DARIUSZ FUCHS
https://doi.org/10.33995/wu2022.1.2

Insurance triad – sum insured, value insured and indemnity according to Articles 824 and 824[1] of the Polish Civil Code

The text presents the issue of basic institutions of insurance law in relation to the issue of regulation, primarily according to Article 824 and Article 824 (1) of the Polish Civil Code. In the article also outlines the ways of interpretation and the scope of their application. It also takes into account the achievements of international law, pointing to the EU solutions, including the planned ones.

Keywords: insurance contract, sum insured, multiple insurance, third party insurance, property insurance

Introduction

Due to its location in the systematics of provisions on the insurance contract in Title XXVII of Book III of the Polish Civil Code, and, above all, due to its content, Article 824 of the Civil Code (hereinafter also: the Civil Code)[1] contains fundamental solutions for property insurance in its entire spectrum. Its appropriate continuation is Article 824[1] of the Civil Code, which essentially refers to the issue of the relation between indemnity and the sum insured, taking into account the specific case of double (multiple) insurance. For this reason, these provisions constitute the legal framework for the permissible contractual freedom of the parties to the insurance contract, which, in the practice of trade, is significantly restricted by the adhesion of the conclusion of insurance contracts with the use of model contracts, *nota bene,* with the solutions adopted in Article 824 and Article 824[1] of the Civil Code, which necessarily correspond therewith. At the same time, even where insurance contractual models do not exist, such as in case of insuring works of art or biobased medicines, Article 824 of the Civil Code still plays a fundamental regulatory role. The interest of doctrine is obviously correlated with the multitude of jurisprudence of common courts, which, on the basis

1. Civil Code Act of 23 April1964, i.e. OJ of 2020, item 1740 as amended.

of individual cases, also try to develop universal principles referring to the relation of the sum insured to the value of the insured property, taking into account multiple insurance, or to determine the dependence of the sum guaranteed on the concept of the sum insured, and consequently: the relation of these concepts to the issue of the amount of indemnity due.

1. Essence of Article 824 of the Civil Code

The essence of the regulation in Article 824 of the Civil Code is the use of the notion of sum insured (which has not been normatively defined by the legislator), and in fact the context in which it is used. It has been rightly noticed that "(...) sum insured in property insurance is specified in Article 824 § 1 of the Civil Code. It states that if the parties have not agreed otherwise, then the sum insured specified in the contract constitutes the upper limit of the insurer's liability In turn, in Article 824 § 2 of the Civil Code the legislator granted the policyholder the right to demand an appropriate reduction of the sum insured, if after the conclusion of the insurance contract the value of the insured property decreased. The same power is given to the insurer, which, however, has also been given a more far-reaching power – that of unilaterally reducing the sum insured if the value of the insured property decreases. In order for the insurer to exercise its right to unilaterally reduce the sum insured, it must give the policyholder effective notice[2]. It may be added that the sum insured is „the amount of money for which the object insured is insured."[3] In view of the foregoing, it should also not be debatable that the sum insured (*scil*.: insurable) "is the monetary amount for which the insurance contract is concluded. In property insurance, it is the upper limit of the insurance indemnity and constitutes in TPL insurance the so-called guarantee sum."[4] It is accepted that „The sum insured is the upper limit of the insurer's liability, binding on the parties if the contract does not contain other provisions defining the scope of insurance."[5] It follows that the insured value can be determined by the sum insured, which in principle means „the upper limit of the benefit or also of the liability of the insurer".[6]

It should be stressed that in its normative expression, „(A)rticle 824 § 1 has a dispositive character, meaning the parties may conclude a contract providing for indemnity higher than the sum insured." Similarly, the content of Article 824 § 2 of the Civil Code in fact constitutes a creation of the right of the parties to the contract to modify the legal relationship, but in no way should it be interpreted as a *sui generis* peremptory mechanism, independent of the will of the parties: "The provision of Article 824 § 2 of the Civil Code gives the right to each party to the insurance

---

2. See legitimate comments contained in: M. Orlicki., [in:] A. Kidyba (ed), *Kodeksowe umowy handlowych*, Lex 2014.
3. Kowalewski E., *Umowa ubezpieczenia*, Bydgoszcz-Toruń 2002, p. 97. Other doctrinal definitions are in essence (per)mutations of this one.
4. D. Fuchs, Z. Łabno, *Umowa ubezpieczenia (Zarys wykładu)*, [in:] H. Ogrodnik (ed), Teoria i praktyka ubezpieczeń gospodarczych, Katowice 2000, p. 16, similarly cf. M. Krajewski, *Umowa ubezpieczenia. Art. 805–834 Kodeksu cywilnego. Komentarz*, Warszawa 2016, p. 529.; A. Chróścicki, *Umowa ubezpieczenia po nowelizacji kodeksu cywilnego. Komentarz*, Warszawa 2008, p. 130.
5. G. Sikorski G, [in]: J. Ciszewski (ed), *Kodeks cywilny. Komentarz*, ed. 2 , Warszawa 2014, LEX (accessed 21 12 2021). Analogously W. Dubis, [in:] E. Gniewek (ed), *Kodeks cywilny. Komentarz*, Warszawa 2011, p. 1352.
6. S. Grzybowski, [in:] *System Prawa Cywilnego. Prawo zobowiązań – część szczegółowa*, Wrocław 1976, p. 929.

contract to take the initiative to reduce the sum insured, and consequently to reduce the premium. The insurer's right to reduce the sum insured under Article 824(2) of the Civil Code cannot, however, be regarded by the claimant as an obligation on the part of the defendant."[7]

At the same time, the regulation of Article 824 of the Civil Code *per toto* constitutes another example of the legislator's intention to treat the insurance contract from the perspective of a synallagmatic relationship, this time (...) in connection with the well-established position, shared by the adjudicating panel in this case, regarding the insurance contract as a mutual agreement (Article 487 § 2 of the Civil Code). It follows that the benefit of one party corresponds to the benefit of the other, so that in an insurance contract the benefit provided by the insurer in the event of an insurance accident should correspond to the value of the insurance risk, compensated to the insurer by the payment of the premium calculated by him. In the case of property insurance, the premium generally corresponds to the insurance risk expressed by the sum insured. Therefore, if the insurer has charged a premium corresponding to the insurance risk up to a certain amount, then, if a loss occurs as a result of an insured event, it should bear liability equivalent to the benefit it received from the insured person (...)" and furthermore " (...) in property insurance, the rule should be that the insurer pays a benefit equal to the loss suffered as a result of the insurance accident, and the limit of liability should be the sum insured, corresponding to the amount of the premium as a mutual benefit of the insurer "[8]

At the same time, despite *prima facie* reference to the legal insurance terminology, characteristic also for the liability insurance in Article 824 of the Civil Code, which the legislator would be inclined to make by the content of §1 *(scil:* "sum insured"), the use in §2 of the notion of "value of the insured property" makes it reasonable to conclude that the relation of the sum insured to the insurer's liability, as provided for in Article 824 of the Civil Code *per toto*, refers in principle (with significant exceptions) to property insurance, which is ultimately concluded by the legislator in Article 824 §3 of the Civil Code, where the appropriate *(vide:* adequate) reduction of the insurance premium in such a situation is mentioned.[9] As regards the question of applying this Article to TPL insurance, there is a view that it is inadmissible because of the different nature of liability insurance, where the equivalent of sum insured is the guarantee sum. This is, however, a consequence of the terminology used in the insurance practice and not derived from the statutory definitions or terms used by the legislator, if only for the reason that in Article 822 of the Civil Code the legislator is silent on the subject of the guarantee sum. Summing up this issue, it has to be agreed that Article 824 § 2 of the Civil Code applies directly to insurance of property, due to clear intention of the legislator, but now the application of Article 824 § 1 of the Civil Code to both insurance of property and TPL should not raise any objections. Recognising the mutuality of insurance contract *per toto,* there are no contraindications to applying the content of Article 824 Civil Code to TPL insurance.

The sum insured referred to in Article 824 of the Civil Code is not and cannot be equated with the sum insured in personal insurance, and in life insurance in particular, for two main reasons. Firstly, the systemic interpretation argues against such an interpretation, because Article 824

7. Cf. judgment of the Supreme Court of 19 July 2000, ref. II CKN 1068/98, LEX No. 50887.
8. Cf. judgment of the Supreme Court of 16 October 2014, ref. III CSK 302/13, OSNC 2015/10/12, cited from LEX, as confirmed in the Supreme Court judgment of 10 June 2016, ref. IV CSK 624/15, LEX noNo. 2067079.
9. Cf. on the mutuality of the insurance contract: D. Fuchs, *Umowa ubezpieczenia – umową wzajemną czy tylko dwustronnie zobowiązującą?*, „Wiadomości Ubezpieczeniowe", Nos 7, 8, 9/ 1995, p. 33. et al.

of the Civil Code is contained in Section II of Title XXVII of the Civil Code, and not in general provisions on the insurance contract (Articles 805–820 of the Civil Code).

Secondly, in personal insurance, as it has already been noticed in the literature, there can be no question of the insurance value, to which the legislator relates the sum insured, because for axiological reasons this would be unacceptable, if only for the additional reason that it would result in application of Article 824[1] of the Civil Code to personal insurance, which would mean an undesirable assessment of personal interests in the form of health or life from the perspective of underinsurance or overinsurance.[10]

Summing up this issue, it has to be agreed that Article 824 § 2 of the Civil Code applies directly to insurance of property, due to clear intention of the legislator, but now the application of Article 824 § 1 of the Civil Code to both insurance of property and TPL should not raise any objections. Recognising the mutuality of insurance contract *per toto,* there are no contraindications to applying the content of Article 824 § 3 of the Civil Code to TPL insurance.

2. Meaning of Article 824[1] of the Civil Code

The above view was legitimate already before the amendment of the code provisions on the insurance contract came into force on 10.08.2007, and after the changes, it is also represented, as a rule, in accordance with the modification of Article 826 in connection with Article 821 of the Civil Code.[11] It has been rightly noted that Article 824 § 1 of the Civil Code does not contradict the idea of TPL insurance, and in this respect the issues regulated by the Civil Code can be applied to civil liability insurance[12]. Consequently, an analogous conclusion will be valid for Article 824[1] of the Civil Code. This is supported by existing case law of common courts.[13]

It is also worth emphasising here that in property insurance there is an important issue of the relation between the sum insured and its value also through the consequences for the limits of the insurer's liability for damages[14]. Interestingly, unlike overinsurance[15], which may occur as a result of a single insurance contract in which the value of the insured property is overestimated, and consequently the sum insured exceeds its value, in double insurance a similar final effect is nevertheless the result of a number of legal actions, which in the simplest case must take the form of two separate insurance contracts under which there is a duplication (at least partial) of insurance cover, taking into account the nature of the object of protection (and thus

10. See also: K. Malinowska, [in:] *Prawo ubezpieczeń gospodarczych*, Volume II. *Prawo o kontraktach w ubezpieczeniach. Komentarz do przepisów i wybranych wzorców umów,* Warszawa 2010, p. 336.
11. See: D. Fuchs, komentarz do art. 826 k.c. in: D. Fuchs, K. Malinowska, D. Maśniak (eds), Kontrakty w ubezpieczeniach, Warszawa 2020., p. 387 et al.
12. Cf. M. Krajewski, *Ubezpieczenie odpowiedzialności cywilnej według kodeksu cywilnego*, Warszawa 2011, p. 304–305.
13. Cf. D. Fuchs, komentarz do art. 824 kc, [in:] D. Fuchs, K. Malinowska, D. Maśniak (eds), op. cit. , p. 348–349.
14. Cf. also D. Fuchs, komentarz do art. 824 k.c. [in:] D. Fuchs, K, Malinowska, D. Maśniak, op. cit., p. 346 et al.
15. A. Wąsiewicz, Z.K. Nowakowski, *Prawo ubezpieczeń gospodarczych*, Warszawa 1980, p. 55; cf. also considerations concluded in: *Kodeks cywilny. Komentarz*, vol. 5, M. Habdas, M. Fras (eds), LEX.

the category of the insurance interest and the identicality of the insurance risk) and the time of its provision by the insurer.[16]

At the same time, however, the question of whether Article 824^1 of the Civil Code, and in particular § 2 thereof, referring to the issue of multiple or overinsurance, is applicable to TPL (*id est*: Third Party Insurance) insurance, is relevant for the practice of civil trade insurance[17]. Two fundamental views have thus developed. According to the former, it is permissible to apply Article 824^1 § 2 of the Civil Code to TPL insurance, as exemplified by the significant resolution of the Supreme Court of 13.05.2016[18]. In this resolution, however, the Supreme Court, starting from the same semantic values of the content of the commented paragraph, stated that the equivalent of the sum insured is the guarantee sum, which led to the view that such application is acceptable. There is a view in doctrine in this connection to this (and perhaps in part independently of the above resolution of the Supreme Court) that assumes the possibility of applying Article 824^1 § 2 of the Civil Code to TPL insurance[19]. In turn, B. Kucharski expressed this view in the following way: „In TPL insurance, although there is no concept of insured value and the sum insured is replaced by the guarantee sum, double insurance may nevertheless take place”[20].

According to the opposing view, such a possibility does not exist, which is best reflected in the following statement of M. Krajewski: „The argument that the concept of insurance value, which is a necessary element of the hypothesis arising from Article 824^1 § 2 of the Civil Code, is not present in TPL insurance, is fundamental here.”[21]. This is also the conclusion reached by M. Orlicki: „Article 824^1 § 2 of the Civil Code can only be directly applied to property insurance other than TPL insurance. Indeed, in the case of TPL insurance, the category of “insurance value”' does not apply, so it cannot be established that the sums insured in aggregate exceed the insurance value.”[22]. Such a view, due to the interpretation of both the Civil Code standards and (in relation to obligatory TPL

16. See: D. Fuchs, komentarz do art. 824^1 kc, [in:] D. Fuchs, K. Malinowska, D. Maśniak, op. cit., p. 370 et al.
17. Against this background, the thesis expressed in relation to the case law of the Supreme Court, decided in the context of Article 821 of the Civil Code, is laconically formulated, and without further justification: “In this case, the issue of dual insurance becomes a significant issue. There is a lack of any legal regulation in this respect, which may cause complications when two or more insurances covering the same subject are reduced”. Cf. A. Chróścicki, *Umowa ubezpieczenia po nowelizacji kodeksu cywilnego. Komentarz*, Warszawa 2008, p. 110, which, in the light of Article 824^1 § 2 is – in the author's opinion (D.F.), debatable.
18. resolution of the Supreme Court of 13.05.2016, III CZP 11/16, OSNC 2017/3, item 31, Cited by M. Fras, [in:] M. Habdas, M. Fras (eds), *Kodeks cywilny. Komentarz*, vol. 5, Warszawa, pp. 321–322, where it seems that the author is sceptical about such a position.
19. Cf. M. Wałachowska, *W sprawie stosowania przepisów kodeksu cywilnego do umowy ubezpieczenia obowiązkowego*, [in:] E. Kowalewski, W.W. Mogilski (eds), *System prawny ubezpieczeń obowiązkowych. Przesłanki i kierunki reform*, Toruń 2014, p. 249–250; similarly: P. Bucoń, *Odpowiedzialność cywilna uczestników wypadku komunikacyjnego*, Warszawa 2008, p. 139, where the view of S. Reps is referred to, as stated in: *Zastosowanie przepisów kodeksu cywilnego w ubezpieczeniach obowiązkowych*, „Prawo Asekuracyjne” 4/2005, p. 18.
20. See: B. Kucharski, *ŚwiadczenieE*, p. 309–310.
21. M. Krajewski, *Umowa ubezpieczeniaE*, 2016, p. 576.
22. M. Orlicki, [in:] M. Orlicki, J. Pokrzywniak (eds), *Umowa ubezpieczenia. Komentarz do nowelizacji kodeksu cywilnego,* Warszawa 2008, p. 112.

insurance) the provisions of the Act on obligatory insurance, should be accepted as conclusive.[23][24] The main reason is that the legislator in Article 824[1] of the Civil Code *explicite* refers, in the disposition of the norm drafted in sentence 1 § 2, to the concept of insurance value, it is necessary to argue in favour of excluding the application of Article 824[1] of the Civil Code to TPL insurance on the basis of *strice* regulations of the Civil Code.[25] At the same time there is nothing to prevent the rule resulting from Article 824[1] § 1 from being applied to TPL insurance (both obligatory and voluntary) ("Unless agreed otherwise, the sum of money paid out by the insurer under insurance may not be higher than the damage suffered")[26]

3. What does the Project of Principles on European Insurance Contract Law (PEICL) say, and the Principles of Reinsurance Contract Law (PRICL) accept?

It should be noted here that the European PEICL project includes in its systematics an issue analogous to the subject of regulation of Article 824 of the Civil Code (and accordingly: Article 824[1] of the Civil Code) in the provisions devoted to the so-called insurance of damage, which, in accordance with the normative terminology binding in the Polish Civil Code, includes property insurance.[27] Interestingly, also in view of possible *de lege ferenda* concepts, the European legislator in the draft does not expressly limit this institution only to property insurance, allowing a broader formula of application; this is certainly related to the adoption of the so-called *indemnity principle* as common to the national systems of individual European states, with the exception of Sweden.[28]

According to Article 8:101 PEICL, the Insurer shall not be obliged to provide a monetary benefit higher than a sum equivalent to the damage suffered by the insured. A provision of the contract

---

23. Act of 22 May 2003 on Obligatory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau, i.e. OJ of 2021, item 854 as amended.
24. More on the discussion in case law and literature: D. Fuchs, komentarz do art. 824[1] kc, [in:] D. Fuchs, K. Malinowska, D. Maśniak, op. cit. pp. 382–387.
25. Art. 824[1] § 2 sent. 1 Civil Code "Where the same object of insurance at the same time is insured against the same risk with two or more insurers for sums which together exceed its insurance value, the policyholder may not claim a benefit in excess of the loss."
26. See: D. Fuchs, *Ubezpieczenia gospodarcze w obrocie lekami biologicznymi*, [in:] M. Świerczyński (ed), *Biologiczne produkty lecznicze. Aspekty prawne*, Warszawa 2016, p. 261–266, and also: D. Fuchs, komentarz do art. 824 kc in: D. Fuchs, K. Malinowska, D. Maśniak (eds), op. cit., p. 348 et al.
27. Cf. on the general concept of the draft Fuchs D., *Restatement of European Insurance Contract Law a koncepcja polskiego kodeksu ubezpieczeń*, [in:] Kowalewski E. (ed), *O potrzebie polskiego kodeksu ubezpieczeń*, Toruń 2009, p. 125 et al.; idem: *Konsument w ubezpieczeniach. Szczególne unormowanie w europejskiej regulacji umowy ubezpieczenia*, [in:] Momkiewicz J., Orlicki M. (eds), *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce, Współczesne wyzwania*, Warszawa 2015, p. 211 et al., and also: D. Fuchs, *Zasady Europejskiego Kontraktowego Prawa Ubezpieczeniowego (PEICL) – bieżący stan prac nad projektem*, paper for the conference *Projektowane przepisy umowy ubezpieczenia w Kodeksie Cywilnym* (reproduced text).
28. Cf. Basedow J., Birds J., Clarke M., Cousy H., Heiss H., Loacker L. (eds), *Principles of European Insurance Contract Law (PEICL)*, 2nd Expand Edition, Köln 2016, p. 245. However, it is worth noting that in the official commentary to PEICL, property insurance is used as an illustration of the application of this regulation in practice. Cf. ibid.

which determines the value of the object of insurance is valid even if the value determined exceeds the actual value of the object of insurance, as long as the policyholder or insured did not act to the detriment of the other party or mislead the insurer at the time the value was determined. With regard to underinsurance, the bill provides that (Article 8:102) the insurer shall be liable for any loss up to the sum insured, even if the sum insured is less than the value of the property insured at the time of the insurance accident. However, if the insurer provides cover in accordance with paragraph 1, the insurer shall also be entitled to pay indemnity in such proportion as the sum insured bears to the actual value of the property insured at the time of the loss.

Thus, the European bill allows for the possibility of applying the proportionality rule, while at the same time specifying the methodology for its application to underinsurance.[29] The solution adopted suggests that if PEICL is applied by the contracting parties to a singular insurance relationship, *ipso modo* the insurer will be able to proportionally reduce the amount of the indemnity paid, without the need for the insured to obtain a separate consent, which also means that if PEICL is absorbed on the basis of a substantive legal indication, this will mean that the application of this method will be left to the insurer's competence, which of course in practice will most often be the case.

Furthermore, the reimbursement of the equivalent of the costs referred to in Article 9:102 (preventive costs) should be made in the same proportion. If, on the other hand, the sum insured exceeds the equivalent of the maximum loss under the insurance contract, either party shall be entitled to demand a reduction in the sum insured and a corresponding reduction in the premium for the remaining term of the contract. Should the parties fail to reach an agreement on a reduction of the sum insured and the premium, either party shall be entitled to terminate the insurance contract one month after the presentation of the request referred to in paragraph 1.

The equivalent of Article 824 ¹ CC, on the other hand, is Article 8:104 PEICL, which provides that if the same insurance interest is separately insured by more than one insurer, the insured is entitled to claim performance from one and every insurer to the extent necessary to satisfy the insured to the extent of the actual damage suffered. The insurer to whom a claim is made shall meet the monetary benefit up to the sum insured and reimburse the costs incurred in taking preventive measures, notwithstanding the right to claim from any other insurer. As between insurers, the rights and obligations referred to above shall be determined in proportion to the sums for which they are liable, independently of each other, to the insured.[30] The European bill on the insurance contract PEICL also contains solutions, worked out by means of comparative law analyses, relating also to the content regulated by Article 824¹ of the Civil Code[31]. First of all, Article 8:103 PEICL provides (Amendment of the contract in case of overinsurance) that if the sum insured exceeds the equivalent of the maximum loss under the insurance contract, either party shall be entitled to demand a reduction in the sum insured and a corresponding reduction in the premium for the remaining

29. Cf. comparative legal analysis of this mechanism in European legal systems M. Orlicki, *O możliwości stosowania reguły proporcji przy niedoubezpieczeniu*, „Prawo Asekuracyjne" 2/2011, p. 63–64

30. The PEICL project cited in the text is based on the Polish translation: D.Fuchs, Ł. Szymański, M. Boguska, *Zasady europejskiego prawa ubezpieczeń (ZEPU)*, [in:] Basedow J., Birds J., Clarke M., Cousy H., Heiss H., Loacker L. (eds), *Principles of European*, p. 657 et al.; this publication also contains the English text accepted by the group as authentic language.

31. Text of the commentary cf. *Principles of European InsuranceE*, ed. J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss, L. Loacker., op. cit.

term of the contract. On the other hand, if the parties fail to reach an agreement on the reduction of the sum insured and the premium, either party is entitled to terminate the insurance contract one month after the presentation of the claim for reduction of the premium. On the other hand, in the case of multiple insurance situations (Article 8:104 (1) PEICL): „Where the same insurable interest is separately insured by more than one insurer, the insured shall be entitled to claim performance from one and every insurer to the extent necessary to satisfy the insured to the extent of the loss actually suffered." In a situation where the claimant has made a claim for payment, the insurer to whom a claim is made shall meet the monetary benefit up to the sum insured and reimburse the costs incurred in taking preventive measures, notwithstanding the right to claim from any other insurer (Article 8:104 (2) PEICL). On the other hand, in an internal relationship between insurers, the rights and obligations referred to in § 2 shall be determined in proportion to the sums for which they are liable, independently of each other, to the insured.

It should be added that the consequences of these solutions are continued in the next bill for a single law on reinsurance contracts, i.e. Principles of Reinsurance Contract Law (PRICL).[32] The foundation of the bill's creators' intentions regarding the content of PRICL is the unification of terminology and the preparation of a model regulation, which would constitute a model of uniform law on a reinsurance (or, in fact: intermediate insurance *per toto,* since it also covers retrocession) contract for reinsurers and insurers (analogically to PEICL, as a project envisaged on the European scale).[33]

At the same time, it responds to doubts which have arisen in doctrine and practice as to the legal nature of the reinsurance contract in the various legal orders, as well as to different concepts as to the law applicable to the contract.[34] The ambition of the creators of PRICL was and is to develop reinsurance clauses drawing on the achievements and traditions of leading reinsurance centres and international reinsurance markets. *Pari ratione*, this model could not only be adapted to the European (EU or non-EU, e.g. within the EFTA countries) legal order, but could also be applied to the Anglo-American or Far Eastern market. What is particularly important for the state of Polish law is that this project, due to its material and legal character, should successfully provide comprehensive inspiration for the Polish legislator, who cannot boast of significant *de lege lata* achievements in this respect, just like the majority of European legislation.[35] In this context, a mention should be made of Article 2.4.3, which refers to clauses popular in reinsurance practice, the application of which, however, results in double (multiple) insurance solutions and the rela-

32. See Polish literature: H. Heiss, O. William, *The Principles of Reinsurance Contract Law (PRICL)*, [in:] E. Bagińska, W.W. Mogilski, M. Wałachowska (eds), *O dobre prawo dla ubezpieczeń. Księga Jubileuszowa Profesora Eugeniusza Kowalewskiego*, Toruń 2019; M. Ostrowska, *The Principles of Reinsurance Contract Law. Nowa jakość umów reasekuracji*, „Prawo Asekuracyjne" 4/2020, D. Fuchs, *Ujednolicenie kontraktowego prawa reasekuracyjnego w skali międzynarodowej in statu nascendi* PRICL (*Project of Reinsurance Contract Law), „*Wiadomości Ubezpieczeniowe" 1/2019.
33. Cf. D. Fuchs, *Ujednolicenie kontraktowego prawa reasekuracyjnego w skali międzynarodowej in statu nascendi_PRICL (Project of Reinsurance Contract Law)*, op. cit. p. 23 et al.
34. For comprehensive discussion, see: M. Fras, *Reżim prawny umowy reasekuracji – zagadnienia materialnoprawne i kolizyjne*, Prawo Asekuracyjne No 4/2008, p. 56 et seq.
35. Official comment: Principles of Reinsurance Contract Law (PRICL) 2019, H. Heiss, M. Schauer, M. Wandt (ed.), https://www.ius.uzh.ch/dam/jcr:c5e36159–2cbc-4686–83ce-1067bc4704a3/PRICL_1.0_2019.pdf, accessed. 30.12.2021

tion of insured loss to indemnity, included in PEICL, in the event that a party to an insurance contract based on this solution would also conclude a reinsurance contract according to PRICL. Anyway, were the law applicable to the insurance contract to be Polish law, it does not exclude that the reinsurer would respect the provisions of the Polish Civil Code based on PRICL (in accordance with the principle of freedom of contract), which in principle contains semiimperative norms but in the case insurance contract (by some even referred to as peremptory norms within the scope of the 807 CC regulation). Namely, Article 2.4.3 of PRICL states (referring to clauses: *follow the settlements* and *follow the fortunes)* that "To the extent a loss is covered by the contract of reinsurance, the reinsurer shall

(a) follow the settlements of the reinsured if the losses are argu-ably within the cover of the primary insurance contract;
(b) follow the fortunes of the reinsured."[36]

4. The issue of proportion in the payment of an insurance benefit

As a result, the concept of the so-called proportion in insurance trading emerges as a consequence of a mismatch (for various reasons) between the sum insured and the insurance value in a situation where the insurance value exceeds the sum insured. However, this is not the only possible solution to this situation, as an alternative is first-risk (*scil.* liability) insurance, where the insurer pays indemnity up to the sum insured.

A fundamental question arises as to whether the proportionality principle rises to the rank of a principle of insurance law, or whether it is merely a solution created on the basis of the principle of contractual freedom and should be analysed *in casu* from the perspective of the legal order and the principles of community life, as well as the nature of the insurance relationship (cf. 353[1] of the Civil Code).[37] Furthermore, when addressing the above issue, is it also necessary to take into account the status of the entities that conclude the insurance contract or is it irrelevant to the resolution of the issue.[38] To conclude this topic, it should be emphasised that in the absence of any regulation of the proportionality principle by the legislator, everything depends on the content of the specific contract. A starting point for further consideration might be the thesis: "The insurance company, in the event of damage to insured property, is obliged to pay compensation, not the sum insured. This extent of the insurer's duty to indemnify arises not only from the specific contract but also from the Act."[39]

Here we must agree with the view that „The introduction of proportionate liability requires an express provision in the insurance contract (the T&C). (...) This means that the sum insured is simply

36. |PRICL Translation into Polish see: M. Ostrowska, op. cit., p. 27., detailed commentary that clause: J. Stempel, Principles of Reinsurance Contract Law (PRICL) 2019, H. Heiss, M. Schauer, M. Wandt, op. Citcit., p.58 et seq.
37. Cf. M. Orlicki, *O możliwości stosowania reguły proporcji przy niedoubezpieczeniu*, op. cit., p. 61–62; Ł. Żarnowiec, *Wpływ niedoubezpieczenia mienia na świadczenie ubezpieczyciela – glosa do wyroku Sądu Najwyższego z dnia 7 października 2010 r., IV CSK 149/10* (unpubl.), „Wiadomości Ubezpieczeniowe" 4/ 2014, p. 117 et al., and also C. Orłowski, *Dopuszczalność stosowania zasady proporcji w sytuacji niedoubezpieczenia*, „Monitor Ubezpieczeniowy" 50/2012, p. 1.
38. See: D. Fuchs, *komentarz do art. 824 kc*, [in:] D. Fuchs, K. Malinowska, D. Maśniak (eds), op. cit., p. 353–356.
39. Judgment of the Supreme Court of 19 February 1999, ref. II CKN 203/98, LEX No 1214425.

the limit of the insurer's liability and its relation to the value of the insured object is irrelevant. Absence of a specific provision regulating this issue means therefore that a system of liability for first risk is in place.[40] This is also backed by the general concept of the possibility of contractual modification of debtor's indemnity liability existing in the Polish law.[41] Hence, it should be assumed that the correct approach is as follows: if at the stage of concluding the contract the insurance value was determined by means of a specified method, which affected the sum insured indicated *in casu*, then *ipso modo* the value is determined at the stage of indemnifying the property damage. Therefore, if then, after the notification of the loss, the insurer, by means of a method other than the one approved by the policyholder at the time of the declaration, values the insured value and thus achieves the possibility of benefiting from a proportion of its performance in relation to the loss suffered *(scil:* contractual, because it is not able to use any other method), this is a practice that is contrary to the general recognition of the insurance contract as a *contractus uberrimae fidei*. This is particularly evident when the method used by the insurer in these circumstances is not mentioned in the T&C or in the contract.

However, in the absence of *explicit* wording of the contract or of the T&C adopted thereto, the application of proportions cannot be based on the common tradition or accepted practice, even invoking Article 56 of the Civil Code, and with regard to Article 807 of the Civil Code, as the application of proportion on this basis would undoubtedly constitute a worsening of the legal situation of the policyholder and the insured respectively, and this is to be prevented by the rule of semi-imperative peremptory expressed in Article 807 of the Civil Code.

Thus it can be concluded that, although the principle of proportion in the present state of the law does not deserve to be regarded as contrary to the nature of insurance, neither the history of business insurance nor the present day provide any grounds for stating that contractual procedures consisting in reducing the indemnity scope of the insurer in relation to the loss suffered by the insured are inexpedient. However, they certainly cannot be derived from market practices or insurance tradition, because as such, already in view of the protective nature of insurance contract regulations, they must be reflected in the provisions of the specific contractual relationship and possibly in the applicable general terms and conditions. Also, there can be no doubt, in view of Article 13 (3) and (5) of the Insurance and Reinsurance Act[42], that a lack of unambiguous interpretation will result in an interpretation in favour of the policyholder or the insured, regardless of whether they are an entrepreneur or not. Since a proportion in the payment of insurance claims is a disadvantage, therefore, in such situations solutions should be disregarded which may or may not, because of their ambiguity (lack of precision and clarity) be interpreted in this way. This applies in particular to the introduction into the T&Cs of complex calculation formulae or constructions which are incomprehensible to a non-professional, irrespective of whether they are a trader or a consumer.

However, if such a provision is formulated in an unambiguous and precise manner, then – since it refers to the main performance in the insurance contract, i.e. insurance protection *(scil:*

40. **J. Nawracała,** *Odpowiedzialność proporcjonalna ubezpieczyciela w przypadku niedoubezpieczenia mienia,* „Prawo Asekuracyjne" 3/2016, p. 35–50, LEX, accessed 12.12.2021.

41. This principle is analysed in the context of the possibility of its change by Jastrzębski J., *O umownych modyfikacjach odpowiedzialności odszkodowawczej* dłużnika, „Kwartalnik Prawa Prywatnego" 3/2007, p. 8001 et al.

42. Cf. E. Bukowska, [in:] P. Czublun (ed.), *Ustawa o działalności ubezpieczeniowej i reasekuracyjnej. Komentarz*, Warszawa 2016, p. 64–66.

guarantee and indemnity liability of the insurer), then even in consumer trade it will not be in such circumstances annullable on the basis of Article 385[1] CC.

5. Unjust enrichment and Article 824 of the Civil Code

It is also worth noting the relation of the content of Article 824 of the Civil Code to the notion of undue benefit, as regards the lack of the obligation to return, which is stipulated by the legislator in Article 411 of the Civil Code. As, from the perspective of Article 411 point 1 of the Civil Code, the interpretation of the notion of knowledge indicates the complete awareness that the benefit is not due to the *accipiens,* and *solvens,* in performing it, acts without any obligation arising from existing and valid undertaking, it should be pointed that based on property insurance, an example of exclusion of *condictio* is the notion of goodwill (referring also to Article 411 point 2 CC) – although such a qualification requires detailed analysis, as this is not a civil law institution that would be unequivocally aligned with the context of undue performance on the part of the insurer due to the differentiation of the form of goodwill in business insurance law.[43] In order to determine whether we are dealing with an insurance goodwill in a particular case or with the payment of a benefit that does not have such a connotation, it is necessary at the outset to refer to the general category of insurance cover[44]. Such a need arises in particular because of the distinction made in the domestic literature between two basic forms of goodwill: dispensational (where the insurer, despite having been granted insurance cover, could refuse to provide the benefit, but does not do so, generally by invoking principles of social co-existence), or marketing (which occurs when, for market reasons, the insurer pays a particular benefit to an entrepreneur, although its basis is not within the scope of insurance cover)[45]. In order to recognize the proper character of the benefit in a given case, the definition of the insurance contract, regulated in Article 805 § 1 of the Civil Code, is of fundamental importance.[46] As a consequence, the insurer, without being exposed to the accusation of infringement of norms of public law nature, should not look for the basis for the payment of the marketing goodwill in the cited norm of the Act on Insurance Activity, because such a benefit does not result from the insurance contract (and respectively – reinsurance), as it is not the effect of the insurance cover granted on the basis of a singular insurance contract. Of course, it cannot be excluded that in practice the insurer also pursues its own marketing objectives by means of a dispensational goodwill, which in any case are usually the reason for the payment of the benefit *ex gratia*. In such a case, however, where the payment of a benefit falls within the limits of the insurance cover previously granted, the legal admissibility of such

43. For more on the context of Article 411 of the Civil Code, cf. D. Fuchs, A. Malik, [in:] M. Habdas, M. Fras (eds), *Kodeks cywilny. Komentarz*, vol. 3, *Zobowiązania. Część ogólna*, Warszawa 2018.
44. See: D. Fuchs, *Ochrona ubezpieczeniowa jako świadczenie główne ubezpieczyciela*, „Prawo Asekuracyjne" 2006/2, p. 40 et al. and D. Fuchs, *Ochrona ubezpieczeniowa a ochrona konsumencka*, „Rozprawy ubezpieczeniowe" 2006/1, p. 35 et al.
45. For definitions of both forms see: E. Kowalewski, D. Fuchs, W.W. Mogilski, M. Serwach ,*Prawo ubezpieczeń gospodarczych*, Toruń-Bydgoszcz 2006, p. 210, cf. also E. Kowalewski, M. Serwach, *Kulancja ubezpieczeniowa*, „Prawo Asekuracyjne" 3/2008.
46. Cf. D. Fuchs, *komentarz do art. 805 k.c.,* [in:] D. Fuchs, K. Malinowska, D. Maśniak (eds), Kontrakty w ubezpieczeniach, op. cit., p. 53 et al.

a benefit cannot be denied. Thus, it can be concluded that a goodwill performance by an insurance company, if legally permissible, can have effects within the scope of Article 824 of the Civil Code.[47]

Summary

Both Articles 824 and 824^1 of the Civil Code are quintessence of property insurance. After the 2007 amendment, they essentially meet the needs of the insurance industry and in its content also provide arguments for the synallagmatic nature of the insurance contract. Their importance for legal transactions is also documented by the significant interest of jurisprudence in notions such as the principle of proportionality or the issue of overinsurance. The essence of this regulation reflects the relationship between the sum insured, the value insured and compensation in property insurance. It should also be pointed out that the scope of application of these provisions to TPL insurance is broader than originally interpreted, particularly under the *ancien regime.* For all those reasons, it is right that these issues are also addressed in the Principles of European Insurance Contract Law.

At the same time the analysis leads to the approval of the current content of Article 8241, especially § 2 of the Civil Code, as on the one hand it positions the policyholder towards the insurer on a level which can be approved also from the perspective of the civil law principle of equality of the parties to the legal relationship, and on the other hand – it corresponds to international standards. On the other hand, we should consider the proposal to unify the construction of double insurance both in land and maritime insurance, which in the author's opinion should first of all mean introducing a solution corresponding to the content of Article 303 § 3 of the Maritime Code in Article 8241 of the Civil Code. The discrepancy *de lege lata* in this respect leads once again to the conclusion about the urgent need to amend Article 8241 of the Civil Code, so that the possibility of applying the implications resulting from it to the whole range of property insurance could not be reasonably questioned in the future.

References

Basedow J., Birds J., Clarke M., Cousy H., Heiss H., Loacker L. (eds), Principles of European Insurance Contract Law (PEICL), *2nd Expand Edition, Köln 2016*

Bucoń P., *Odpowiedzialność cywilna uczestników wypadku komunikacyjnego*, Warszawa 2008

Bukowska E., [in:] P. Czublun (ed), *Ustawa o działalności ubezpieczeniowej i reasekuracyjnej. Komentarz*, Warszawa 2016

Chróścicki A., *Umowa ubezpieczenia po nowelizacji kodeksu cywilnego. Komentarz*, Warszawa 2008

Dubis W., [in:] Gniewek E. (ed), *Kodeks cywilny. Komentarz*, Warszawa 2011

Fras M., *Reżim prawny umowy reasekuracji – zagadnienia materialnoprawne i kolizyjne*, „Prawo Asekuracyjne" 4/2008

Fuchs D., *komentarz do art. 824 kc*, [in:] Fuchs D., Malinowska K., Maśniak D. (eds), *Kontrakty w ubezpieczeniach*, Warszawa 2020

47. See: D. Fuchs, *komentarz do art. 824,* [in:] D. Fuchs, K. Malinowska, D. Maśniak, op. cit. p. 362 et seq.

Fuchs D., *komentarz do art. 824¹ kc*, [in:] Fuchs D., Malinowska K., Maśniak D. (eds), *Kontrakty w ubezpieczeniach*, Warszawa 2020

Fuchs D., *komentarz do art. 826 k.c.*, [in:] Fuchs D., Malinowska K., Maśniak D. (eds), *Kontrakty w ubezpieczeniach*, Warszawa 2020

Fuchs D., *Konsument w ubezpieczeniach. Szczególne unormowanie w europejskiej regulacji umowy ubezpieczenia*, [in:] Momkiewicz J., Orlicki M. (eds), *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce*, Współczesne wyzwania, Warszawa 2015

Fuchs D., Łabno Z., *Umowa ubezpieczenia (Zarys wykładu)*, [in:] Ogrodnik H. (ed), *Teoria i praktyka ubezpieczeń gospodarczych*, Katowice 2000

Fuchs D., Malik A., [in:] M. *Habdas, M. Fras* (eds), *Kodeks cywilny. Komentarz, vol. 3, Zobowiązania. Część ogólna, Warszawa 2018, komentarz do art. 411*

Fuchs D., *Ochrona ubezpieczeniowa a ochrona konsumencka, „Rozprawy ubezpieczeniowe”* 1/2006

Fuchs D., *Ochrona ubezpieczeniowa jako świadczenie główne ubezpieczyciela*, „Prawo Asekuracyjne” 2/2006

Fuchs D., *Restatement of European Insurance Contract Law a koncepcja polskiego kodeksu ubezpieczeń*, [in:] Kowalewski E. (ed), *O potrzebie polskiego kodeksu ubezpieczeń*, Toruń 2009

Fuchs D., Szymański Ł., Boguska M., *Zasady europejskiego prawa ubezpieczeń (ZEPU)*, [in:] Basedow J., Birds J., Clarke M., Cousy H., Heiss H., Loacker L. (eds), *Principles of European Insurance Contract Law (PEICL)*, 2nd Expand Edition, Köln 2016

Fuchs D., *Ubezpieczenia gospodarcze w obrocie lekami biologicznymi,* [in:] M. Świerczyński (ed), *Biologiczne produkty lecznicze. Aspekty prawne*, Warszawa 2016

Fuchs D., *Ujednolicenie kontraktowego prawa reasekuracyjnego w skali międzynarodowej in statu nascendi PRICL (Project of Reinsurance Contract Law)*, „Wiadomości Ubezpieczeniowe” 1/2019

Fuchs D., *Umowa ubezpieczenia – umową wzajemną czy tylko dwustronnie zobowiązującą?*, „Wiadomości Ubezpieczeniowe”, Nos 7, 8, 9/1995

Fuchs D., *Zasady Europejskiego Kontraktowego Prawa Ubezpieczeniowego (PEICL) – bieżący stan prac nad projektem, paper for the conference Projektowane przepisy umowy ubezpieczenia w Kodeksie Cywilnym* (reproduced text).

Grzybowski S., [in:] *System Prawa Cywilnego. Prawo zobowiązań – część szczegółowa*, Wrocław 1976

Heiss H., William O., *The Principles of Reinsurance Contract Law (PRICL)*, [in:] E. Bagińska, W.W. Mogilski, M. Wałachowska (eds), *O dobre prawo dla ubezpieczeń. Księga Jubileuszowa Profesora Eugeniusza Kowalewskiego*, Toruń 2019

Jastrzębski J., *O umownych modyfikacjach odpowiedzialności odszkodowawczej dłużnika*, „Kwartalnik Prawa Prywatnego” 3/2007

Kodeks cywilny. Komentarz, vol. 5, M. Habdas, M. Fras (eds), LEX

Kowalewski E., Fuchs D., Mogilski W.W., Serwach M., *Prawo ubezpieczeń gospodarczych*, Toruń-Bydgoszcz 2006

Kowalewski E., Serwach M., *Kulancjaubezpieczeniowa*, „Prawo Asekuracyjne” 3/2008

Kowalewski E., *Umowa ubezpieczenia*, Bydgoszcz-Toruń 2002

Krajewski M., *Ubezpieczenie odpowiedzialności cywilnej według kodeksu cywilnego*, Warszawa 2011,

Krajewski M., *Umowa ubezpieczenia. Art. 805–834 Kodeksu cywilnego. Komentarz*, Warszawa 2016

Malinowska K., [in:] *Prawo ubezpieczeń gospodarczych*, Volume II. *Prawo o kontraktach w ubezpieczeniach. Komentarz do przepisów i wybranych wzorców umów,* Warszawa 2010

Orlicki M., [in:] Orlicki M., Pokrzywniak J. (eds), *Umowa ubezpieczenia. Komentarz do nowelizacji kodeksu cywilnego*, Warszawa 2008

Orlicki M., [in:] Kidyba A. (ed), *Kodeksowe umowy handlowych*, Lex 2014

Orlicki M., *O możliwości stosowania reguły proporcji przy niedoubezpieczeniu*, „Prawo Asekuracyjne" 2/ 2011,

Orłowski C., *Dopuszczalność stosowania zasady proporcji w sytuacji niedoubezpieczenia*, „Monitor Ubezpieczeniowy" 50/2012

Ostrowska M., *The Principles of Reinsurance Contract Law. Nowa jakość umów reasekuracji*, „Prawo Asekuracyjne" 4/2020

Reps S., *Zastosowanie przepisów kodeksu cywilnego w ubezpieczeniach obowiązkowych*, „Prawo Asekuracyjne" 4/2005,

Sikorski G., [in]: Ciszewski J. (ed), *Kodeks cywilny. Komentarz*, ed. 2, Warszawa 2014, LEX

Wałachowska M., *W sprawie stosowania przepisów kodeksu cywilnego do umowy ubezpieczenia obowiązkowego*, [in:] E. Kowalewski, W.W. Mogilski (eds), *System prawny ubezpieczeń obowiązkowych. Przesłanki i kierunki reform*, Toruń 2014

Wąsiewicz A., Nowakowski Z.K., *Prawo ubezpieczeń gospodarczych*, Warszawa 1980

Żarnowiec Ł., *Wpływ niedoubezpieczenia mienia na świadczenie ubezpieczyciela – glosa do wyroku Sądu Najwyższego z dnia 7 października 2010 r., IV CSK 149/10* (unpubl.), „Wiadomości Ubezpieczeniowe" 4/ 2014

Ubezpieczeniowa triada – suma ubezpieczenia, wartość ubezpieczenia i odszkodowanie według art. 824 i 824¹ polskiego kodeksu cywilnego

Autor prezentuje kwestie dotyczące podstawowych instytucji prawa ubezpieczeniowego w szczególności w kontekście art. 824 u 824 (1) kodeksu cywilnego. W artykule przedstawiono także sposoby wykładni i zakres ich zastosowania. Uwzględniono także dorobek prawa międzynarodowego, wskazując na rozwiązania unijne, w tym te, które są planowane.

Słowa kluczowe: suma ubezpieczenia, wartość ubezpieczenia i odszkodowanie według art. 824 i 824¹ polskiego kodeksu cywilnego

DR HAB. DARIUSZ FUCHS – Chair of Civil Law and Private International Law Faculty of Law and Administration of Cardinal Stefan Wyszyński University in Warsaw
ORCID: 0000-0001-5853-2657
e-mail: d.fuchs@uksw.edu.pl