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# Recourse Claims between the Parties to the Liability Insurance Contract

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The aim of this article is to discuss the recourse settlements between the parties of the insurance relationship as soon as the compensation claims of the injured party are fully satisfied. The author outlines the differences between typical and non-typical regression, and subsequently analyzes the cases where the insurer can report recourse claim to the other party of the civil liability insurance (OC). She presents cases where this entitlement can be reported in compulsory liability insurance and discusses the potential legal basis for recourse claims of the insurer in voluntary liability coverage. Furthermore, she presents interpretative doubts related not only to the qualification of such a claim, but also to its admissibility. In summary of her deliberations the author proposes the use of an interpretation that will remain in line with the objective of liability insurance; the functions to be fulfilled by the insurance as well as the recognition that, in the case of certain types of damage, the direct perpetrator should not be relieved of material responsibility for the damage.

**Keywords:** liability insurance, non-standard (special) regression, typical regression, compulsory insurance and voluntary insurance, legal status of the policyholder, the insured perpetrator of the damage and the insurer

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## 1. Introduction

Liability insurance (OC) has long been of high interest to legal doctrine and judicature. The cause of such a state of affairs is not only the specificity of this insurance but primarily its dynamic development. This insurance also plays an increasingly important role in the brokerage market, as it is difficult to conduct brokerage activities without knowing the principles of liability insurance as well as problems related to their interpretation.

Despite the interest in liability insurance, little attention has been paid to settlement issues between the parties of the liability insurance and between the insurer and the direct perpetrator of the damage. The decisive factor is attributed to the protection of the injured party and the functions that this insurance covers in relation to that entity, giving the injured party greater assurance of compensation for the resulted injury. Moreover, the issue of settlements between co-responsible parties, where the loss of an injured person has been compensated is of great importance not only because of the broker's role in developing the provisions of a specific insurance contract for an insurance seeker, but primarily because the insurance agent may also be charged with the obligation to reimburse a certain amount of insurance benefit to the insurer. Therefore, the issue of recourse claims in liability insurance requires thorough deliberation.

## 2. The concept of recourse in civil liability insurance

When analyzing the recourse claim in civil liability insurance, it should be emphasized that the situation of parties in this legal relationship is shaped differently than in

other types of insurance. The policyholder in this case is the perpetrator of the damage and simultaneously the subject responsible for compensating it *in solidum* with the insurer. In other property insurances, the policyholder has a status of an injured party and the insurer takes the responsibility for compensation *in solidum* with a third party outside the contractual relationship. Yet a different situation occurs in case of parties in personal insurance, especially life insurance where there is another entity that is the beneficiary<sup>1</sup>. In any case the outlined differences have a significant impact on the problem of a recourse claim. While the existence of a claim on the side of the insurer, who has paid the insured indemnity for destroyed or damaged property is obvious<sup>2</sup>, the granting of this claim in civil liability insurance can cause justified doubts. They result from the fact that apart from the regulations relating to certain compulsory insurance there is a lack of separate legal basis for recourse which raises a question of the general admissibility of reporting this right. The analogous application of Article 376 of Civil Code does not solve the problem. Although it is permissible to consider *per analogiam* only the first sentence of §1 of this regulation, which indicates that the content of the existing legal relationship between the co-debtors decides whether and in what areas they may demand repayment from the remaining co-debtors. Certainly, it is not appropriate to refer to the principle of equal division which results from the second sentence of the quoted regulation. This is the only way to comprehend the possibility of applying the regulation of Article 376, although certain reservations may result from the application of analogy only to a part of that regulation. However, this links with an additional question whether this regulation constitutes a sufficient basis for the insurer's recourse and in which cases it may be used. The analysis of the legal status as well as the insurance practice leads to the conclusion that the insurer may request the reimbursement of paid insurance benefits to many different entities responsible for the resulted damage.

### 3. The legal nature of the policyholder's claim against the insurer

It is important to ascertain whether a claim granted to a policyholder who corresponds *in solidum* with the insurer has actually the nature of the recourse claim. It is undisputed that the policyholder who has compensated the loss can apply to the insurer with a claim for reimbursement of the indemnity if he or she proves that all the conditions of his contract have been fulfilled. This is the basic purpose of civil liability insurance, which was its oldest form. The scope of this claim is determined by two elements: the amount of compensation paid by the policyholder and the amount of the guarantee sum indicated in the agreement. Depending on the circumstances of a particular case, the policyholder will therefore be entitled to demand reimbursement of

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<sup>1</sup> However, in the accident insurance policy, the policyholder is also the victim of an accident specified in the insurance contract. The issue of a recourse in personal insurance is also a matter of dispute. In older legal literature it has been widely acknowledged that in these insurances there is no place for insurer's recourse. This is discussed in more detail in E. Kowalewski. 2002. "Business Insurance Law," 2<sup>nd</sup> edition, Bydgoszcz-Toruń p. 243. According to this author, the recession can occur if the insurer's benefit is in the form of compensation, at least partially (e.g. reimbursement of medical expenses) and when the insurance contract provides for the relevant provision.

<sup>2</sup> Of course, I mean property insurance. The regression has a one-way nature i.e. it is granted to the insurer against the perpetrator. On the other hand, the perpetrator of the loss cannot claim a recourse claim against the insurance company. The legal doctrine assumes that the legal basis for this recession is Article 828 of Civil Code.

the spent sum in full or in part<sup>3</sup>. But is such a claim determined by the nature of the recourse claim? The answer to this question is not simple, as it depends on the acceptance of the construction of the recourse claim. In the doctrine of civil law two opposing positions have emerged in this regard. According to the supporters of a narrow attitude, one general regress institution cannot be constructed. The essential feature is its self-containedness, resulting from the fact of payment by one of the persons obliged under different obligations<sup>4</sup>. An opposite point of view is represented by A. Szpunar<sup>5</sup>, who emphasizes that the legal nature of a recourse claim is different and depends on the legal relationship between the parties. The regression institution should be as wide as possible (*sensu largo*) so that it covers all those claims that serve similar purposes. Regression presented in this manner is an overriding concept, and is a collective term that defines a whole range of situations<sup>6</sup>. There are also authors who emphasize that the recourse claims that occur in insurance differ significantly from the recourse claim "in the ordinary sense of this word"<sup>7</sup>. According to W. Warkało this happens because the insurance recession causes an entity transformation of the granted claim<sup>8</sup>. Without entering into debate on the nature of the recourse claim it is crucial to note that under the law of business insurance any of the above concepts can be defended. The policyholder has the right to demand from the insurer the return of the compensation in both broad and narrow sense. It is clear, however, that there are two main issues involved in this case: settlements between persons obliged to loss adjustment and in consequence of mutual relations resulting from the existence of an internal relationship between the entities responsible *in solidum* as well as the claim for performance of contract which is granted to a party insured against civil liability. There is no doubt that, regardless of the construction of the recourse claim, the claim of the policyholder comes to the fore as a claim for performance of a liability insurance contract. So even the adoption of a broad concept of recession does not change the fact that the basis for the policyholder's claim is not so much a law provision that clearly gives him such a right, but rather a civil liability insurance contract. The acceptance of this thesis leads to greater clarity of the legal position of the policyholder and in a longer perspective, also the

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<sup>3</sup> It must be borne in mind that it may be important whether the policyholder has paid the indemnity to the injured party with the consent of the insurer, or whether he or she did so against the insurer's will; finally whether he or she repaired the damage voluntarily or through judicial coercion. In some cases, the insurer may refuse to pay the insurance benefit.

<sup>4</sup> B. Lewaszkiwicz-Petrykowska. 1978. "Wyrządzenie szkody przez kilka osób". Warsaw, p. 139. Among the followers of the discussed opinion are also: W. Czachórski, E. Łętowska and A. Ohanowicz.

<sup>5</sup> The author expressed his views in a number of different publications, e.g. "Roszczenie zwrotne zakładu ubezpieczeń przeciw kierowcy pojazdu", *Palestra* 7-8 / 1993, p. 11 ff.

<sup>6</sup> According to this author, entering into the rights of a satisfied creditor is a particular type of recession. Both institutions are dependent on the existence of the original claim and the fulfillment of the service by a certain person, A. Szpunar. 1990. "O roszczeniach regresowych zakładu ubezpieczeń", NP 7-8/1990, p. 38. An opposite view is held by G. Bieniek. 1978. "Roszczenia regresowe zakładu pracy wobec pracownika". Warsaw, p. 21. According to this author, subrogation and recourse claim are two separate and independent institutions. Therefore, a claim of an insurance company against a third party is not a recourse. It seems that the position of the last lawyer is isolated.

<sup>7</sup> W. Warkało. 1974. "Zbieg roszczeń, regres i subrogacja w polskich ubezpieczeniach gospodarczych i społecznych", *Wiadomości Ubezpieczeniowe* 1974, No. 3, p.6. According to this author, both regression and subrogation in insurance law differ from regression and subrogation of universal law. W. Marek, "Roszczenie regresowe ubezpieczyciela...", p. 176 ff.

<sup>8</sup> W. Warkało, "Odpowiedzialność odszkodowawcza...", p. 40

insured. Both the source of the policyholder's claim for the compensation paid to the injured party as well as the nature of the claim are rejected. The insured party is entitled to it against the insurer because of the fact that it has entered with that entity into a contract of specified content and has fulfilled its terms. Therefore, in order to arrange the existing considerations, it should be stated that the link *in solidum* between the insurer and the policy holder justifies the application, by way of analogy, of Article 376 §1 sentence 1 of Civil Code, but only to the extent to which this provision refers to the content that exists between liable subjects of legal relationship. The reference to the internal layout is not a sufficient criterion for determining the limits of recourse claim, especially that it is evaluative, which in the field of liability insurance does not explain much. In this state of affairs it is necessary to establish situations in which the insurer may claim recourse, which in turn will allow to determine the basis and legal nature of this claim. On the other hand, the legal position of the policyholder is much clearer. This entity can – in any case of fulfilling the conditions of the civil liability insurance contract – apply for it, so depending on the circumstances of a particular case: exemption from the obligation to compensate the loss caused to the injured person or to return the indemnity paid to him or her. In the second case in spite of similarity to the regression *sensu largo* all above we are dealing with a claim for execution of a specific contract. It is of secondary importance to settle the policyholder or the insured with the other entities responsible for the damage including the insurer.

#### 4. Recourse claim of the insurer to the other party of insurance relationship

In the first place, consideration should be given to the admissibility of accepting a solution whereby the insurer has the right to proceed a recourse claim to the counterparty. It would seem that this construction is contrary to the purpose of the liability contract. Any entity that includes civil liability insurance pays contributions primarily to avoid the negative effects of its actions or omissions. Granting the insurer who has fulfilled his insurance obligations a recourse law could jeopardize the legitimate interests of the insuring party. The development of civil liability insurance, and, in particular, the construction of *actio directa* has created not only the possibility, but even the necessity, to grant the insurers a recourse claim also against the other side of the insurance relationship. Nowadays the idea of protecting the injured person comes to the fore and it is so strong that it involves the need to reclassify previously accepted assumptions. Regress which the insurer is entitled to, in relation to the subject of insurance relationship, in the professional literature, was called an atypical regression or specific regression<sup>9</sup>. The recourse granted to the insurer is atypical not only by its name, but also by its legal nature. In this regression, the legal situation of individual entities is presented in a specific way. As T. Sangowski<sup>10</sup> recalls, in civil liability insurance, when the accident occurs, the injured party not the insured person, acquires two separate claims for damages. The insurer's claim against the policyholder is created when he fulfills the benefit to the injured party. This solution leads to the fact that – according to T. Sangowski – the injured person accepts in a way the quasi-insured position, while the insured person has a third party status responsible for the damage.

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<sup>9</sup> See T. Sangowski. 1977. "Regres ubezpieczeniowy", Warsaw p. 144 ff.

<sup>10</sup> T. Sangowski, "Regres...", p. 30. For compulsory insurance see. M. Orlicki. 2011. "Ubezpieczenia obowiązkowe", Warsaw: Wolters Kluwer and numerous texts in this monograph.

#### 4.1. Unusual regress in compulsory liability insurance

The necessity of introducing the right change was noticed first of all in compulsory insurance in which the possibility of raising the recourse against the party of the insurance relationship is provided by the legislator in a clear legal provision<sup>11</sup>. It was done for the first time in § 33 of the Decree of the Minister of Finance of December 9, 1992 on the general conditions of compulsory liability insurance for motor vehicle owners for damages arising from the movement of such vehicles<sup>12</sup>. Appropriate regulations were subsequently introduced into the Act on Compulsory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau<sup>13</sup>. Article 43 of the enacted Act provides for the right of recourse *expressis verbis* listing cases allowing the insurer to recover the reimbursement of compensation paid under liability insurance from the driver of a motor vehicle. In addition to deliberate damage, under the influence of alcohol or other intoxicants or psychotropic substances, specific cases have been introduced for this type of insurance and liability of the driver as a direct perpetrator of the damage. Namely, the perpetrator took possession of the vehicle as a result of the crime, fled the scene or did not have the required power to run this type of vehicle<sup>14</sup>. It was considered that the insurer's obligation to pay compensation for the loss with an indirect exemption of a driver directly responsible for remedying that loss in the above mentioned situation would be contrary to the principles of social coexistence. Thus, the recourse of the insurer is a manifestation of the co-operation of the compensatory function of the liability insurance as well as their repressive function, and above all the preventive function in the scope of the prevention of road accidents. A different issue is whether and to what extent apply Article 120 of the Labour Code in relation to the employee who has caused damage while performing his or her employment obligations and when, the insurer's recourse becomes outdated<sup>15</sup>. Further regulations relating to non-standard recourse in compulsory insurance have been introduced to liability insurance of the farmers, but with limitations that the insurer has the right to demand from the perpetrator of damage the return of the indemnity, but only in those cases where the perpetrator was under the influence of alcohol, narcotic drugs or other psychotropic substances. The right to claim recourse was granted not only to liability insurance of farmers and motor vehicle owners, but also to the IGF<sup>16</sup>.

<sup>11</sup> However, in the motor vehicle liability insurance, there is a comprehensive list of situations in which the insurer can claim the compensation paid to the injured party.

<sup>12</sup> Journal of Laws, No 96, Item 475. In the regulations, the catalog of circumstances authorizing the insurer to recourse claim was, however, narrower than it is now. This provision also used the term "a motor vehicle driver", nowadays it is "a driver".

<sup>13</sup> Compulsory Insurance Act of May 11, 2003, The Insurance Guarantee Fund and the Polish Motor Insurers' Bureau; consolidated text: Journal of Laws of 2016, Item 2060, 1948. In the further part of this discussion, this law will be called the "Compulsory Insurance Law, IGF and PMIB" or MLI – Mandatory Liability Insurance.

<sup>14</sup> Situation in which it was about saving people's life or property or pursuing someone immediately after the crime is an exception.

<sup>15</sup> For more information on this topic see: M. Serwach. 2013. "Przedawnienie roszczeń jako przyczyna odmowy wypłaty przez ubezpieczyciela", Acta Universitatis Lodzensis, Folia Iuridica 2013, Łódź, p. 117 ff. Cf. B. Janiszewska. 2007. "Przedawnienie roszczenia zwrotnego ubezpieczyciela przeciwko ubezpieczonemu sprawcy szkody komunikacyjnej", Przegląd Ustawodawstwa Gospodarczego of 2007, No 1, p. 25

<sup>16</sup> See Article 110 MLI referring to the limitation of the IGF recourse claim. Cf. verdict of the Supreme Court of November 18, 2005, IV CK 203/05; verdict of the Supreme Court of January

However, undoubtedly the greatest importance for compulsory civil liability insurance, has the introduction of regulations from Article 11 sec. 3 of the Act on compulsory insurance. The provision provides that in the other compulsory insurance (referred to in Article 4, point 4) the insurer (just like the UFG) is entitled to demand from the insured person and persons he is responsible for, the reimbursement of the compensation paid in the case of damage caused as a result of gross negligence and in the case of loss caused by alcohol, drugs or psychotropic drugs. When comparing the content of individual provisions assuming non-standard regressions in compulsory liability insurance, it is desirable to indicate one common circumstance – causing the loss after use of alcohol or other narcotic and psychotropic drugs. It is confirmed when we consider this kind of failure of the direct perpetrator of the damage which causes that his liability insurance cannot relieve him of accountability. However, it ought to be emphasized that the nature of the insurer's recourse for damage caused by gross negligence<sup>17</sup> should be discussed. It seems that this type of regulation is really unfavourable for policyholders in the so-called professional liability insurance, especially as the very concept of gross negligence in the scope of medical law raises some interpretative reservations<sup>18</sup>.

The unique nature of civil liability insurance also implies that, despite the existence of a clear legal basis for recourse to compulsory insurance, – currently there are more objections related to the definition of the rules governing the shape of this entitlement<sup>19</sup>.

### 4.2. Insurers recourse claims in voluntary liability insurance

In voluntary liability insurance, the discussed issue is even more complicated. In the Insurance and Reinsurance Act of 2015<sup>20</sup>, there is no guidance concerning insurer's recourse against the persons responsible for the resulting damage. A. Szpunar mentioned in his statement the lack of possibility of raising the regression towards the other side of the insurance relationship, as well as T. Sangowski, who in a comprehensive monograph explained the differences between various types of insurance recession. The point of view presented by these authors is characteristic of older law school, according to which the non typical regression occurs only in obligatory civil liability

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18, 2012, II CSK 157/11; resolution of 7 judges of the Supreme Court of September 10, 2013, III CZP 50/13.

<sup>17</sup> See more: M. Serwach. 2005, "Prawo ubezpieczeń gospodarczych. Komentarz", edited by M. Brodecki, M. Serwach, Zakamycze, p. 754 ff.

<sup>18</sup> M. Serwach. 2004. "Interpretacja postanowień wyłączających lub ograniczających odpowiedzialność zakładu ubezpieczeń w ubezpieczeniach majątkowych, Odpowiedzialność cywilna". Memorial Book in Honour of Prof. A. Szpunar, Zakamycze, p. 423 ff.

<sup>19</sup> According to A. Szpunar 2004, "Roszczenie zwrotne zakładu ubezpieczeń przeciw kierowcy pojazdu", *Palestra* 199, No. 7-8, p. 19; the entitlement of an insurance company results from an insurance relationship, but becomes payable only when the injured party is compensated. Id. 1994. "Przedawnienie roszczeń ubezpieczeniowych", *Insurance Law* 1994, No. 1, p. 46. An opposite view is held by E. Kowalewski, "Umowa ubezpieczenia", p. 127. According to Kowalewski, non-typical insurance recourse is neither a claim under Article 828 of the Civil Code, nor a claim resulting from an insurance contract. Another view on this issue is presented by A. Wąsiewicz, "Ubezpieczenia komunikacyjne...", p. 119. According to Wąsiewicz, recourse is a claim of the injured person against the perpetrator of the damage that has been passed to the insurer at the time of the compensation payment. This means that the claim is time-barred.

<sup>20</sup> Insurance and Reinsurance Activity Act of September 11, 2015 (*Journal of Laws* of 2015, Item 1844, as amended).

insurance<sup>21</sup>. Therefore, it is important to consider whether there is a need for developing this kind of claim in the context of voluntary liability insurance and, in consequence, under what circumstances this entitlement may be granted to the insurer. On the other hand, it is incontestable that the insurer's claim against the party of the insurance relationship – if it is to be granted – must be exceptional. Generally speaking, insurers who have paid compensation to the injured party cannot claim a refund from the policyholder. By giving a third party the insurance benefit, they confirmed their liability at a specified amount. By providing a third party with a liability insurance, they have confirmed their responsibility even if the perpetrator has caused damage intentionally or through gross negligence, has not prevented the loss or contrary to the contract has been guilty of certain misconduct, the insurers have – in principle – the right to refuse to pay indemnity in full or in part<sup>22</sup>. If they do not exercise this right it is to be assumed that they acknowledged their responsibility and therefore the benefit paid by them is not due and cannot be claimed. The only very important exception to this rule is a situation in which the insurer could not rely on specific charges concerning insurance relationship, against the victim who has claimed the direct claim. Obviously it is all about a breach of certain contractual terms if the action or omission of the policyholder occurred after the accident of the insured party. Then, the insurer who has paid the compensation may request the entity to return the “overpayment”. This right may be exercised to the extent that they can show that if it was possible to raise specific objections from the liability contract, their benefits would be reduced accordingly. The scope of this claim cannot therefore exceed the amount actually paid by the insurer, regardless of the total amount of the indemnity debt. In extreme cases (e.g. when the insured concealed important circumstances of the accident and there was a collusion between him and the injured party) the insurer will have even the so-called – full refund claim. This follows directly from the basic principle of civil law, according to which no one can rely on their own abominable conduct. The entitlement granted to insurers towards the other side of the insurance relationship should be strictly defined. The possibility of reporting it only arises when the injured person has directly put a claim with the insurer.

## **5. Legal basis of a non-typical recession**

The described accounting model in relation between the insurer and the policyholder is supported not only by a purpose-driven interpretation but also reasons for equity and ethical arguments<sup>23</sup>. It is difficult to point at the existence of any other solution that would undermine the interests of all participants in the proceedings: the insurer, the policyholder and the injured party. It should be noted that the proposed approach is applied in all legal orders which prohibit the insurer from raising certain accusations against the victim from the insurance contact. As an example in French law, G. Viney<sup>24</sup> reveals that an insurer who cannot claim certain policy charges has actually paid for “another insured.” The arguments put forward by this author lead to a specific

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<sup>21</sup> T. Sangowski, “Regres...”, p. 152. A similar view is presented by E. Kowalewski, “Prawo ubezpieczeń...”, 2nd edition, p. 245; J. Łopuski, E. Kowalewski. 1991. “Założenia legislacyjne dalszej reformy prawa ubezpieczeń”, Państwo i Prawo 1991, No. 11, p. 17.

<sup>22</sup> Although the provisions of the Civil Code allow for the coverage of damage caused intentionally, the insurance practice shows that insurers under the general insurance conditions have established not to provide for such a possibility. In their opinion the risk in this case is too high.

<sup>23</sup> The attention to the impact of non-dogmatic values on the assessment of recourse in commitments is mainly drawn by E. Łętowska.

<sup>24</sup> Viney, “Traite de Droit, Les obligations la responsabilite: effects”, L.G.D.J., Paris 1988 p. 564

separation of the claim of the direct victim from the insurer's liability resulting from the insurance relationship. If the entity fulfilling the insurance benefit does not pay for "his policyholder", then it can be said that he is responsible for someone else's debt, not his own. As a consequence, the insurer enters into the right of the injured party whose claims have been compensated, and he may appeal against all charges against the policyholder that the injured party could rely on in relation to the perpetrator<sup>25</sup>. However, it is not necessary to distinguish the detailed legal basis of the claim of the insurer. Unlike other types of business insurance, in voluntary liability insurance, the basis should not be sought in the content of Article 828 of Civil Code. The literal interpretation of the provision leads to the conclusion that it regulates the transition to the insurer *ex lege* claims of the policyholder against the perpetrator of the injury. In civil liability insurance, the possible recourse of the insurer – obtained under Article 828 of Civil Code<sup>26</sup> – does not meet this standard, since it is not a claim of a policyholder but a claim against that person<sup>27</sup>. In addition, the intention of the legislator was to grant – under Article 828 Of Civil Code – the right of recourse against a non-contractual third party, instead of the other party to the insurance relationship. Without further consideration, it can only be stated that it is possible to establish certain rules in the insurance contract itself between the insurer and the policyholders. This entitlement is not the possession of the insurer, who appears to be the "unknown" (i.e. uninsured) perpetrator of the damage. Hence, it may be necessary to provide him in this case with a claim under the applicable law<sup>28</sup>.

The potential substantive legal basis in the form of Article 518 §1 (4), that provides for the right of subrogation of satisfied creditor on the basis of a specific provision, not only does not solve the problem, but raises the issues considered at the starting point. According to the dominant position, such *lex specialis*, which refers to point 4, is precisely Article 828 of Civil Code<sup>29</sup>. It also seems wrong to seek for the basis of the in-

<sup>25</sup> G. Viney, *Ibidem*.

<sup>26</sup> The systemic interpretation of this provision could indicate that it applies to all types of non-life insurance, including civil liability insurance. However, until recently, it has been considered only for property insurance. Such a position, among others, was expressed by Supreme Court in the resolution of 22 April 1994, OSN 11/1994, Item 213.

<sup>27</sup> However, it can be postulated - by applying appropriate interpretative procedures - to make Article 828 of Civil Code expansive so that it constitutes passing on the insurer not only the policyholder's claim but also the claim of the injured party. Such a solution could be supported by the dispositive nature of the standard, which provides for *cessio legis* in the policyholder's rights "unless otherwise agreed". It appears, however, that the use of the provision in question by analogy is neither valid nor intentional.

<sup>28</sup> Article 828 of Civil Code was repeatedly pointed out as the basis for the recourse claim also in other cases, e.g. in the context of the recession of the IGF. Currently the IGF recourse base is covered by the Compulsory Insurance Act, IGF and PMIB. The admissibility of the analogous application of Article 828 of Civil Code was indicated earlier despite the fact that - as raised in doctrine - IGF is not an insurance company. The Supreme Court opposed this view and stated (Resolution of 11 March 1994) that the UFG could not be regarded as the third party liable for damage within the meaning of Article 828 of Civil Code, as this provision concerns the perpetrators of harm and the persons responsible for those perpetrators under the provisions of Civil Code. See more S. Reps. 1995. "Zakłady ubezpieczeń a Ubezpieczeniowy Fundusz Gwarancyjny – praktyka i problemy prawne", *Prawo Asekuracyjne* 1995, No. 1, p. 45 ff.

<sup>29</sup> A similar view is presented by following authors: W. Czachórski, J. Ławrynowicz, A. Szpunar, A. Wąsiewicz, see, for example, A. Szpunar. 1990. "O roszczeniach regresowych zakładu ubezpieczeń", *NP* 1990, No. 7, p. 38. Similarly, the Supreme Court in one of the rulings stated that Article 828 of Civil Code constituted a special rule in relation to Article 518 § 1 of CC, and

surer's recourse in the content of Article 518 § 1 pt. 1 of Civil Code.<sup>30</sup> As it is well known, the insurer, by paying compensation to a third party, implementing *actio directa*, regulates their own debt, and not others. On the other hand, point 3 of the provision requires a written permission of the debtor, so in the case of insurance relations – the policyholder's consent to the right of subrogation of the satisfied creditor. Such a construction – in the scope of business insurance – is slightly artificial, especially as it is contrary to the *actio directa* and the "inclusion" in the case of the insured perpetrator should be considered. In this way, we come to the conclusion that the principle of legal subrogation will not apply in the area of our interest. This means that the provisions relating to recourse claims in the field of property insurances cannot be used to assess this claim in voluntary liability insurance, at least in relation to the relationship between the insurer and the other party to the insurance relationship.

It is also inherently not possible to take into account the regulations relating to the settlement between persons responsible for damage caused by an unlawful act – Article 441 § 2 and § 3 Civil Code<sup>31</sup> – or provisions on unjust enrichment – Article 405 of Civil Code.<sup>32</sup> There are also no justifications either for the rule of contractual subrogation<sup>33</sup>, transfer<sup>34</sup>, or for invoking in doctrine, general principles that constitute the source of a recourse claim<sup>35</sup>. Does the lack of clear legal basis mean that it is not permissible to confer a claim against the contractor to the insurer in voluntary liability insurances? The correct answer to this question will be possible if we consider the nature of this claim. Pointing to its essence, it is necessary in the first place to settle a seemingly trivial issue – who the insurer's claim is against. As long as the policyholder is insured at the same time, defining the subjective scope of this entitlement does not face too many difficulties. They occur if we deal with the lack of identity of these people. The previously suggested purpose-driven interpretation would indicate that regression should be directed against the perpetrator. By introducing this institution to business insurance, the legislator clearly indicated the functions that the claim should fulfill. Authors dealing with this problem argued that – unlike typical regression – two

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therefore excluded the use of the latter. (Resolution of 18 November 1994, OSN 3/1995, Item 48).

<sup>30</sup> More on this subject of Article 828 of Civil Code in A. Szpunar. 2000. "Wstąpienie w prawa zaspokojonego wierzyciela", Zakamycze.

<sup>31</sup> The admissibility of applying this provision in certain cases is recognized by the Supreme Court in the resolution (7) of 25 March 1994, OSN 7-8 / 1994, Item 145, for example. Differently in the SC's resolution of 8 November 1994, III CZP 146/94, TSO 7-8 / 1995, Item 160 and in resolution (7) of 19 October 1995, II CZP 98/95, OSN 12/1995, Item 169.

<sup>32</sup> According to the Supreme Court, provisions on unjust enrichment due to Article 409 of the Civil Code, could constitute only a "weaker" basis of the claim (resolution of the Supreme Court of 19 October 1995, OSN 12/1995, Item 169). Besides, the responsibility for unfounded enrichment has a subsidiary character, so it is relevant only if there are other claims, Gdańsk Court of Appeal's judgment of May 31, 1996, OSA 1/997, Item 1.

<sup>33</sup> Small usefulness of contractual subrogation - apart from the issue of its admissibility – is the determined by the necessity of concluding a contract between a satisfied creditor - the injured, and a third party – the insurer. The injured party is not normally interested in making such a transfer of receivables, and making the payment of insurance benefits conditional upon the acceptance of the relevant provisions is unacceptable.

<sup>34</sup> The transfer was already rejected in the context of compulsory liability insurance as less favorable to all interested stakeholders than subrogation.

<sup>35</sup> These rules are described by E. Kowalewski, "Prawo ubezpieczeń...", p. 242. These include: the principle of indemnity, the prohibition of enrichment of the insured, the principle of absolute liability of the perpetrator of damage to the fault and on the basis of marine insurance – the priority of insurance liability (compensation).

functions are essential in the case of non-standard regression: preventive and educational as well as repressive. It works as follows, the perpetrator cannot avoid the consequences of property damage<sup>36</sup>. On the other hand, compensatory function was mentioned – which is the most important property insurance – and allows the insurer to recover the amount spent. It does not change the fact that the recourse, both typical and untypical, has always been considered together with the aim that the legislator wished to achieve by introducing this institution into insurance regulations. This objective was to prevent the victim from obtaining double compensation and to avoid the possible evasion of the perpetrator from the effects of an insurance accident. Thus – according to W. Warkało – the insurer's recourse claim was a link between the individual responsibility and warranty liability<sup>37</sup>.

The above assumption is fully reflected in the compulsory motor vehicle liability insurance, in which the recourse can be raised against the driver as the perpetrator<sup>38</sup> of the damage. Mandatory insurance regulations do not refer to the legal criteria, but to the facts, although there is no doubt that when a driver is not both the owner of a motor vehicle and the perpetrator, the regress is directed against the insured – the direct perpetrator<sup>39</sup>. The solution is typical of motor vehicle liability insurance and liability insurance for farmers, but it is not characteristic of all mandatory civil liability insurance, where a special recourse is foreseen. By way of example, in the already abolished but interesting solutions relating to civil liability insurance for entities accepting a contract for health services<sup>40</sup> – the insurer was entitled to claim reimbursement of compensation paid from the policyholder. At the same time insurance did not only cover the civil liability of the policyholder, but also each “person for whom he is responsible, as well as the losses that this person caused when granting benefits in the scope of the awarded contract for health services”. This means that in addition to the policyholder, there could be a specific group of “co-insured”, but the regression is directed against the person who established the insurance relationship. This solution is not provided for current liability insurance for entities that perform medical activities<sup>41</sup>.

## 6. Summary

It is clear from the previous considerations that in the compulsory third party insurance the problem of the insurer's recourse to the other party to the insurance contract has a clear legal basis in the form of *lex specialis* regulations. However, there are doubts about the interpretation of statutory regulations. In voluntary third party liability insurance, especially in connection with business activities, insurance coverage can be

<sup>36</sup> See W. Warkało. 1974. “Zbieg roszczeń, regres i subrogacja w polskich ubezpieczeniach gospodarczych i społecznych”, *Wiadomości Ubezpieczeniowe* 1974, No. 3, p. 6.

<sup>37</sup> W. Warkało, “Zbieg roszczeń...”, p. 7.

<sup>38</sup> There are some reservations in this doctrine. See A. Szpunar, “Wstąpienie...”, p. 156-157. The Mandatory Insurance Law, IGF and PMIB currently uses the term - a motor vehicle driver.

<sup>39</sup> A corresponding formulation is contained in Article 58 of MLI referring to farmers' liability insurance, which provides for the insurer's right “to claim, from the perpetrator of damage, reimbursement of compensation paid by farmers' liability insurance (...)”.

<sup>40</sup> Regulation of the Minister of Finance of 17 November 1998 on the general conditions of obligatory civil liability insurance of the entity accepting the contract for health care services for damages caused by the granting of these benefits, (*Journal of Laws* of 2015, No. 293, Item1729).

<sup>41</sup> Regulation of the Minister of Finance of December 22, 2011 on compulsory insurance of civil liability of a medical practitioner (*Journal of Laws* of 2011, No. 293, Item1729).

extended to both the policyholder and the person he is liable for. By way of example, in civil liability insurance in private life this claim may be covered by the so-called homeowners or employees employed by them, on the stipulation to provisions of Article 828 of Civil Code. In this case, if the identity of the policyholder and the insured perpetrator is not present, the claim of the insurer should be raised against the policyholder. This conclusion at least justifies the scope of the claim. Let us remind that it is only available when the insurer cannot raise specific allegations from the insurance contract against the injured party. These accusations concern a failure to comply the contractual obligations that took place after the occurrence of an insurance accident. According to Article 808 § 2 of Civil Code the obligations resulting from the contract of insurance for someone else's account charge the policyholder<sup>42</sup>. The formulation of a given provision may raise legitimate objections, especially when the policyholder's role is limited to signing the contract and paying the premium. Nevertheless, precisely this entity suffers the consequences of improper fulfillment of insurance conditions. This is confirmed by the provisions of the general conditions of third party liability insurance, which generally impose the obligations laid down in them on the policyholder. The statement of this fact presents previous considerations in a completely different light and leads to the conclusion that the insurer's claim in voluntary third party liability insurance differs significantly from the non-standard recourse in compulsory third party liability insurance. If we are dealing with an insurer's claim to the policyholder based on the contractor's failure to comply with contract terms, one may wonder whether the claim has actually the nature of a recourse claim. Is it not a claim for improper performance of the insurance contract? And the insurer must simply show the damage suffered, which consists in the fact that he was obliged to pay the injured person a certain amount of compensation. In such a case there is no need to look for a separate legal basis for the insurer's claim against the policyholder, in insurance law. The basis for this claim is the general principles of Article 471 of Civil Code.

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<sup>42</sup> On the other hand, it should be borne in mind that in accordance with the construction of a contract for a third party, obligations should not be imposed on the holder.

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### Roszczenia regresowe pomiędzy stronami umowy ubezpieczenia OC

Tematem niniejszego artykułu są rozliczenia regresowe pomiędzy stronami stosunku ubezpieczenia z chwilą, gdy roszczenia odszkodowawcze poszkodowanego zostaną w pełni zaspokojone. Autorka przedstawia różnice pomiędzy regresem typowym oraz regresem nietypowym, a następnie analizuje przypadki pozwalające na zgłoszenie przez ubezpieczyciela roszczenia regresowego do drugiej strony umowy ubezpieczenia odpowiedzialności cywilnej (OC). Powołuje przypadki, w jakich uprawnienie to może być zgłoszone w obowiązkowych ubezpieczeniach OC oraz analizuje ewentualne podstawy prawne roszczenia regresowego ubezpieczyciela w dobrowolnych ubezpieczeniach OC. Przedstawia wątpliwości interpretacyjne związane nie tylko z kwalifikacją takiego roszczenia, ale także z jego dopuszczalnością. W podsumowaniu swoich rozważań proponuje zastosowanie interpretacji, która będzie pozostawała w zgodzie z celem ubezpieczenia OC; funkcjami, jakie ubezpieczenie to powinno spełniać oraz uznaniem, że w przypadku niektórych rodzajów szkód, bezpośredni sprawca nie powinien zostać zwolniony z materialnej odpowiedzialności za jej wyrządzenie.

**Słowa kluczowe:** ubezpieczenia odpowiedzialności cywilnej, regres nietypowy (szczególny), regres typowy, ubezpieczenia obowiązkowe a ubezpieczenia dobrowolne, pozycja prawna ubezpieczającego, ubezpieczonego sprawcy szkody, ubezpieczyciela.