

VAN STEENDEREN MINPORTLAWYERS

THIRD PARTY ACTION UNDER DUTCH LAW

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A person suffering loss or injury (“injured party”) at the hands of a tortfeasor / contractual defaulter (“injuring party”) is not a party to and so not privy to the contract of insurance between the injuring party and his insurers. Injured party has no direct rights against those insurers.

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I Introduction

In the event of insolvency of injuring party:
Insurance proceeds become part of the assured's general assets. Injured party will rank in the insolvency proceedings as a mere ordinary creditor.

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Introduction

UK: the Third Parties (Rights Against Insurers) Act 1930
Norway / Sweden: Insurance Contracts Act, Introduction of a general system of Statutory subrogation. The third party has the right to address a claim for compensation directly against the insurer. This right is restricted to compulsory third party insurance or to certain cases where the insured is unable to pay compensation for the damages caused, e.g. when the insured is in receivership; has made a composition with its creditors or is a dissolved legal entity.

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Introduction

In legal theory common opinion that injured party was not well protected.

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Introduction

Legislature had only accommodated injured party by art. 3:287 DCC

“1. The claim for compensation of damage creates a privilege upon any claim which the debtor (the insured) might have against the insurer pursuant to his liability insurance, to the extent that this claim relates to the obligation to compensate the damage.”

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Under this article the injured party can take recourse for his claim against the claim on which the privilege rests, without the rights of third persons to this latter claim being invoked against him.

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This protective provision was introduced in the Dutch Civil Code on 1 January 1992.

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Introduction

Enactment of direct action charters: breaking with the philosophy that insurance is for the protection of the person who paid premium for it and who was party to the contract of insurance.

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II The Netherlands General

- Generally, claimants have no direct action against insurers, unless direct action given by statute law Dutch Supreme Court NJ 2000, 189, NJ 1992, 397, NJ 1985, 794
- Example: Motor Insurance Liability Act (art. 6) since 1963.
- Prescription period: 3 years after the tort

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III Motor Insurance Liability Act

Article 7

The injured party can sue the insurers at the place where the damages arose, at the place where the injured party has his habitual residence, or at the place where the insurers are incorporated, have their registered office.

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Motor Insurance Liability Act

Article 8

It is the duty of the insured to disclose all facts and documentation to the insurers relating to the incident.

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Motor Insurance Liability Act

Article 9

A judgment rendered in legal proceedings will have final and conclusive effect versus the insurers, the insured or the injured party if they have had the position of plaintiff or defendant.

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IV Compulsory National Health Insurance

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V Article 7:954 DCC

- On 1 January 2006 entry into force of direct action against liability insurers for loss resulting from dead and bodily injury.

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- The bodily injured party can request the liability insurers of the liable party to make direct payment on behalf of their insured.

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- The insured can not dispose to the detriment of the injured party over the claim against liability insurers. Creditors of the insured can not effect garnishment of this claim against insurers.

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- If legal proceedings are necessary: injured party should
 - generally call the insured / liable party into the proceedings as a defendant (not necessary if insured went bankrupt or was dissolved).

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VI Subrogation and recourse

Article 6:197 DCC

This provision excludes recourse or subrogation by insurers. Insurers can not acquire the rights by contract, nor can they have them exercised in their favour by the title-holder in the insurer's name.

A third party damaging insured property can lead to multiple claims. A concurrence / joiner of actions can occur if both the injuring party and the insurers settle the claim with the injured party.

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Subrogation and Recourse

Insured has free choice: claiming against his insurers or claiming against the injuring party (if identity is known).
For practical reasons: insured shall normally claim under insurance contract and not against injuring party (e.g. tort or breach of contract).

Payment by the insurers to the insured will have to be taken into account when taking recourse against the injuring party. Damages should be compensated once. Dutch legislature has acknowledged the interest to maintain recourse against the injuring party.

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Subrogation and Recourse

1838: Article 284 Dutch Commercial Code

2006: Now article 7:962 DCC.

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VII Letters of Undertaking

We, the undersigned, (P&I Club or Bank) waiving and renouncing all benefits and exceptions, conferred on guarantors ... hereby declare to bind ourselves as surety to and in favour of (name creditor) by way of security for the true and proper discharge by (principal debtor) of whatever the principal debtor may be found to be indebted to the creditor by virtue of a judgment ...

rendered against the principal debtor

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Letters of Undertaking

This guarantee shall expire unless before or within 12 months from the date of signing hereof legal proceedings have been instituted with relation to the aforesaid issue in a competent court of law having jurisdiction in the matter, or against the undersigned, as provided in the third paragraph ...

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Letters of Undertaking

Third paragraph:

Covers bankruptcy or moratorium situation of principal debtor. Then the creditor is entitled to bring legal proceedings against the undersigned guarantor directly in order to have indebtedness of the principal debtor ascertained by the court (declaratory or awarding money). If there is no bankruptcy / moratorium: creditor should not issue writ against guarantor as co-defendant.