer under the insurance policy. Therefore, *there exists a concurrence of two legal grounds for compensation*, and it is important for the legal system to regulate the relationship between these claims.

The concept of the prohibition of cumulation of rights refers to *the prohibition of simultaneous realization of both rights in their full amount:* namely, compensation from the insurer under the insurance contract, and damages from the liable third party under civil liability.[33] This, however, should not be understood as a prohibition for the insured to pursue claims against both the insurer and the tortfeasor, nor should

[32] The other, as accepted in French law, provides that the sum insured is reduced after each indemnity payment during the insurance period.

[33] Predrag Šulejić, *Pravo osiguranja*, Faculty of Law University of Belgrade, Belgrade, 2005, 267–278.

it be interpreted as imposing a sequence of enforcement or recovery. Rather, the prohibition applies only to *receiving more than the actual damage sustained*, as such overcompensation would have several negative consequences. There are several reasons for this restriction.

In comparative law, it was until recently widely accepted that cumulation of rights is not allowed in property insurance, whereas it is permitted in insurance of persons.[34] This distinction undeniably arises from the principle of indemnity, which fundamentally differentiates these two types of insurance. This distinction is also recognized in our domestic legal system, with an exception pertaining to accident insurance.

The prohibition of cumulation may be implemented in two ways: directly (by prohibiting the insured from receiving more than the amount of the actual loss on both grounds) and indirectly (by granting the insurer the right of subrogation after paying compensation under the policy, whereby the insurer steps into the shoes of the insured with respect to their claim against the liable party responsible for the insurance case).[35] Both ways are recognized in our domestic law. The prohibition of cumulation in property insurance is enforced through the principle of subrogation, whereby the insurer acquires the insured's rights against the party responsible for the damage (ZOO, art. 939). In insurance of persons, both approaches are applied: cumulation is permitted by prohibiting the insurer from exercising subrogation against the liable party (ZOO, art. 948, para. 1), and the insured is entitled to receive payment from both the insurer and the tortfeasor (ZOO, art. 948, para. 2). It should be noted, however, that the prohibition of subrogation by the insurer in insurance of persons does not absolve the responsible party from liability. It is the insured or the beneficiary who retains the right to file a claim for damages against the tortfeasor, thereby preventing insurance of persons from effectively becoming liability insurance for the wrongdoer. These rules are mandatory in nature, and deviations from them are not permitted.

[34] Historically, in the former Yugoslav region, there was a time when even life insurance did not allow double recovery. This was the case under the *Austro-Hungarian Commercial Code* and t*he Serbian law on compensation for death or bodily injury*. The latter stipulated that a railway operator was liable for injuries or death in railway accidents, while explicitly excluding the possibility of combining compensation from insurance with damages from the responsible party. See: Zlatko Petrović, Vladimir Čolović, Duško Knežević, *Istorija osiguranja u Srbiji, Crnoj Gori i Jugoslaviji do 1941. godine*, Belgrade, 2013, 73.
The same tendency appears in domestic legal theory. For example, Professor Jankovec believed that combining insurance and tort-based compensation was justified only in cases of serious fault by the tortfeasor. If the damage was caused intentionally or by gross negligence, double recovery was acceptable. See: Ivica Jankovec, „O kumuliranju naknade iz obaveznog osiguranja o odgovornosti sa naknadama, odnosno davanjima po drugim pravnim osnovama", *Zbornik Pravnog falkulteta u Novom Sadu,* 1974, 203–218.
[35] P. Šulejić, 267.

V Subrogation – the insurer's role in preventing insurance from becoming its own opposite

One of the most intriguing principles for legal professionals in the field of insurance is the concept of subrogation.[36] Namely, the Law on Contract and Torts (ZOO) explicitly states that, upon payment of compensation, all rights of the insured against any third party liable for the damage, on any legal basis, are transferred to the insurer, up to the amount of compensation paid. This transfer of rights occurs *ex lege* upon the payment of compensation by the insurer to the insured. Since subrogation arises from the law, the insurer is not obligated to notify the third party liable for the damage. The ZOO also makes it clear that the effects of subrogation commence only at the moment of compensation payment, and not before. This leads to the following legal consequences: from the time of compensation payment, the insured loses the right to pursue claims against the tortfeasor or their liability insurer, as that right is transferred to the insurer.

Based on the interpretation of the ZOO and judicial practice, it is important to emphasize that subrogation requires the cumulative fulfillment of two conditions. The first condition is that *the insurer must have paid compensation under the insurance contract to the insured or to the injured party*. Legal theory rightly points out that the insurer cannot file a claim for damage against the tortfeasor under tort law prior to paying the insurance compensation, for at least two reasons.[37] First, the insurer lacks active legal standing to file a claim for damages, as it is not itself the injured party and therefore does not meet the general requirements for asserting a right to compensation (namely, the causal link between the wrongful act and the resulting damage). Second, and perhaps more clearly, the insurer does not suffer damage in the proper legal sense of the word. The compensation paid to the insured does not constitute a loss for the insurer but is rather a contractual obligation, factored into the premium calculations under specific insurance contract. The compensation due to the insured upon the occurrence of an insurance case is offset by the premiums collected. The insurer is thus fulfilling his contractual obligation. The amount of compensation paid constitutes the upper limit of the subrogation claim. The essence of subrogation is that the insurer may recover from the tortfeasor only up to the amount it paid to the insured This rule serves a protective function in favor of the insured, whose right to compensation under general tort principles has legal priority over the insurer's subrogation right. Only once the insurer has paid compensation and fulfilled his contractual obligation can it be said that the insured has lost a right serving an equivalent compensatory function. The second condition for subrogation is that *there must be an*

[36] More on subrogation trends: Wei Zou, Quiqwu Li, "Wei Zou, Quiqwu Li, „Uporedni trendovi u regulisanju prava oštećenih lica, štetnika i Fonda za nadoknadu šteta prouzrokovanih neosiguranim motornim vozilima kroz pravo subrogacije", *Evropska revija za pravo osiguranja*, No. 2/2022, 18–28.

[37] Y. Lambert-Faivre, L. Laveneur, 449.

existing claim for damages against a third party, regardless of the legal basis. Naturally, this condition will not be met in all cases. In such cases, the insurer bears the burden of indemnification, which is consistent with the nature of his contractual promise. However, when both subrogation conditions are met, the insurer plays a key role in ensuring that the principle of compensation, stipulated in the ZOO, is fulfilled: namely, that the party who caused the damage ultimately bears the cost of compensation. However, transfer of rights of the insured to the insurer if the damage was caused by a person who is related to the insured in a direct line of kinship, a person for whose actions the insured is legally responsible, a person living in the same household as the insured, or an employee of the insured, except when such persons caused the damage intentionally.[38] An exception is also made if any of these persons is covered by liability insurance. In that case, the insurer is subrogated to the rights of the insured against such individuals, but enforcement occurs against the liability insurer of the person at fault.

Insurance professionals are well aware that subrogation carries significant legal consequences. Primarily, it results in the transfer of rights from the insured to the insurer against the liable party. This brings about concrete legal effects. Firstly, the insurer assumes the insured's rights against the tortfeasor and is, accordingly, subject to all defenses and objections (e.g. set-off) that the tortfeasor could raise against the insured, but only up until the moment subrogation takes effect, which is the moment of compensation payment. Any defenses arising after this point cannot be asserted against the insurer. Also, once compensation is paid, the insured loses the right to bring a claim for damages against the tortfeasor.

To fully understand the positions of the insured and the tortfeasor within the context of subrogation, it is important to emphasize that the insured retains the choice of whether to claim compensation from their insurer or directly from the tortfeasor. Entering into an insurance contract does not affect the insured's discretion to select the debtor. Since most insured persons perceive the insurer as more solvent and capable of providing faster compensation, they usually opt to claim from the insurer, enabling the insurer to exercise the insured's rights against the tortfeasor.[39] In cases where, due to limits in insurance coverage, the insured does not receive full compensation, the principle applies that the transfer of rights from the insured to the insurer *must not harm the insured*. This principle resolves any potential conflict of interest between the insurer and the insured.[40] Therefore, although subrogation undoubtedly serves the interests of insurers, *it is primarily tied to the principle of indemnity and, as such, serves to protect the public order in insurance law*.

[38] These are individuals whom the insured would not ordinarily sue, regardless of whether insurance coverage exists, such as close relatives, or those for whose actions the insured bears legal responsibility, such as employees. As one French author aptly put it, recognizing the insurer's right of subrogation in such cases would amount to allowing the insurer to "take back with one hand what it has given with the other".

[39] P. Šulejić, 377.

[40] Y. Lambert-Faivre, L. Leveneur, 463.

VI Conclusion

Property insurance represents a type of insurance that is of immeasurable importance for the uninterrupted functioning of life in modern society. By compensating for destroyed or damaged assets of individuals and/or legal entities, through a process characterized by efficiency and consideration of the interests of service users, insurers perform a socially beneficial function. The role of insurance ensures that losses or damages to property are swiftly compensated, allowing business operations to continue without interruption.

It must be emphasized **that insurance, as an industry, holds a natural monopoly when it comes to the protection of property, given that no competing service offers the same scope or quality of protective function.** To make optimal use of the benefits provided by insurance protection, it is essential to adopt a strategy for promoting property insurance and increasing insurance literacy among citizens as service users. A citizen who has invested in insurance is in a more favorable position than one who has not. It is important to highlight that in many cases, premium contributions do not place a significant financial burden on the client's budget. A prime example is home insurance against basic risks, which typically costs approximately one euro per square meter.

Our regulatory framework for property insurance, although established under the Law on Contract and Torts (ZOO) adopted in 1978, provides a solid foundation for the development of new insurance services. However, if sustainable growth in the insurance sector is to be encouraged, amendments to the regulatory framework should be expected in the foreseeable future. It should be emphasized that insurers play a key role in creating a stimulating environment for the development of property insurance. Indeed, they have significantly contributed to this by establishing, through insurance conditions, all the necessary prerequisites for the development of various forms of property insurance tailored to the needs of protecting different types of property assets.

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