Recent Developments in 'Side A' D&O Insurance in Germany

by Robert Koch*

A. Relevance of 'Side A' D&O Insurance in Germany

In Germany, 'Side A' cover plays a crucial role in D&O insurance. There are two reasons for this. Firstly, members of the executive board owe a duty of care and loyalty only to their company (internal liability), but not to third parties (external liability).[1] They are liable to third parties only in exceptional circumstances, such as in the case of tortious acts, failure to pay taxes or social security contributions, or late filing for insolvency.[2] Secondly, the executive board members' duty of care and loyalty includes the obligation to ensure that the company acts lawfully and fulfils its legal obligations towards third parties (including public authorities). Since the business judgment rule does not apply in the letter case,[3] any breach of duty by them in dealings with third parties, for which the company is liable either solely[4] or jointly and severally, therefore also constitutes a breach of duty towards the company. For this reason, the company is under no obligation to indemnify its executive board members from third party claims. Rather, once the company has settled the third party's claim for damages, it has a right of recourse against its executive board members.[5]

Furthermore, in stock corporations (Aktiengesellschaften), the supervisory board is obliged to bring claims for recourse against members of the executive board on behalf of the company if it becomes aware of any breaches.[6] If the supervisory board fails to do so, its members – who, like the members of the executive board, are covered under the 'Side' A D&O insurance policy – may also be held personally liable to the company.[7] The stock corporation may waive claims for compensation against members of its executive and/or

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*Dr Robert Koch is a Professor at the University of Hamburg (Germany). He holds the chair of Private Law and Insurance Law, is the director of the Institute of Insurance Law (est. 1916) and the LLM programme on Insurance Law. He is the chairman of the Working Party on 'Financial Lines & Cyber' of the International Insurance Law Association (AIDA). This paper is based on a presentation given by the author at the meeting of the AIDA Working Party on 'Financial Lines & Cyber' as part of the 12th AIDA Europe Conference on 11/12 June 2026 in Rotterdam (The Netherlands) and the 19th Congreso CILA on 26-28 August 2026 in Cartagena (Colombia).

[1] BGH, 10 July 2012 – VI ZR 341/10 , Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 194, p. 26 n. 23; BGH, 13 April 1994 – II ZR 16/93, 125, BGHZ 125, 366, 375; BeckOGK/Fleischer, 1.2.2026, AktG § 93 Rn. 403.

[2] See e.g. BeckOGK/Fleischer, 1.2.2026, AktG § 93 Rn. 403.

[3] If the legal situation is unclear, there is no scope for applying the 'business judgment rule' under § 93 para 1 sent 2 the Stock Corporation Act (AktG) by analogy as a 'legal judgment rule' (see e.g. J. Koch, 20th ed. 2026, AktG § 93 n. 40).

[4] According to § 31 of the German Civil Code (BGB) which is applied to members of the executive board by analogy, 'the association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by them in carrying out the business with which they have been entrusted, where the act gives rise to a liability in damages.'

[5] J. Koch, 20th ed. 2026, AktG § 93 n. 87.

[6] BGH, 21 April 1997 – II ZR 175/95, BGHZ 135, pp. 244, 253 – ARAG/Garmenbeck.

[7] OLG Hamm, 6 April 2022 – 8 U 73/12, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2022, pp. 662 et seq. – Arcandor.

supervisory board or settle the claims only three years after the claim has arisen, and only if the general meeting gives its consent and no minority shareholders whose shares together amount to one-tenth of the share capital objects (§ 93 para 4 sent 3 of the German Stock Corporation Act (AktG)). Unlike in other legal systems, German law therefore does not permit the ex ante release of board members from liability.[8]

In this context, it should be also noted that members of the executive and supervisory board are liable for breaches of duty even in cases of simple negligence[9] and that there is no statutory limit on liability. Claims are only time-barred after five years (§ 93 para 6 AktG, § 43 para 4 of the German Private Limited Company Act (GmbHG), § 34 para 6 of the Co-operative Act (GenG); for stock listed corporations, the limitation period is even ten years (§ 93 para 6 AktG).

For all these reasons, more than 90% of legal actions brought against members of the executive or supervisory board in Germany are not brought by third parties but by the company itself (or its insolvency administrator). This explains why, in Germany, when it comes to D&O insurance, there is primarily a need for 'Side A' cover to protect the personal assets of board members, rather than for 'Side B' cover. However, a 'Side B' clause is included in almost all policies.[10] In contrast, 'Side C' cover, which protects the company's assets against third-party claims for damages, particularly in connection with allegations under capital markets law or prospectus liability, is not always included.[11] There is no published German case law on disputes concerning insurance cover on 'Side B' and 'Side C'.

B. Assignment of the D&O`s Claim for Indemnification to the Company/Policyholder

I. Conversion of the Claim for Indemnification into a Claim for Payment

If, after assessing the company's claim for damages against board members, the insurer rejects the claim for damages as unfounded and/or denies cover, companies are often reluctant to take their board members to court, even if the latter have already left the company. In order to avoid legal proceedings against the (former) board members, both the company and the (former) board members wish for the company to take legal action directly against the insurer. However, a direct claim under non-compulsory liability insurance is only admissible once the (former) board members have assigned the claim for indemnification against the insurer to their company. As a result of the assignment, the board members'

[8] See § 23 para 5 AktG: The by-laws may deviate from the provisions of the present Act only where this has been expressly permitted. Supplementing the by-laws by additional determinations is permissible unless the present Act provides conclusively for the matter.

[9] Under § 93 para 2 sent 2 AktG no liability arises if, when taking a business decision, the member of the management board could reasonably assume, on the basis of sufficient information, that they were acting in the best interests of the company. It should be noted, however, that according to the legislature's intention, only decisions which are by their nature forward-looking and characterised by forecasts and assessments are deemed to be 'business decisions' (see Bundestags-Drucksache 15/5092, 11).

[10] Ihlas in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 4, 3rd ed. 2025, Kap. 35 n. 66.

[11] W. Doralt in Semler/v. Schenck/Wilsing (eds.), Arbeitshandbuch für Aufsichtsratsmitglieder, 6th ed. 2025, § 18 Versicherung gegen Schadensersatzansprüche (D&O-Versicherung) n. 15.

claim for indemnification against the insurer is converted by operation of law into a claim by the company for payment against the insurer, provided that the board members are liable to the company and have a right to cover against the insurer. If the insurer refuses to pay, the court must rule both on the liability of the board members and on the existence of insurance cover.[12]

Under the German Insurance Contract Act (VVG), the claim for indemnification by the (co-)insureds against the insurer may only be assigned to the third party who has suffered the loss (§ 108 VVG). Prior to the decision of the German Federal Court of Justice (BGH) of 13 April 2016,[13] it was disputed whether the company was to be regarded as a third party within the meaning of § 108 VVG. Some scholars took the view that, in cases of internal liability, the company could not be both the policyholder and a third party, and that an assignment of board members' claim for indemnification was therefore impermissible.[14] The BGH rejected this view and ruled that, in the case of insurance for the account of a third party, such as D&O 'Side A' cover, the concept of the third party cannot be restricted to persons who are not parties of the insurance contract. Consequently, the company/policyholder may also assume the role of a third party to whom the claim for indemnification can be assigned.[15]

II. Shifting the Burden of Proof from the Insurer to the Company as a Result of the Assignment?

It is disputed whether the burden of proof regarding the breach of duty, the occurrence of loss and the causal link passes to the company or remains with the insurer if, following the assignment of the claim for indemnification, the company brings an action for payment against the insurer. According to § 93 para 2 sent 2 AktG and § 34 para 2 sent 2 GenG in the event of a claim, the burden of proof lies with the members of the executive board if it is disputed whether they exercised the due care of a prudent manager, as they are in a better position than the company to set out the circumstances indicating the proper fulfilment of their duties.[16] § 93 para 2 sent 2 AktG and § 34 para 2 sent 2 GenG establish a general

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[12] BGH, 20 April 2016 – IV ZR 531/14, recht und schaden (r+s) 2016, p. 455, para 17; for further details *see* R. Koch in Beckmann/R. Koch (eds.), Bruck/Moeller, Großkommentar zum VVG, vol. 4, 10th ed. 2022, § 100 VVG ns. 134, 135.

[13] BGH, 13 April 2016 – IV ZR 304/13, Versicherungsrecht – Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht (VersR) 2016, p. 786.

[14] See Armbrüster, Prozessuale Besonderheiten in der Haftpflichtversicherung, r+s 2010, pp. 441, 448; Schimmer, Die D&O-Versicherung und §§ 105 und 108 Abs. 2 VVG 2008 - kann die Versicherungsnehmerin „geschädigte" Dritte sein?, VersR 2008, pp. 875, 878 et seq.; for a different view see Baumann, Die Problematik der Abtretbarkeit von Freistellungsansprüchen in der D&O-Versicherung – insbesondere an die geschädigte Versicherungsnehmerin - – Zugleich Grundsatzbetrachtungen zu § 108 Abs. 2 VVG –, r+s 2011, pp. 229, 230 ff.; R. Koch, Der Direktanspruch in der Haftpflichtversicherung, r+s 2009, pp. 133, 135 et seq.; Lange, Der Direktanspruch gegen den Haftpflichtversicherer (am Beispiel der D&O-Versicherung), r+s 2011, pp. 185, 187.

[15] BGH, 13 April 2016 – IV ZR 304/13, VersR 2016, p. 786 n. 20 et seq.

[16] J. Koch, 20th ed. 2026, AktG § 93 n 103; MüKoAktG/Spindler, 6th ed. 2023, AktG § 93 n. 225.

principle which applies by analogy to the managing director of a limited liability company (Gesellschaft mit beschränkter Haftung (GmbH)).[17]

Some authors take the view that the burden of proof shifts to the company if the members of the executive board assign their claim for indemnification against the insurer to the company.[18] The Cologne Court of Appeal[19] and the Frankfurt Court of Appeal[20] take a different view. In their opinion, the assignment does not alter the burden of proof regarding the liability of the board members, which the court must examine incidentally whilst considering the company's claim for payment.[21]

I agree with this finding,[22] and it remains to be seen when the BGH will have the opportunity to rule on this matter. However, particularly in broker wordings, the parties regularly address this uncertainty by including a clause in the D&O insurance policy stipulating that, in the event of an assignment of the claim for indemnification, there shall be no reversal of the burden of proof concerning the board members' liability.

III. Assignment in Lieu of or on Account of Payment of the Claim for Damages?

1. Assignment in Lieu of the Claim for Damages

Understandably, the members of the executive or supervisory board wish to be released from liability towards the company in return for the assignment of the claim for indemnification (see § 364 para 1 BGB), regardless of whether the company succeeds in its claim for payment against the insurer. However, the release from liability of board members of stock corporations is subject to strict limitations. As already mentioned, the claim must be at least three years old and the general meeting must have approved the assignment in lieu of the fulfilment of the claim for damages, as assignment in lieu of the fulfilment amounts to a waiver within the meaning of § 93 para 4 sent 3 AktG. These requirements were not met in the case decided by the Munich District Court on 20 May 2025, which is why the court

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[17] BGH, 4 November 2002 – II ZR 224/00, BGHZ 152, pp. 280, 283.

[18] Armbrüster in Beckmann/R. Koch (eds.), Bruck/Möller, Großkommentar zum VVG, 10. ed. 2021, A-9 n. 34; Brinkmann, Die prozessualen Konsequenzen der Abtretung des Freistellungsanspruchs aus einer D&O-Versicherung, Zeitschrift für Wirtschaftsrecht (ZIP) 2017, pp. 301, 306 et seq.; Dreher/Thomas, Die D&O-Versicherung nach der VVG-Novelle 2008, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2009, pp. 31, 43 et seq.; for a different view see Voit in Prölss/Martin, VVG, AVB A-9 n. 2; Harzenetter, Abtretung des Freistellungsanspruchs aus einer D&O-Versicherung nach den BGH-Urteilen vom BGH 13.4.2016, NZG 2016, pp. 728, 732; R. Koch in Beckmann/R. Koch (eds.), Bruck/Möller, § 108 VVG n. 64 et seq.; Baur/Holle, Anwendung des § 93 Abs. 2 Satz 2 AktG im Direktprozess gegen den D&O-Versicherer (§ 93 Abs. 2 Satz 2 AktG), Die Aktiengesellschaft (AG) 2017, pp. 141, 143; Glimpel, Die Abtretung von Deckungsansprüchen nach § 108 Abs. 2 VVG, 2022, pp. 245 ff.

[19] Cologne Court of Appeal, 21 November 2023 – 9 U 206/22, VersR 2024, p. 100.

[20] Frankfurt Court of Appeal, 8 May 2025 – 3 U 113/22, VersR 2025, p. 936.

[21] Frankfurt Court of Appeal, 8 May 2025 – 3 U 113/22, VersR 2025, pp. 936, 940; Cologne Court of Appeal, 21 November 2023 - 9 U 206/22, VersR 2024, pp. 100, 106 et seq.

[22] R. Koch, note on the judgement of the Cologne Court of Appeal, VersR 2024, pp. 109 et seq.

declared the assignment of the claim for damages against the former executive board member in lieu of fulfilment of the claim for damages to be invalid.[23]

2. Assignment on Account of Payment of the Claim for Damages

Only an assignment of the claim for indemnification on account of fulfilment of the claim for damages (§ 364 para 2 BGB) is permissible, as in this case the stock corporation is merely obliged to first assert the claim for payment against the insurer. The stock corporation may only pursue its liability claim against the board members once the claim for payment against the insurer has been dismissed.[24] Until then, the limitation period for the liability claim against the board member is suspended (§ 205 BGB).[25]

C. Recent Case Law on 'Side A' D&O Insurance

D&O insurance in its current form was introduced in Germany in the early 1990s.[26] It is by no means still in its infancy in this country. Nevertheless, there remain a number of contentious legal issues regarding the scope of 'Side A' cover. Some of these issues were the subject of recent rulings by the Frankfurt Court of Appeal and the Cologne Court of Appeal, against which the plaintiffs, whose claims were dismissed, have lodged appeals with the BGH. The outcome of these appeal proceedings will have significant implications for D&O insurance in Germany. The two cases are therefore examined in more detail below.

I. Frankfurt Court of Appeal, 29 November 2024 – 7 U 82/22 (Wirecard)

The case decided by the Frankfurt Court of Appeal deals with the following issues: 1) What constitutes a valid 'notice of circumstances', given that the sum insured amounted to €25 million in 2019, whereas at the time the claim was made in 2020 it stood at €15 million; 2) is a clause valid which provides that the sum insured is to be reduced by all insured costs; and/or 3) how payments that lead to the exhaustion or reduction of the sum insured for public relations (PR) costs are to be apportioned amongst the co-insureds.

1. Brief Summary of the Facts

Wirecard, a German payment processor and financial services provider whose former CEO, COO and other executives have been arrested or are otherwise implicated in criminal proceedings has become insolvent. The D&O insurance provided cover for PR costs, subject to a sub-limit of €100,000 per insured person. The total sum insured for the 2020 insurance period amounted to €15 million, including costs for legal defence in civil and criminal courts and for PR. When the insurer refused to cover an executive's PR costs on the grounds that the sum insured had been exhausted, the executive sued the insurer. The Frankfurt Court of Appeal dismissed the claim.[27]

[23] LG München I, 20 May 2025 – 13 HKO 7553/22, r+s 2025, pp. 1176, 1178 et seq.
[24] Cologne Court of Appeal, 21 November 2023 – 9 U 206/22, VersR 2024, pp. 100, 103.
[25] R. Koch, note on the judgement of the Cologne Court of Appeal, VersR 2024, pp. 109, 112.
[26] Ihlas in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 4, 3rd ed. 2025, Kap. 35 ns. 5 et seq.
[27] The appeal before the BGH is pending under case number IV ZR 183/24.

2. Decision of the Frankfurt Court of Appeal

a) Requirements for a Valid Notice of Circumstances

The insurance policy stipulates that the notice must contain details of the potential breach of duty, the name of the director and/or office, the potential loss, and the potential claimant or potential legal action.

According to the Frankfurt Court of Appeal, in order to meet these requirements, the potential liability must be set out in sufficient detail to enable the insurer to calculate its current liability risk and set aside provisions. The notice must therefore include details of the person against whom the infringement was committed, as well as the extent of any damage that person may have suffered.[28] In the view of the Frankfurt Court of Appeal, these requirements were not met in the present case, as the notice in 2019 merely referred to an article in the Financial Times in which concerns were expressed regarding suspicious transactions and alleged actions by a member of the company's finance team in Singapore, as well as to a class action lawsuit filed in the US District Court for California seeking damages for alleged breaches of US securities laws, and to investigations by the authorities in Singapore into the aforementioned circumstances and allegations.[29]

b) Validity of the 'Cost Inclusive' Clause

The German Insurance Act (VVG) provides that liability insurance shall cover defence costs, even if these costs, together with the amount required to compensate the injured party, exceed the sum insured (§ 101 para 2 sent 1 VVG). However, D&O insurance contract practice deviates from this rule, as it is agreed that defence costs are deducted from the total policy limit, rather than being paid in addition to the defence costs ('cost-inclusive' clause).[30]

The validity of the 'cost-inclusive' clause is disputed. Some legal scholars take the view that the insurer, which ultimately decides whether to indemnify board members by making a payment to the company or to defend them, acts at its own risk when assessing the merits of the company's claim against the board members. Should this assessment prove to be incorrect, because the court considers the company's claim for damages to be well-founded, unlike the insurer, deducting the defence costs from the sum insured would shift this risk onto the board members. This would result in an unreasonable disadvantage for them, which is why the clause is invalid pursuant to § 307 para 1 sent 1BGB. Under § 307 para 2 no 1 BGB, an unreasonable disadvantage, leading to invalidity, is to be assumed if a standard term and condition is not compatible with the essential principles of the statutory provision from which it deviates.[31]

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[28] Frankfurt Court of Appeal, 29 November 2024 – 7 U 82/22, VersR 2025, pp. 282, 287.

[29] Frankfurt Court of Appeal, 29 November 2024 – 7 U 82/22, VersR 2025, pp. 282, 287 et seq.

[30] Ihlas in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 4, 3rd ed. 2025, Kap. 35 ns. 507 et seq.

[31] See e.g. Voit in Prölss/Martin, VVG, 32nd ed. 2024, AVB D&O A-6.4 n. 2; Schimikowski in Rüffer/Halbach/Schimikowski (eds.), Versicherungsvertragsgesetz, 5th 2025, § 101 VVG n. 4; Säcker, Streitfragen zur D&O-Versicherung, VersR 2005, pp. 10, 14 et seq.

Whilst the Frankfurt Court of Appeal followed this line of argument in its decision of 9 June 2011,[32] it has changed its position in its judgment of 29 November 2024 and ruled that an 'costs inclusive' clause, under which payments for legal defence costs reduce the total sum insured, is valid.[33] According to the Frankfurt Court of Appeal the shift of the risk onto the board members is justified because the factual and legal situation in D&O insurance is different from other forms of liability insurance such as personal liability insurance since it would typically involve high and, moreover, unforeseeable defence costs.[34]

This assessment seems to be quite accurate. In practice, in the event of a breach of duty by a member of the executive board, the company holds not only that member liable, but also all other members of the executive board and, where a supervisory board exists (as is the case with a stock corporation), the members of the supervisory board as well for breach of their supervisory and control duties, as they are all jointly and severally liable to the company for the damage occurred. Each of them against whom a claim is made is represented by a lawyer of their choice, which inevitably leads to a multiplication of the defence costs.[35] For these reasons, it seems reasonable to conclude that the insurer has a legitimate interest in including legal defence costs within the sum insured, and that the presumption of unreasonableness is rebutted.

c) Sum Insured not Sufficient to Cover all Board Members insured PR Costs

Under the VVG, where there are several injured parties, whose claims exceed the sum insured, the insurer must settle these claims in proportion to their respective amounts (§ 109 VVG). This rule does not apply to D&O insurance in cases of internal liability, as there is only one injured party, namely the company.

Some authors suggest applying § 109 VVG either by analogy[36] or through a supplementary interpretation of the insurance contract, provided nothing else is agreed in the contract.[37] For example, if the board members A, B and C are liable to the company (not jointly and severally) for damages amounting to €5, €10 and €15 million respectively, and the sum insured is limited to €15 million, A, B and C would be indemnified by the insurer in the amount of €2.5, €5 and €7.5 million. They would have to pay the company the remaining half of the damages, which is not covered, out of their own pockets. Other authors take the view that the insurer is entitled to make payments in the order in which the company has asserted its claims for damages against the board members, regardless of whether these payments result in the sum insured for the indemnification of the other board members being exhausted or reduced in the face of subsequent claims for damages by the company

[32] Frankfurt Court of Appeal, 9 June 2011 – 7 U 127/09, VersR 2012, pp. 432 et seq.
[33] Frankfurt Court of Appeal, 29 November 2024 – 7 U 82/22, VersR 2025, pp. 290 et seq.
[34] Frankfurt Court of Appeal, 29 November 2024 – 7 U 82/22, VersR 2025, pp. 290, 292.
[35] Frankfurt Court of Appeal, 29 November 2024 – 7 U 82/22, VersR 2025, pp. 290, 293.
[36] See R. Koch, in: Bruck/Moeller, Großkommentar zum VVG, vol. 4, 10th ed. 2022, § 109 VVG n. 69.
[37] See R. Koch, ibid., § 109 VVG ns. 70 et seq.

(principle of first come, first served).[38] Other academics, in turn, advocate a per capita allocation of the sum insured.[39]

The case heard before the Frankfurt Court of Appeal does not concern the allocation of the insurance sum for indemnifying the members of the executive and supervisory board against the company's claim for damages, nor for the reimbursement of defence costs. Rather, it was about the reimbursement of PR costs incurred by one of the executives who received only €38,452.65 out of the total sub limited sum of €100,000, as the entire sum insured of €15 million had been exhausted by the criminal defence costs for other board members. Consequently, there is no scope for the application of § 109 VVG, neither by analogy nor through a supplementary interpretation of the insurance contract.

However, allocating the sum insured for PR costs on a 'first come, first served' basis, as applied by the Frankfurt Court of Appeal,[40] does not serve the interests of the board members and does not appear to be in the insurer's interests either. Firstly, allocation on a 'first come, first served' basis does not apply if claims for reimbursement of PR costs were made simultaneously. Secondly, in the event of a subsequent claim for reimbursement based on a notice of the circumstances made before the sum insured for PR costs had been exhausted, the insurer would have to cover the PR costs a second time and demand repayment of the amount from the board member whose PR costs the insurer had already reimbursed.[41] It is therefore highly questionable whether the BGH will accept the allocation on a 'first come, first served' basis.

II. Cologne Court of Appeal, 10 February 2026 –9 U 49/25 (Greensill)

The case decided by the Cologne Court of Appeal[42] concerns the validity of a standard-form waiver clause to declare the insurance contract avoided on the grounds of fraudulent misrepresentation and the validity of the 'severability clause' and the 'fallback clause'.

1. Brief Summary of the Facts

Greensill Bank AG (Greensill) went bankrupt in 2021 following allegations of fraud and balance sheet manipulation. As early as the end of 2019, the Deposit Protection Fund of the Association of German Banks had urged Greensill to reduce its concentration of loans and exposure to companies linked to Sanjeev Gupta's GFG Alliance. Greensill's executive board members did not disclose this matter in their warranty statements to the insurers at the time of the contract renewal, even though they had been asked whether they were aware of any events that had already occurred and which could reasonably be expected to give rise to claims for damages. For this reason, the insurers (the primary insurer and all excess insurers)

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[38] See e.g. Lange, Die verbrauchte Versicherungssumme in der D&O-Versicherung, VersR 2014, pp. 1413, 1416 et seq.
[39] Armbrüster, Verteilung nicht ausreichender Versicherungssummen in D&O-Innenhaftungsfällen, VersR 2014, pp. 1, 6; Peppersack, Die Problematik unzureichender Versicherungssummen in der D&O-Versicherung – Modelle und Lösungsansätze, r+s 2018, pp. 117, 123.
[40] Frankfurt Court of Appeal, 29 November 2024 – 7 U 82/22, VersR 2025, pp. 290, 295.
[41] R. Koch, Verteilung unzureichender Jahresversicherungssummen für Freistellung, Rechtsschutz und sonstige Kosten auf Organmitglieder in der D&O-Versicherung, VersR 2026, pp. 670, 675 et seq.
[42] Cologne Court of Appeal, 10 February 2026 –9 U 49/25, VersR 2026, pp. 428 et seq.

declared the insurance contract void on the grounds of fraudulent misrepresentation, even though it had been agreed in the contract that the insurers would waive their right (clause 10.10 sent 1). Furthermore, the insurers argued that the alternative provisions in the form of 'Severability Clause' 10.10 sent 2, and Clause 10.11 – which was intended to serve as a fallback solution in the event that a court were to declare the waiver null and void – were also invalid. In response, Greensill's insolvency administrator brought an action against all insurers seeking a declaration that the D&O excess insurance would remain in force until its expiry at the end of 2024. The Cologne Court of Appeal dismissed the claim against one of the excess insurers.[43] The proceedings in Munich against the primary and another excess insurer are still pending before the Munich district court.

2. Wording of the Clauses 10.10 and 10.11

The relevant clauses read as follows:

10.10 Waiver of the right to void the contract

[1]In the event that the insurer would be entitled to void the contract on the grounds of fraudulent misrepresentation, the insurer waives this right.[2]However, this waiver shall not apply in respect of those insured persons who a) have given cause for the exercise of the right, or b) were aware, at the time of concluding this contract, of the acts which would entitle the insurer to exercise the rights.

10.11 [no heading]
[1]If the waiver is not legally permissible and the insurer declares the contract or the renewal agreement avoided the following legal consequences shall apply:
[2]The contract or the renewal agreement, respectively, shall be set aside with retroactive effect.
[3]The contracting parties agree that the contract or the renewal agreement, respectively, would nevertheless have been concluded in respect of those insured persons who did not commit the fraudulent misrepresentation or who were unaware of the fraudulent misrepresentation at the time of the extension of this contract.
[4]The contract or the renewal agreement, respectively, therefore remains in force in relation to these insured persons.
[5]Furthermore, the declaration of avoidance has the effect that there is no insurance cover with retroactive effect for any circumstances directly related to the grounds for avoidance.

3. Decision of the Cologne Court of Appeal

The Cologne Court of Appeal ruled that the clauses 10.10 and. 10.11 were invalid, as they would benefit the company in the event of joint and several internal liability on the part of both honest and dishonest board members. If insurance cover were to continue for honest board members, this would mean that the company would be compensated for any losses, even though the conduct of the dishonest board members would, by law, be attributed to the company. Since, for the purposes of attribution, the company is treated as if it had acted

[43] The appeal before the BGH is pending under case number IV ZR 51/26.

fraudulently itself, the Cologne Court of Appeal ruled that the advantage accruing to the company as a result of retaining the clauses would be contrary to public policy.[44]

At first glance, this reasoning seems to be very doctrinal and narrow-minded. However, it must be borne in mind that fraudulent misrepresentation not only entitles the other party to avoid the contract, but also gives the other party a right to claim damages.[45] Under § 249 para 1 BGB, the party liable for damages must restore the injured party to the position they would have been in had the breach of contract not occurred. Had Greensill's executive board members not made a misrepresentation when renewing the contract, it must be assumed that the insurer would either not have renewed the contract or would have excluded from cover all insurance claims relating to the misrepresentation. Consequently, the insurer's claim for damages would have included the right to require Greensill to agree that the contract not be renewed or that it be amended. Since, pursuant to § 276 para 3 BGB, no pre-agreed exclusion of liability for intentional acts is permissible,[46] and fraud constitutes a form of intentional act, the insurer could not have waived its right to rescind or amend the contract. The Cologne Court of Appeal's finding that the standard-form waiver, the 'severability clause' and the 'fallback clause' are invalid would therefore somehow be consistent with the fundamental principle set out in § 276 para 3 BGB.

Even if the BGH were to rule that the waiver and the severability clause is valid, contrary to the view of the Cologne Court of Appeal, the insurer would therefore in any event be entitled to demand that the contract not be renewed or that it be amended, unless this claim is not already time-barred according to §§ 195, 199 para. 1 BGB. Since the insurers declared the contract void on the grounds of fraudulent misrepresentation on 30 December 2021, the limitation period for the damage claim began on 31 December 2021 at the latest and would therefore end on 31 December 2024, provided that the limitation period has not been interrupted.

D. Concluding Remarks

As has been shown in this paper, for members not only of the executive board but also of the supervisory board 'Side A' D&O insurance is most relevant since there is an eminent threat of internal unlimited liability towards the company. It is therefore not surprising that, in practice, candidates make their decision to accept a position on the executive or supervisory board of a stock corporation contingent upon the taking out of Side A D&O insurance.[47] The same applies to limited liability companies (GmbH) if the candidates are not also shareholders.

Should the BGH reverse the ruling of the Frankfurt Court of Appeal in the Wirecard case on the grounds that, contrary to the view of the appeal court (the decision on the appeal is to be expected not before late 2027), the costs clause is invalid, a significant increase in premiums and, almost certainly, a reduction in the capacity provided by insurers is to be

[44] Cologne Court of Appeal, 10 February 2026 –9 U 49/25, VersR 2026, pp. 428, 435 et seq.
[45] BGH, 7 February 2013 – IX ZR 138/11, Neue Juristische Wochenschrift (NJW) 2013, p. 1591 n. 9.
[46] See also BGH, 18 January 1973 – II ZR 82/71, NJW 1973, pp. 456, 457.
[47] Pant/Beller – in Moosmayer/Lösler (eds.), Corporate Compliance, 4th ed. 2024, § 9. Versicherungslösungen n. 33.

expected. The dispute in the Greensill case over the validity of the standard-form waiver of the right to avoid the contract and/or renewal agreement, the 'severability clause' and the 'fallback clause' is likely to have even more far-reaching consequences. Should the BGH upheld the Cologne Court of Appeal decision and confirm the invalidity of these clauses (the decision on the appeal is to be expected not before early 2028), this is likely to spell the end of the D&O insurance taken out by the company on account of its executive and supervisory board members.

As insurers are unable to provide the level of cover required for the company for each member of the executive and supervisory board, taking out (stand-alone) personal D&O insurance is not a viable option for the board members.[48] Separate policies for the members of the executive and supervisory board do not solve the problem if the company takes out the insurance policies, as any misrepresentation by one executive is imputed to the company.[49] Clauses in the service contracts with members of the executive and the supervisory board, which provide that the company shall not assert any claims against them if they did not make the misrepresentation and had no knowledge of it, are also no solution. First, it is questionable if they are legally permissible for stock corporations. Secondly, the company would run the risk of not being compensated for the damage incurred, even though it has paid the premiums.

A viable alternative, however, could be to find a third party as service provider (e.g. an independent – perhaps – inhouse insurance broker) who takes out (group) insurance on account of the members of the management and the supervisory board as well as officers ('Side A' cover) and possibly on account of the company ('Side B' and 'Side C' cover). In this scenario, the D&O insurance would be purely third-party insurance.[50]

[48] R. Koch, Und es ist wieder geschehen! - Anfechtung des Versicherungsvertrags wegen arglistiger Täuschung durch die D&O-Versicherer trotz vereinbarten Anfechtungsverzichts, VersR 2026, pp. 550, 558.
[49] R. Koch, ibid., VersR 2026, pp. 550, 558 et seq.
[50] R. Koch, ibid., VersR 2026, pp. 550, 559.