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BGH (German Federal Court of Justice): No denial of D&O insurance coverage based on inferred knowing misconduct

In a landmark decision dated 19 November 2025 (case no. BGH IV ZR 66/25), the Federal Court of Justice ruled on the longstanding issue of denials of D&O liability coverage on grounds of knowing misconduct.

D&O insurers typically exclude coverage for director liability arising from the director's willful or knowing misconduct. In insolvency situations, suits by the insolvency administrator against directors are common and not infrequently based on payments illicitly made by the director while the company was insolvent. D&O insurers often invoke knowing misconduct exclusions and deny coverage where the director failed to file for insolvency protection despite knowing the company to be insolvent or knowingly breached another so-called cardinal duty. Many courts inferred from the knowing breach of a cardinal duty that any illicit payments during insolvency were also knowingly made and did not require proof from the D&O insurer on this point.

The Federal Court of Justice has now expressly rejected this blanket inference and significantly strengthened the position of insolvency administrators against D&O insurers.

I. Background and significance of the decision

Under general principles, the insurer has the burden of pleading and proving the existence of a coverage exclusion in D&O insurance. The courts had previously held that breaches of a managing director's cardinal duties must have been committed knowingly, and this was the position of the court below in the instant case (Higher Regional Court (OLG) Frankfurt am Main, case no. 7 U 134/23). The reasoning was that managers are expected to be aware of and comply with cardinal duties. These cardinal duties include the obligation to file for insolvency protection if the company is overindebted or unable to pay its debts as they fall due (§ 15a InsO). In the instant case, the director

failed to file for insolvency, and the Higher Regional Court found this to be a knowing failure.

In keeping with prior case law, the court went a step further and concluded from the knowing breach of the obligation to file for insolvency that the payments later made, which reduced the assets available to the insolvency estate, were also to be treated as having been made with knowledge that they were impermissible because they were a direct consequence of the failure to file for insolvency.

The courts drawing this blanket conclusion were, however, criticized by some voices in the literature, who instead called for a case-by-case assessment. The Federal Court of Justice adopted this view in the case here reported on.

II. Underlying facts

In the instant case, the insolvency administrator had obtained a judgment against the sole director of an insolvent limited liability company (GmbH) holding him liable for payments improperly made while the company was insolvent (§ 64 sent. 1 GmbHG prior version; now § 15b InsO). The director was in principle insured against such liability under a D&O policy, but the terms excluded coverage for harm intentionally caused, for knowing failure to comply with laws, regulations, resolutions, grants of authority, or instructions, and for other breaches of duty knowingly committed.

By way of executing the judgment, the insolvency administrator attached the managing director's claim for indemnification under the D&O policy and filed suit when the insurance company refused payment, citing the exclusion for knowing misconduct.

The trial court found for the insolvency administrator, but on appeal the Higher Regional Court reversed and dismissed the action. The Higher Regional Court followed a line of cases holding that knowledge of insolvency or the deliberate violation of the obligation to file for insolvency were sufficient grounds for inferring a deliberate violation of the payment prohibition under § 64 GmbHG (prior version). Since it found the payments to be deliberately wrongful, the court held that the coverage exclusion applied. The insolvency administrator then appealed to the Federal Court of Justice.

III. The court's reasoning

The Federal Court of Justice held that, in order for the coverage exclusion for knowing misconduct to apply, the determination of knowledge must relate to the particular misconduct giving rise to the director's liability (in this case the wrongful payments while insolvent) (**see 1**), and that knowledge that the payments were wrongful could not be inferred merely from knowledge that an insolvency petition should have been filed (**see 2**). The high court referred the case to the Higher Regional Court for further findings as to whether the director knew the payments made while insolvent to be wrongful.

1. Knowing breach of duty must cause the liability

Under the high court's reading of the terms of the D&O policy, the coverage exclusion applied only where the breach of duty that specifically gave rise to liability was committed knowingly.

- The Federal Court of Justice emphasised that coverage exclusion clauses were to be interpreted narrowly based on how a reasonable policyholder lacking specialized knowledge of insurance law would understand them. The narrow interpretation standard applied especially where third parties were included as insured persons in the scope of the insurance coverage (as is regularly the case with D&O insurance). A broader interpretation, whereby coverage would also be excluded in the event of knowing breach of other obligations, was therefore not permissible.

- The court further found that it was apparent from the wording and structure that the coverage exclusion referred to the definition of an insured event – and was intended to exclude precisely those insured events that were committed knowingly.

2. No inference based on failure to file for insolvency

Under the above principles, the applicability of the coverage exclusion depends on whether the payments made during insolvency were knowingly wrongful. The Federal Court of Justice states, however, that the knowledge that the company was in a state of insolvency, and the knowing violation of the obligation to file for insolvency, were not in themselves a sufficient basis on which to infer that the payments were knowingly wrongful.

- In this regard, the Federal Court of Justice notes that a director may know the company to be in a state of insolvency and hence that he or she is obligated to file a petition for the commencement of insolvency proceedings without knowing that the payments made in this situation violate the law (§ 64 GmbHG, prior version; § 15b InsO). This is because payments that are "compatible with the diligence of a prudent businessman" remain permissible even in insolvency. Since insolvency does not trigger an unconditional ban on payments, there can be no automatic presumption that the director knows the payments to be wrongful. Rather, the director must consider each payment individually.

- In the court's view, knowing violation of the obligation to file for insolvency also does not automatically diminish the assets of the insolvency estate. The court states that the failure to take timely steps to obtain provisional insolvency protection from the insolvency courts for the assets of the insolvency estate cannot be equated with actively initiating prohibited payments.

On this basis, the Federal Court of Justice remanded the case to the Higher Regional Court. Since the court below had assumed that knowledge of wrongful payments could be inferred from knowledge that the company was in a state of insolvency, it had not reached any factual determinations regarding the director's intent. These determinations will now be made. The Federal Court of Justice made it clear that, under the wording of the specific exclusion clause, actual knowledge is required and conditional intent (reckless or willful disregard of the facts) will not suffice.

3. Consequences and practical advice

The practical consequences of the decision are far-reaching. In the future, D&O insurers invoking coverage exclusions based on knowing misconduct in insolvency situations must assume that they will have to plead and prove that the director was aware, at the time payments were made, not only that the company was in a state of insolvency and that a prohibition on payments had thus gone into effect, but also that the prohibition applied to the specific payments made. In defending actions brought to enforce insurance coverage, showing that the director or officer had positive knowledge that the specific payments it made were prohibited will be crucial. It will not be enough to show merely that the insured person knew that he or she had failed to file for insolvency when required to do so.

To meet this burden of proof and effectively defend the interests of the insurer in contested cases, more extensive advance factual investigation will be necessary in the future. This applies with regard to the economic facts establishing that a company was required to file for insolvency protection as well as to the knowledge and decision-making processes at the management level.

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