

Civil Liability Insurance – Settlement with Third Parties

The Greek Civil Law Perspective

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Introduction

The Civil Liability insurance is governed by article 25 of the Insurance Law (L 2496/1997). According to the provisions of article 25, the civil liability insurance includes expenses directly resulting from the defense and settlement of claims brought by third parties against the policy holder and which result from acts or omissions of the policyholder, for which the provision of insurance cover had been agreed. No cover shall be provided if the acts or omissions arise from willful misconduct on the part of the insured or the policy holder.

The civil liability insurance is a form of insurance where the insurance cover is provided for the liabilities created against the policyholder arising out of his civil liability. The most common form of civil liability insurance is the motor insurance. This is by law a compulsory insurance governed in Greece by specific regulation (L 489/1976). Other forms of compulsory civil liability insurance are governed by article 26 of the Insurance Law, which is of general application to any compulsory insurance except to the motor insurance. In case of compulsory insurance, article 26 of the Insurance Law provides that the third party has a direct claim against the insurer up to the limit for which the insurance is compulsory. Furthermore, the aforementioned article 26 provides that if the insurer makes a payment to the third party, although not obliged to do so pursuant to the provisions of the insurance policy, the insurer shall be subrogated to the third party's claim against the policy holder up to the amount paid. It is questionable whether the aforementioned provisions of article 26 of the Insurance Law are by analogy applicable to the non compulsory civil liability insurance governed by article 25 of the Insurance Law.

The non compulsory civil liability insurance covers the expenses made (a) for the defense and (b) for the settlement of claims brought by third parties against the policy holder.

Under Greek Civil Law perspective, settlements with third parties under a non-compulsory civil liability insurance may have three forms: (A) the form of a Liberation Promise/Claim, (B) the form of an Agreement in Favor of a Third Party and possibly (C) the form of an Agreement for the Assumption of Debt.

A. The settlement with Third Parties as a Liberation Promise/Claim

According to the prevailing authority in Greece, the civil liability insurance is considered as being a kind of promise by the insurer to the policy holder to pay the third party (Liberation Promise).

Such promise is governed by article 478 of the Greek Civil Code. Article 478 of the Greek Civil Code provides that, if one person (here the insurer) has promised to a debtor (here the policy holder) that he shall pay the latter's debt, in case of doubt the creditor (here the third party who suffered damages) shall not acquire any right to enforce such promise. The liberation promise is made from the new debtor to the original debtor without the involvement of the creditor. The liberation promise does not create rights and obligations vis-à-vis the creditor. The person who promises to the original debtor that he will pay the latter's debt to the creditor has, by virtue of this promissory contract, the obligation against the original debtor to fulfill his payment obligation and make such payment to the creditor. The original debtor, and not the creditor, has the right to demand the fulfillment of the obligation of the promissory contract (article 478 of the Greek Civil Code). The original debtor is not released from his debt to the creditor [except only through a payment made by the promisor (article 317 of the Greek Civil Code)]. Therefore, the liberation promise may in principle have the form of a *non-genuine contract in favor of a third party*. Rendering a contract in favor of a third part *genuine* depends on the intention of the contracting parties (i.e. the original debtor and the promisor). In such a case the third party acquires a direct right against the promisor and, therefore, the third party becomes a direct creditor of the promisor. This could be made either by an explicit agreement between the insurer and the insured or through the application of the provisions of article 478 of the Greek Civil Code, which provide that *in case of doubt* (i.e. in case it is not certain whether A and B have agreed that C acquires a direct claim against A),

such direct claim is not awarded to C and C cannot enforce its rights directly against A. It results from article 478 of the Greek Civil Code that such direct claim is awarded to the third party by way of construction of the agreement so that there is no doubt as to the enforceability of third party's rights against the promissor.

B. The settlement with third parties as a Contract in Favor of a Third Party

From the above analysis it results that the civil liability insurance may also be considered as being an agreement in favor of a third party. According to this approach, such an agreement is concluded between the policy holder and the insurer and it is in favor of the third party who suffered damages covered by the civil liability insurance. The agreement in favor of a third party is governed by article 410 of the Greek Civil Code, which provides that, if a person has accepted a promise of performance in favor of a third party, such person may demand from the promissor to pay the third party.

Article 411 of the Greek Civil Code further provides that the third party may demand the performance directly from the promissor *only* if it appears that such was the intention of the contracting parties or if such conclusion results from the nature and the purpose of the contract (*genuine agreement in favor of a third party*). Therefore, *in case of doubt* an agreement in favor of a third party *is not* a genuine agreement in favor of a third party, i.e. there is no direct claim of the third party against the promissor. A typical genuine agreement in favor of a third party is a life insurance. In this type of insurance the third beneficiary has a direct claim against the insurer for payment.

In the civil liability insurance it is upheld that the insurer has an economic interest that the claim, covered by the insurance policy, is not managed by the policy holder to the detriment of the insurer. This is why the civil liability insurance policies provide in practice that the policy holder cannot – without the prior consent of the insurer – recognize a claim covered by the insurance nor make any agreement aiming at the amendment of the nature and/or the content of the claim, i.e. novation, prolongation, change of the payment terms, change of the interest payable etc. Furthermore, in the civil liability insurance the policy holder does not have in principle the right to pay the third party without prior notification to the insurer in order for the latter to be in a position to contest the claim. It is the prevailing opinion in Greece that, civil liability

insurance being from a legal point of view an agreement between the insurer and the policy holder, the third party has *a priori* no direct claim against the insurer.

However, in my opinion, it could be agreed between the insurer and the policy holder that the third party has a direct claim against the insurer. If this is *explicitly* agreed, such civil liability insurance would be a genuine agreement in favor of a third party governed by the specific terms of the insurance policy and by article 411 and seq. of the Greek Civil Code. In the case of a civil liability insurance being a genuine agreement in favor of a third party, a number of issues may arise. I would summarize some of them as follows:

- (a) Is it possible for the insurer and the policy holder to cancel the rights of the third party by an *actus contrarius*? The answer to this question is provided for in article 412 of the Greek Civil Code, according to which the two contracting parties cannot agree on the revocation of the right of the third party after the declaration by the third party to the promissor that the third party will exercise his rights. On the other hand, before making such declaration, the revocation of the rights of the third party by an *actus contrarius* is valid.
- (b) What are the rights of the third party in case of defect of the insurance policy? According to article 414 of the Greek Civil Code, the promissor may oppose to the third party any objection arising out of the agreement, i.e. in case of a defect of the insurance policy, the insurer may refuse payment. However, it is to be noted that article 26 para 2 of the Insurance Law provides that the insurer may not in principle raise objections arising out of the insurance contract against the third party which has sustained the loss, unless the person who suffered damages is either the policy holder or a person closely related to the policy holder (spouse, relatives etc.), it is questionable whether this special provision of article 26 para. 2 of the Insurance Law is of general application by analogy to any civil liability insurance.
- (c) What are the rights of the third party in case the insurer does not fulfill its obligations under the insurance policy? According to the prevailing opinion, in a genuine agreement in favor of a third party if the promissor does not fulfill his obligations against the third party, such third party has against the promissor (a) the primary claim for fulfillment and (b) claim for damages. It is, however, questionable whether the third party has also the right to terminate the agreement. In my view this would not be acceptable in the case of an insurance policy.

C. The settlement with third parties as an Assumption of Debt

In my view the settlement with third parties in civil liability insurances may be also achieved through the conclusion of an agreement between the insurer and the third party. Such an agreement may be an agreement for the assumption of debt governed by articles 471 and seq. of the Greek Civil Code. According to article 471 of the Greek Civil Code, through an agreement concluded with a creditor a person may assume a debt of another. In the case of civil liability insurance the creditor would be the third party who suffered damages, the debtor would be the policy holder and the new debtor (*assumer*) would be the insurer. In the Greek law we can distinguish two kinds of assumption of debt: (i) the *privative assumption of debt* and (ii) the *cumulative assumption of debt*.

In the case of the privative assumption of debt, the old debtor is released and the obligation is transferred to the new debtor (*assumer*). In the case of the cumulative assumption of debt, although the new debtor undertakes the obligation, the old debtor is not released (article 477 of the Greek Civil Code) so that the creditor has two debtors, who are jointly and severally liable for the obligation.

With reference to the relations of the assumer with the creditor, the assumer has the same duties and the same objections vis-à-vis the creditor as the old debtor (articles 472 and 473 of the Greek Civil Code). Consequently, if it is agreed between the third party and the insurer the assumption of debt of the policy holder arising out of a civil liability agreement, the insurer may oppose against the third party any objections deriving from the original debtor-creditor relationship, such relationship being the cause of the damage covered by the civil liability insurance policy. However, if the old debtor has a counter-claim against the creditor, the assumer *cannot oppose* such counter-claim in off setting against the creditor (article 473 para. 2 of the Greek Civil Code). On the other hand, the assumer cannot invoke any objections arising out of the life insurance policy (e.g. nullity) against the creditor (article 474 of the Greek Civil Code). Obviously any defect of the assumption agreement itself may be invoked by the assumer against the creditor.

The answer to the question whether a settlement agreement concluded between the insurer and the third party who suffered damages is a privative assumption or a cumulative assumption is provided by article 477 of the Greek Civil Code, according to which, if a person has, through the conclusion of a contract with the creditor, promised payment of a debt of another, the debtor shall not be released *...unless the release of the old debtor clearly results from this contract*. Therefore, *in dubio* a settlement agreement between the insurer and the third party would be in principle a *cumulative assumption of debt*.

A further question would be whether the insurer may agree the assumption of the debt with the third party without the consent of the policy holder. In my view, because of the potential negative effects that such a settlement agreement could have for the policy holder (e.g. this may result to constrains of the policy holder's legitimate interest to defend himself and/or his reputation in case of a tort liability, to the increase of the premium and/or the overall insurance costs payable by the policy holder, to the subrogation of the insurer to the third party claim against the policy holder etc.), such settlement agreement would not be possible unless it is permitted under the civil liability insurance policy or with the prior consent of the policy holder.