BARTOSZ KUCHARSKI
https://doi.org/10.33995/wu2024.3.1
date of receipt: 05.08.2024
date of acceptance: 12.11.2024

Introduction to the Law and Economics of insurance

The article describes major issues discussed by the Law and Economics of Insurance. It starts by identifying the differences between the economic and legal notions of insurance. According to the author, reconciliation is possible by defining the insurer's obligation as 'bearing the risk'. Secondly, the article explores information asymmetries favouring policyholders, such as adverse selection and moral hazard. Thirdly, it addresses asymmetries favouring insurers, the largest and most well-qualified players in the insurance market. The author tries to explain how European legal systems attempt to manage both types of information asymmetries. The final section of the article attempts to find out which actors within the legal framework of insurance—courts, legislators, or legal doctrine—are best equipped to find the balance between these information asymmetries and the conflicting interests of insurance market participants. The author does not offer a simple conclusion, instead emphasising that all these actors play an important role in the growth of modern and efficient insurance law.

Keywords: Law & Economics, insurance, insurance contract, adverse selection, moral hazard, Information asymmetries

Introduction

Liaisons between law and economics are particularly evident in insurance, primarily an economic concept governed by economic principles that lawyers try to confine within legal frameworks. Unfortunately, there is often little understanding between economists and lawyers as they use completely different methodologies and languages to describe the same phenomena. For these reasons, the insurance analysis law using economic tools—an approach central to the relatively

new school of Law & Economics, which creates a common platform between lawyers and economists—seems highly valuable[1].

The most important theses of the Law & Economics school can be summarised in a few points. Firstly, the main function of law is to solve the problem of coordinating the common actions of human individuals, who are rational actors driven by their benefits[2]. Secondly, the law should be economically efficient, meaning it should maximise social welfare by enabling the efficient allocation of goods[3]. An allocation is efficient if it cannot be changed to make one person better off without making another person worse off (Pareto efficiency)[4]. Thirdly, it is possible to construe a coherent theory of justice using economic tools. Here, justice is understood in alignment with the principles of Law & Economics[5], mainly as a mutual advantage[6].

Decision-making by rational individuals can be affected by uncertainty and risk. Insurance is the main mechanism for handling these factors. Economists generally view insurance as a tool that redistributes the risk threatening an individual among participants of a fund, who face similar risks and contribute premiums. Lawyers, on the other hand, view insurance as a contract in which the insurer agrees to reimburse the insured for losses caused by designated contingency in exchange for a premium. The possibility of reconciling these conflicting perspectives will be discussed in the next part of the article.

The subsequent section will focus on the problem of information asymmetries, which appears central to the Law & Economics of insurance. Finally, the concluding section will seek to answer who—the legislator, the courts, or legal doctrine—is best equipped to balance the conflicting interests of insurers and policyholders.

1. Legal and economic definition of insurance

As previously mentioned, the economic approach to insurance emphasises the concept of risk pooling. From an economic point of view, insurance is a mechanism that addresses the financial needs of individuals affected by random events occurring with some regularity. This is achieved

1. Cooter R.T., Ulen T., *Ekonomiczna analiza prawa*, eds. J. Bełdowski, K. Metelska-Szaniawska, Warszawa 2011, p. XX-XXVI.
2. Stelmach J., Brożek B., Załuski W., *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007, pp. 18–19; Stelmach J., *Spór o ekonomiczną analizę prawa*, in: *Ekonomiczna analiza prawa w zastosowaniach prawniczych*, ed. J. Stelmach, M. Soniecka, Warszawa 2007, p. 14.
3. Stelmach J., Brożek B., Załuski W., *Dziesięć*, op. cit., pp. 17–18; Stelmach J., *Spór*, op. cit., p. 14; Devlin A., *Fundamental Principles of Law and Economics*, London and New York 2015, pp. 13–14.
4. A weaker conception of efficiency is *Kaldor–Hicks efficiency*. An allocation of goods is Kaldor–Hicks efficient if there is no other allocation in which those who are made better off as a result of the new allocation could *hypothetically compensate* those who are made worse off. See, e.g., Cooter R.T., Ulen T., *Ekonomiczna*, op. cit., pp. 53–54.
5. As to relationship between law and justice, see, e.g., Tokarczuk R.A., *Sprawiedliwość jako naczelna wartość prawa*, *'Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia,* section G', 1997 vol. XLIV, p. 138.
6. Schäfer H.B., Ott C., Bełdowski J., *Ekonomiczna analiza prawa cywilnego. Tom 1. Zagadnienia ogólne i prawo umów*, Warszawa 2024, pp. XXXVI-XXXVIII.

by pooling the risk of such events among fund participants who face similar threats and contribute premiums[7].

In contrast, jurists view insurance as a contract in which one party (the insurer) agrees, in exchange for a premium, to pay the other party (the insured) a sum of money or provide him with a corresponding benefit upon the occurrence of a specified event[8]. Unlike economists, who analyse insurance on a macro scale, lawyers typically focus on the individual insurance contract.

Most lawyers would likely agree that insurance is, first and foremost, an economic phenomenon. For proponents of the Law & Economics, the economic concept of insurance should be crucial because it enables to explain the efficiency and profitability of insurance. The financial loss caused by an insured event might be difficult to redress by the insured or some other individual. Risk pooling renders this burden of compensation manageable and even impalpable for the individual, making insurance efficient in the Pareto sense[9]. However, legal definitions of insurance, which often emphasise the individual legal relationship, tend to overlook the insurance method. This raises the question of whether both approaches can be integrated, allowing the legal definition of an insurance contract to reflect the insurance method. The challenge seems to lie in accurately defining the insurer's performance, which is characteristic performance in insurance contract.

The insurance method becomes obscured when the insurer's performance is defined solely as paying damages or a specific sum of money upon the occurrence of an insured event. Such definition is still very common in European countries[10]. However, in some jurisdictions, legal definitions of insurance also include the transfer of risk, where the insurer assumes the risk from the policyholder[11]. Notably, Germany has amended its law to incorporate the transfer of risk into the definition of insurance[12].

The second view is also reflected in Section 1:201 of the *Principles of European Insurance Contract Law* (PEICL), which defines an insurance contract as one where one party—the insurer—promises another party, the policyholder, cover against a specified risk in exchange for a premium. Most importantly, this definition does not explicitly mention the pecuniary performance provided by the insurer upon the occurrence of the insured event, instead focusing on the concept of 'cover'

7. Łazowski J., *Wstęp do nauki o ubezpieczeniach*, ed. W.W. Mogilski, Sopot, no date, pp. 13–14.
8. Channell J in *Prudential v Commissioners of Inland Revenue* [1904] 2 KB 658. For a more detailed analysis, see, e.g., Hodgin R.W., *Problems in Defining Insurance Contracts*, 'Lloyd's Maritime and Commercial Law Quarterly', 1980, p. 14.
9. This is probably one of the reasons why insurance may provide compensation for certain pure economic losses that are unrecoverable on general grounds. See Kucharski B., *Świadczenie ubezpieczyciela w umowie ubezpieczenia mienia*, Warszawa–Łódź 2019, p. 197–211.
10. See, e.g., Art. 1 of the Austrian Insurance Contract Act; Art. 921 of the Croatian Civil Obligations Act; Art. 421 of the Estonian Law of Obligations Act; Art. 1 of the Greek Law 2496/97 regarding insurance contract; Section 17.7.1. of the Dutch Civil Code; Art 1882 of the Italian Civil Code; Art. 805 of the Polish Civil Code; Art. 2199 of the Romanian Civil Code; Art. 788 of the Slovakian Civil Code; Art. 1 of the Spanish Insurance Contract Act; and Section 1 of the English Marine Insurance Act 1906.
11. Art. 183 of the Bulgarian Code of Insurance, Section 6:439 of the Hungarian Civil Code, Art. 1 of the Portuguese Insurance Contract Law approved by Decree Law No 72/2008.
12. See Art. 1 of the German VVG 2008. In France, there is no statutory definition of insurance, and the traditional definitions focusing only on payment upon the occurrence of the insurance event have been criticised. See *Le Contrat d'Assurance (Traite de droit des Assurances, Tome 3)*, ed. J. Bigot, Paris 2002, p. 26.

as the primary obligation[13]. The risk seems to be viewed here on a micro-scale, as the probability of the agreed event occurring. However the broad notion of the insurer 'bearing the risk' allows for further exploration of the various activities encompassed by this concept[14].

Another approach is to emphasise that all actions undertaken by the insurer fall within the scope of his business operations[15]. Both interpretations face challenges, mainly those connected with the fact that the insurer uses the insurance method regardless of the individual insurance contract[16].

By clarifying the concept of 'bearing the risk' or 'acting within the scope of his enterprise', it can be argued that the insurer's primary performance involves enrolling the policyholder into a risk community established and managed by the insurer. This structure ultimately facilitates compensation for those members of the community who suffer losses due to insured events. It is alleged that this constitutes the true essence of the insurer's performance even though the claim refers only to the ultimate and uncertain result: the payment of pecuniary compensation upon the occurrence of an insured event[17]. This approach offers a way to reconcile the economic and legal concepts of insurance, bridging the gap between these two perspectives.

When considering the importance of the insurance method, it is also worth noting that it leads to significant principal-agent problem between policyholders and insurers. These problem differs substantially from traditional principal-agent problem in commercial companies. Policyholders are not owners of the insurance company. As members of a risk community, they typically view themselves not as inventors but as customers who have purchased a specific guarantee from the insurance company. For the average policyholder, the primary concern is the assurance that the insurer will compensate him for any losses he may incur. In contrast, for shareholders and insurance managers of insurance companies, the most important objective is ensuring the profitability of the company's operations. This divergence creates a potential conflict: from the policyholders' point of view, insurance managers may tend to adopt significantly risky strategies, when managing funds collected from premiums, to achieve short-term profitability[18].

To address these challenges, insurers are subject to strict and detailed regulations, particularly in the following areas:

- Organisational form: Insurers must operate as joint-stock or mutual companies.
- Minimum financial resources: Insurers must hold a minimum amount of capital on their balance sheets to ensure policyholders are not exposed to excessive risk.
- Solvency capital requirements: These are calculated taking into account the market risk, insurance or underwriting risk (to cover future claims), operational risk (e.g., failed internal personal or operational processes), and other relevant factors.

13. For a more detailed analysis of both legal attitudes, see Kucharski B., *Świadczenie*, op. cit., pp. 112–115.
14. Orlicki M., *Umowa ubezpieczenia*, Warszawa 2002, pp. 136–137.
15. This is stressed, for example, by Art. 805 of the Polish Civil Code. See Orlicki M., *Uwagi o nowelizacji przepisów dotyczących umowy ubezpieczenia na tle nowych przepisów niemieckich*, *'Prawo Asekuracyjne',* 2008 no. 1(54), pp. 63–64.
16. Krajewski M., *Świadczenie ubezpieczyciela w umowie ubezpieczenia*, *'Przegląd Sądowy',* 2011 vol. 11–12, pp. 15–16.
17. Kucharski B., *Świadczenie*, op. cit., pp. 126–132.
18. Schwartz D., Siegelman P., *Law and Economics of Insurance*, in: *The Oxford Handbook of Law and Economics. Volume II, Private and Commercial Law*, ed. F. Parisi, Oxford 2017, pp. 483–484.

- Conditions governing insurance business: This includes maintaining an adequate governance system and conducting regular risk and solvency assessments.
- Allowable exposure policies and capital investment strategies: Insurers are required to adopt strategies that align with regulatory limits.
- Supervision by financial authorities: Regulatory oversight spans granting permissions to operate, requiring detailed reporting and public disclosure overseeing liquidation and bankruptcy processes, and monitoring company transformations[19].

2. Insurance information asymmetries

2.1. Information advantage of policyholders

The economy of insurance is significantly influenced by information asymmetries. These asymmetries are mutual, benefiting policyholders and insurers, albeit in different ways. Starting with asymmetries favouring policyholders—which seem more straightforward to understand—they can be categorised into four groups: 1) adverse selection, 2) moral hazard, 3) insurance fraud, and 4) excessive claims.

Adverse selection arises because policyholders have more knowledge about their risk levels than insurers do. This creates a scenario in which those who face higher risks are more likely to purchase insurance[20]. The issue is relevant across all kinds of insurance. For example, individuals aware of hazardous conditions in their environment, those conducting particularly risky activities, holding dangerous jobs, or maintaining high-risk lifestyles are more inclined to seek insurance coverage. This is detrimental not only to insurers but also to policyholders, as it can drive up premiums for everyone.

Andverse selection may serve as a justification for the theory of insurance as a contract of *uberrima fidei*, a principle established by Lord Mansfield in the famous case of *Carter v. Boehm* (1766)[21]. In this case, it was stressed that the underwriter ascertains the risk based on the policyholder's declaration of material facts. The duty of disclosure varies in scope across legal systems. Currently, the so-called system of questionnaires predominates, where the prospective policyholder is required to disclose not all circumstances that may affect the risk, but only those that are the subject of direct questions from the insurer[22]. Negligent nondisclosure or misrepresentation

19. In Europe it is primarily regulated by *Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) (OJ L 335, 17.12.2009)*. In Poland, it is governed by the Act of 11 September 2015 on Insurance and Reinsurance Activity (consolidated text: Polish Journal of Laws of 2023, item. 656).

20. The average civil law specialist, including the author, cringes at the phrase 'buying an insurance product' instead of 'concluding an insurance contract'. However, economic terminology is extensively used in UE regulations (see, e.g., the IDD Directive). The topic of this article sufficiently justifies the use of economic terminology. For a general discussion on adverse selection, see Cooter R.T., Ulen T., *Ekonomiczna, op. cit.,* pp. 60–61.

21. (1766) 3 Burr. 1905.

22. The system of spontaneous declaration is adopted, e.g., in Austria, Belgium, Italy, Luxembourg, and Portugal. The proposal form system has been adopted in Germany, France, Switzerland, Spain, Poland, Greece, and Finland. In the United Kingdom, the traditional voluntary declaration system established by the Marine Insurance Act of 1906 exists only in non-consumer insurance contracts. In consumer contracts, the Consumer Insurance (Disclosure and Representation) Act 2012 introduced the system of questionnaires. The latter was also adopted in Art. 2.101 of the PEICL.

of the circumstances that caused the insured event usually entitles the insurer to deny liability, provided the insurer had not already voided the policy earlier (e.g., under Article 815 of the Polish Civil Code or Article 2.102 of the PEICL)[23].

It may seem that the older system of spontaneous declaration offers better protection against adverse selection. However, the modern trend to protect the weaker party in a contract presents a strong argument against it. Furthermore, there is currently little empirical evidence to support adverse selection. In certain areas of insurance, the opposite trend, known as propitious selection, can even be observed[24]. Additionally, the validity of the traditional theory of utmost good faith, which emphasises the importance of the policyholder's declaration, is often questioned in modern contexts. This issue will be discussed later.

Another problem connected with the policyholder's information advantage concerns the so-called moral hazard. Insured individuals may expose themselves to unnecessary risks or neglect preventive measures because they are protected by insurance[25]. For this reason, legislators aim to encourage policyholders to avoid risk and enable insurers to impose certain obligations or reduce insurance compensation. This can take the form of special precautionary measures, where failure to comply releases the insurer from liability if it was negligent and caused the event. Events caused intentionally by the policyholder are commonly not considered insurable events, meaning the insurer is not liable for them. In most countries, the insurer is also exempted from liability[26] or permitted to reduce compensation[27] if the insured event results from the gross negligence of the policyholder[28].

After the occurrence of an insured event, the policyholder is required to notify the insurer within a reasonable period stated in the policy or the general insurance terms. Breach of this duty may result in liability for damages[29], revocation of the insurer's liability[30], or reduction of compensation, provided the insurer can prove that the delay caused prejudice[31]. The occurrence of an insured

23. The duty is usually extended throughout the duration of the insurance contract by a clause obliging the policyholder to notify the insurer of any changes to the disclosed information, especially those that aggravate the risk.

24. Van Boom W.H., *Insurance Law & Economics: An Empirical Perspective*, in: *Essays in the law and economics of regulation: in honour of Anthony Ogus,* eds. M. Faure, F. Stephen, Intersentia, Antwerp–Oxford–Portland 2008, pp. 5–7.

25. Cooter R.T., Ulen T., *Ekonomiczna*, op. cit., p. 60. From an empirical point of view, this seems to be a real problem but should not be generalised, see Van Boom W.H., *Insurance*, op. cit., pp. 7–8.

26. This is the case in Austria (Art. 7 of the Austrian VVG), Greece (Art. 7 para. 5 of the Greek ICA), Italy (Art. 1900 para. 1 of the Italian CC), the Netherlands (Art. 7:952 of the Dutch CC), and Poland (Art. 827 para. 1 of the Polish CC). This approach is adopted in Art. 9.101 of the PEICL.

27. This is the position in German law (s. 81 para. 1 of the VVG), Swiss law (Art. 45 para. 2 of the Swiss VVG), Finnish law (ss. 28 to 30 of the Finnish ICA), and Sweedish law (s. 5 para. 2 of the Swedish ICA).

28. However, in Romanesque jurisdictions, the policyholder is entitled to compensation in case of gross negligence. See Art. 113–1 of the French Code des Assurances, Art. 8 of the Belgian ICA, Art. 19 of the Spanish ICA, and Art. 46 para. 1 of the Portuguese ICA.

29. Art. 113–11 para. 4 of the French Code des Assurances, Art. 21 para. 1 of the Belgian ICA, Art. 1119 of the Italian CC, Art. 7, para. 2 of the Greek ICA, Art. 7:941 para. 3 of the Dutch CC, and Art. 38 para. 2 of the Swiss VVG.

30. This is typically the case when the duty was breached intentionally (see Art. 21 para. 2 of the Belgian ICA, Art. 1915 of the Italian CC, Art. 7:941 para. 5 of the Dutch CC, Art. 42 para. 5 of the Swiss ICA.

31. See Art. 819 of Polish CC and Art. 6.101 of the PEICL.

event also activates the policyholder's duty to mitigate the loss. Intentional or grossly negligent breaches of this duty exempt the insurer from liability for damages resulting from a failure to salvage the insured property (e.g., Article 826 of the Civil Code and Article 9.101.3 of the PEICL). On the other hand, the policyholder is entitled to recover reasonable mitigation costs, even if these efforts turn out to be ineffective. European legislation varies on whether mitigation costs, when combined with the loss, are recoverable if they exceed the insured sum[32].

Another method of encouraging policyholders to avoid risk is the possibility of limiting insurance compensation compared to the amount that would be accessible under general legal principles. Insurance policies often include excess or deductible clauses or require the policyholder to bear a portion of the risk up to a certain amount (*warranted part uninsured*)[33]. These clauses are typically not explicitly regulated by legislation but are accepted in judicature. An exception is Article 121.1, Line 2 of the French *Code des Assurances*, which stipulates that it may be agreed that the insured must act as their insurer for a specified sum or portion or bear a fixed deduction from the compensation for the loss. In Poland and Germany, for example, insurers commonly include deductibles of 5% of the total loss in Own Damage car insurance policies[34]. Removal of such clauses is generally possible upon payment of a higher premium.

Policyholders may also abuse their information advantage through insurance fraud. According to insurers' estimates, detected and undetected fraud accounts for up to 10% of all claims expenditure in Europe[35]. Insurance fraud is among the oldest types of economic fraud recognised in European penal codes. In Poland, debates regarding the need to classify insurance fraud as a separate crime occurred as early as the 1932 and 1969 criminal codes[36]. Ultimately, it was introduced into the Polish Penal Code in 1994, coinciding with the return of the free-market economy.

Article 298 of the Polish Penal Code penalises only preparations for fraudulently obtaining insurance compensation by causing an event. Of course, intentionally causing an event is only one form of insurance fraud. Other methods include fabricating an event, purchasing insurance with knowledge of a pre-existing loss, fraudulent multiple insurances, and more. Fraud that does not involve intentionally causing an event may fall under general fraud provisions in Article 286 of the Polish Penal Code, which penalises inducing another person to disadvantageously dispose of his or someone else's property by misleading him or exploiting his error or inability to understand hisactions.

In addition to so-called hard insurance fraud, policyholders may also exploit the occurrence of insured events to make inflated claims. This can be done in various ways, including overestimating the value of damaged property, attributing pre-existing damage to the insured incident, or falsifying documents to exaggerate the extent of the loss. Insurance regulations seek to prevent such abuses by requiring policyholders to notify insurers promptly of insured events and

32. See *Principles of European Insurance Contract Law*, eds. J. Basedow et al., Munich 2009, p. 294.
33. Van Boom confirms some effectiveness of deductibles, particularly in medical health care insurance. See Van Boom W.H., *Insurance*, op. cit., pp. 9–10.
34. Vandt M., *Versicherungsvertragsrecht*, München 2016, pp. 307–308.
35. *The impact of insurance fraud*, Insurance Europe, Brussels 2013. https://insuranceeurope.eu/publications/492/the-impact-of-insurance-fraud/
36. The idea was abandoned because it was considered that insurance fraud could be penalised within the confines of general fraud provisions. See Dąbrowska-Kardas M., Kardas P., in: *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.*, wyd. V, eds. W. Wróbel, A. Zoll, Warszawa 2022, art. 298, thesis 1.

by imposing sanctions for non-compliance. Additionally, regulations address issues such as multiple insurance[37], retroactive insurance[38], and the obligation of state authorities and other institutions to provide insurers with information necessary to determine the circumstances of insured events and the amount of compensation[39].

2.2. Insurers' information advantage

Not only the policyholders but also insurers have important advantages when it comes to access to relevant information. Insurers are inherently privileged, not only by their economic power but also by their status as professional entrepreneurs specialising in insurance activities. They have experience and educated staff to address all the problems. Simply put, insurers know the insurance business best. For this reason, legal doctrine and judicature commonly regard the duty of utmost good faith as mutual. Even Lord Mansfield, in his early *Carter v. Boehm* judgement, held that if an insurer withheld material facts, the policyholder could void the policy and recover the premium.

The information advantage of insurers starts at the very first contact with prospective policyholders. Insurers' employees or agents apply all their professional skills and knowledge to persuade customers to buy their insurance products, especially when their salaries depend on sales performance. This can, of course, lead to misselling. Recognising this issue, the European Union enacted Directive 2016/97 on Insurance Distribution (IDD Directive), which obliges all insurance distributors, including those representing insurers, to act in the best interests of their customers (Article 17). Additionally, they must identify customers' demands and needs and ensure that any proposed contract aligns with these demands and needs (Article 20)[40]. In Poland, the directive has been implemented through the Act on Insurance Distribution[41].

Another privilege for insurers lies in the adhesive nature of the insurance contracts and the widespread use of standard contract forms. Insurance documents are prepared in advance by insurers, who impose the terms of these contracts on their customers. The average customer is not able to negotiate these terms. Protection for policyholders is achieved through soft and hard measures. Soft measures include rules such as *in dubio contra proferentem* and 'in some countries reasonable expectation test. when interpreting unclear terms in insurance documents[42]. Hard

37. 824^1 para. 2 and 3 of the Polish CC, Art. 78 of the German VVG, Arts. 58–59 of the Austrian VVG, Art. 121–4 of the French *Code des Assurances*, Art. 45 of the Belgian ICA, Art. 7:961 of the Dutch CC, s. 6 of Ch 4 of the Swedish ICA, s, 59 of the Finnish ICA, and Art. 15 of the Greek ICA. The PEICL regulates different types of insurance in Art. 8.104.

38. Art. 806 of the Polish CC, Art. 2 of the German VVG, s. 2 of the Austrian VVG, Art. 25 of the Swiss VVG, Art. 121–15 of the French *Code des Assurances*, Art. 24 of the Belgian ICA, Art. 7:925 of the Dutch CC, and Art. 6.2 of the Spanish ICA. The PEICL regulation is in Art. 2.401.

39. See, e.g., Art. 42 of the Polish Act on Insurance and Reinsurance Activity 2015.

40. *Distributors are also burdened with extended information requirements (Arts. 17 – 18). For all these innovations, see, e.g., Bravo J.M., IDD and Distribution Risk Management*, in: *Insurance Distribution Directive, A Legal Analysis*, eds. P. Marano, K. Noussia, Springer 2021, pp. 356–357, passim; Malinowska K., *Insurance transparency and protection regime under Insurance Distribution Directive*, '*Wiadomości Ubezpieczeniowe*', 2016 no. 4, p. 94.

41. Act of 15 December 2017 on Insurance Distribution (consolidated text: Polish Journal of Laws of 2023, item 1111)

42. Art. 5 of Directive 1993/13/EEC, Art. 5:103 of the PECL, II 8:103 of the DCFR, and Art. 1.203 of the PEICL.

measures involve regulations declaring certain provisions unfair, even if expressed in plain and intelligible language. The problems arising from contract standardisation have also been addressed by the European Union through Directive 93/13EEC on unfair terms in consumer contracts[43]. A key question in the field of insurance is whether protection should be granted only to consumers or to all insurers' clients[44].

Insurers may also use their information advantage to charge inflated premiums. For obserwant customers insurance premiums may often seem arbitrary, appearing more influenced by market demand for certain products than careful calculations. In certain U.S. states, there have been attempts to introduce statutory limitations on premiums for some insurance products; however, these efforts are considered unsuccessful[45]. In Poland, the issue of premium estimation is addressed in Article 33 of the Act on Insurance and Reinsurance Activity, which stipulates that premiums must be determined following an assessment of insurance risk, based on statistical data, and set at a level sufficient to cover all obligations under insurance contracts and the costs of conducting insurance activities.

Another, and probably the most significant, manifestation of insurers' information advantage concerns the unlawful denial of insurance claims, underestimation of payouts, or payment delays. This is where the insurer's duty of utmost good faith should be most stringently applied because fast and trouble-free indemnification in the event of a loss is central to the essence of an insurance contract.

For this reason, most European legislations[46] and the PEICL[47] include special provisions regarding the timing of insurance payments. In continental legal systems, the insurance contract is considered an ordinary civil law contract. Consequently, any breach of this contract by the insurer entitles the policyholder to remedies available under general legal principles. If an insurer unlawfully refuses to pay, underestimates a claim, or delays a payment, he may be held liable for breach of contract. The consequences include liability for damages and interest for the delay[48]. Recent legal reforms

43. *Arts. 3 and 4 of Directive 1993/13/EEC, Art. 4.110 of the PECL, Art. II.9 of the DCFR, and Art. 2.304 of the PEICL. See, e.g., Borselli A., Unfair Terms in Insurance Contracts*, 'European Insurance Law Review', 2011 no. 2. In Polish literature, the issue of unfair contract terms in insurance contact was discussed, e.g. by Ziemiak M.P., *Postanowienia niedozwolone na tle umów ubezpieczenia. Studium cywilnoprawne*, TNOiK, Toruń 2017.

44. Art. 4.110 of the PECL adopts the second view, as the editors consider it inappropriate in insurance law since all policyholders need protection against insurers. See Basedow J. et al. eds., *Principles*, op. cit., p. 116. In Poland, the legislator extends consumer protection only to natural person entrepreneurs (Art. 815 § 4 of the Polish CC).

45. See Tennyson S., *Efficiency Consequences of Rate Regulation in Insurance Markets*, Networks Financial Institute Policy Brief No. 2007-PB-03, 2007, p. 16–18. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=985578*; Schwartz D., Siegelman P., *Law*, op. cit., p. 487.

46. See, e.g., 14 of the German VVG, s. 11 of the Austrian VVG, Art. 30 of the Swiss ICA, Arts. 113–5, 242–2, and 211–9 of the French *Code des Assurances*, Art. 67 of the Belgian ICA, Art. 38 of the Spanish ICA, Art. 104 of the Portuguese ICA, s. 1 para. 2 of Ch. 7 of the Swedish ICA, Art. 24 of the Danish ICA, s. 70 of the Finnish ICA, and Art. 817 of the Polish CC.

47. Art. 6:104.

48. Kucharski B., *Odpowiedzialność ubezpieczyciela za niewykonanie umowy ubezpieczenia*, in: *Ubezpieczenia gospodarcze. Wybrane zagadnienia prawne*, ed. B. Gnela, Warszawa 2011, pp. 51–59. The PEICL addresses the problem in Art. 6:105, entitling the claimant to recover interest at the rate applicable to commercial transactions and compensation for any additional loss caused by late payment.

in England have introduced similar remedies for policyholders[49]. Additionally, some European legal systems[50] and the PEICL provide for elevated interest rates for late payments by insurers.

2.3. In search of the equilibrium

The next question is which of the three main creators of the legal framework of the insurance contract—legislator, courts, or legal doctrine—is best equipped to balance the information asymmetries and conflicting interests of the parties to the insurance contract[51].

Traditionally, courts address these issues on a day-to-day basis. Compared to other actors, courts are best positioned to determine how specific rules and policy wordings should apply in various situations. They are better suited than legislators to mitigate the harshness of certain rules in specific factual contexts by referring to general clauses or the nature of insurance contracts. For example, German courts have held that some exclusion clauses effectively conceal precautionary obligations imposed on policyholders. A breach of such obligations does not allow the insurer to deny liability regardless of the causal connection between the breach and the occurrence of an event or the degree of fault[52]. On the other hand, proving actual causation in specific cases often presents an insurmountable burden for insurers. In England, judicial developments have established that a failure to adhere to precautionary measures need only significantly increase the probability of an insured event occurring[53].

Legislators and soft law regulators, however, also have certain advantages. It is argued that their main strength is their potential expertise. Theoretically, they have the time and unlimited access to professional knowledge and are capable of monitoring the effects of certain regulations over time as well. The legislators are also, in theory, more democratically accountable than the courts. However, unlike courts, legislators are susceptible to lobbying by insurers, the most powerful players in the insurance market[54]. An important question arises regarding the binding nature of recommendations issued by insurance supervision authorities. While these recommendations are theoretically classified as soft, they often have a de facto binding effect, especially when the issuing authority is empowered to impose penalties for non-compliance.

The third actor, legal doctrine, is probably better prepared to assess whether traditional, historically moulded principles and doctrines of insurance law should remain immutable. Perhaps some of these principles should be adapted to modern circumstances or even abandoned. For instance, insurers, who often dominate contractual negotiations, may seek the ability to contract

49. See s. 13A(5) of the Insurance Act 2015. See also Birds J., *Birds' Modern Insurance Law*, London 2016, pp. 305–309. Wider analysis is provided by Campbell N., *The nature of an insurer's obligation*, 'Lloyd's Maritime and Commercial Law Quarterly', 2000, pp. 42–75.

50. See Art. 211–13 of the French *Code des Assurances* and Art. 20 para. 3 of the Spanish ICA.

51. See Schwartz D., Siegelman P., *Law*, op. cit., pp. 495–496.

52. See Vandt M., *Versicherungsvertragsrecht*, op. cit., pp. 250–251; Schimikowski P., *Versicherungsvertragsrecht*, C.H. Beck, Munchen 2017, pp. 135–136.

53. Now codified in Arts. 10 and 11 of the Insurance Act 2015. See Birds J., *Birds'*, op. cit., pp. 176–177.

54. A notable Polish example is the narrowing of the notion of "motion of a vehicle" in the amended version of the Law on Compulsory Insurance, the Insurance Guarantee Fund, and the Polish Bureau of Motor Insurance. This change aims to exclude losses caused by various devices installed on vehicles from the scope of obligatory insurance cover, despite the opposing opinion of the Supreme Court.

around certain doctrines. A good starting point is the previously mentioned *uberrimae fidei* doctrine, established in the mid-18th century by Lord Mansfield. One may ask whether it remains valid today[55]. Nowadays, insurers have sometimes better knowledge of the policyholder's situation than the policyholder himself. The increasing development of artificial intelligence may soon challenge the very foundations of this doctrine even further. Should the burden of the utmost good faith obligation shift to insurers?

Another example is the concept of insurable interest, which was developed in England for both property and life insurance. In property insurance, the doctrine has evolved. The hard rules of *Lucena v. Craufurd*[56], which required policyholders to have a specific right to the insured goods, have been largely relaxed in favour of recognising purely economic interest—though this can be difficult to define. But should insurers even be able to invoke a lack of interest if they agreed to underwrite certain risks? In life assurance, after the *Dalby* case[57], the courts held that insurable interest does not exist at the time of the insured event. This has led to practices such as the trade of life policies in the United States.

In contrast, most continental European jurisdictions require the insured's consent when another party takes out a policy on their life. Thus the majority of the doctrine is of the opinion that the insurable interest doctrine does not refer life assurances where it is substituted with the requirement of the consent of the insured for somebody else taking up policy on his life. Major European insurance statutes still reference insurable interest, but the concept is strongly criticised, even in its homeland, as flawed or useless[58]. This likely explains why the PEICL omit insurable interest entirely, focusing instead on the existence of risk as its counterpart.

Another modern example is the *contra proferentem* rule, which appears to be a straightforward remedy for the information advantage of insurers by interpreting ambiguous contract language in favour of the policyholder. It is argued that the extensive application of this rule encourages policyholders to remain intentionally unaware of policy terms. At the same time, insurers, fearing that precise language might expand their liability, may retain the terms considered by courts to be ambiguous[59]. Another argument raised by opponents of the rule is that it forces insurers to use casuistic language, which becomes even more opaque to the average customer than before[60]. These doubts about the *contra proferentem* rule are just one small fragment of a broader debate: whether

55. Łopuski J., *Doktryna najwyższej dobrej wiary w anglosaskim prawie ubezpieczeniowym, jej pochodzenie, znaczenie i krytyka*, in: *Szkice o ubezpieczeniach*, ed. M. Kuchlewska, Poznań 2006, p. 146; Faruggia A., *The Reform of the Doctrine of Utmost Good Faith: A Reconnaissance of the Development and Outcome with Particular Reference to the UK*, 'Governance and Regulations' Contemporary Issues', July 2018, pp. 169–170; A. Hasson, suggest that the doctrine was a result of misunderstanding of Lord Mustill judgment in *Carter v. Boehm*. See Hasson A., *The Doctrine of Uberrimae Fides in Insurance Law: A Critical Evaluation*, 'Modern Law Review' vol. 32(6), January 2011, pp. 615–637.

56. *Luvena v. Craufurd* (1806) 2 Bos & P.N.R. 269.

57. *Dalby v. India & London Life Assurance Co.*, (1854) 15 CB 365.

58. See, e.g., Dwyer F.A., *Insurance Law Reform by Degrees: Late Payment and Insurable Interest*, 'Modern Law Review', vol. 80, no. 4, May 2017, pp. 505–509; Atmeh S.M., *Regulation not Prohibition: The Comparative Case Against the Insurable Interest Doctrine*, 'Northwestern Journal of International Law & Business', 2011 vol. 31, issue 1, p. 140.

59. Boardman M., *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 'Michigan Law Review', 2005 vol. 104, pp. 1120, 1115.

60. Schwartz D., Siegelman P., *Law, op. cit.*, pp. 493–494.

the constant trend towards protecting policyholders in dealing with insurers has gone too far. This trend risks treating competent adults as incapable of making informed decisions, unduly limiting freedom of contract, and potentially destabilising the insurance market.

References

Atmeh S.M., *Regulation not Prohibition: The Comparative Case Against the Insurable Interest Doctrine*, 'Northwestern Journal of International Law & Business', 2011 vol. 31, issue 1.

Birds J., *Birds' Modern Insurance Law*, London 2016.

Boardman M., *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 'Michigan Law Review', 2005 vol. 104.

Borselli A., *Unfair Terms in Insurance Contracts*, 'European Insurance Law Review', 2011 no. 2.

Bravo J.M., *IDD and Distribution Risk Management*, in: *Insurance Distribution Directive, A Legal Analysis*, eds. P. Marano, K. Noussia, Springer 2021, pp. 349–369.

Campbell N., *The nature of an insurer's obligation*, 'Lloyd's Maritime and Commercial Law Quarterly', 2000, pp. 42–75.

Cooter R.T., Ulen T., *Ekonomiczna analiza prawa*, eds. J. Bełdowski, K. Metelska-Szaniawska, Warszawa 2011.

Dąbrowska-Kardas M., Kardas P., in: *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.*, wyd. V, eds. W. Wróbel, A. Zoll, Warszawa 2022.

Devlin A., *Fundamental Principles of Law and Economics*, London and New York 2015.

Dwyer F.A., *Insurance Law Reform by Degrees: Late Payment and Insurable Interest*, 'Modern Law Review', vol. 80, no. 4, May 2017, pp. 489–509.

Faruggia A., *The Reform of the Doctrine of Utmost Good Faith: A Reconnaissance of the Development and Outcome with Particular Reference to the UK*, 'Governance and Regulations' Contemporary Issues', July 2018.

Hasson A., *The Doctrine of Uberrimae Fides in Insurance Law: A Critical Evaluation*, 'Modern Law Review' vol. 32(6), January 2011.

Hodgin R.W., *Problems in Defining Insurance Contracts*, 'Lloyd's Maritime and Commercial Law Quarterly', 1980.

Krajewski M., *Świadczenie ubezpieczyciela w umowie ubezpieczenia*, 'Przegląd Sądowy', 2011 vol. 11–12, pp. 7–26.

Kucharski B., *Odpowiedzialność ubezpieczyciela za niewykonanie umowy ubezpieczenia*, in: *Ubezpieczenia gospodarcze. Wybrane zagadnienia prawne*, ed. B. Gnela, Warszawa 2011.

Kucharski B., *Świadczenie ubezpieczyciela w umowie ubezpieczenia mienia*, Warszawa–Łódź 2019.

Le Contrat d'Assurance (Traite de droit des Assurances, Tome 3), ed. J. Bigot, Paris 2002.

Łazowski J., *Wstęp do nauki o ubezpieczeniach*, ed. W.W. Mogilski, Sopot, no date.

Łopuski J., *Doktryna najwyższej dobrej wiary w anglosaskim prawie ubezpieczeniowym, jej pochodzenie, znaczenie i krytyka*, in: *Szkice o ubezpieczeniach*, ed. M. Kuchlewska, Poznań 2006.

Malinowska K., *Insurance transparency and protection regime under Insurance Distribution Directive*, '*Wiadomości Ubezpieczeniowe*', 2016 no. 4, p. 89–102.

Orlicki M., *Umowa ubezpieczenia*, Warszawa 2002.

Orlicki M., *Uwagi o nowelizacji przepisów dotyczących umowy ubezpieczenia na tle nowych przepisów niemieckich*, 'Prawo Asekuracyjne', 2008 no. 1(54).

Principles of European Insurance Contract Law, eds. J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss, L. Loacker, Munich 2009.

Schäfer H.B., Ott C., Bełdowski J., *Ekonomiczna analiza prawa cywilnego. Tom 1. Zagadnienia ogólne i prawo umów*, Warszawa 2024.

Schimikowski P., *Versicherungsvertragsrecht*, C.H. Beck, Munchen 2017.

Schwartz D., Siegelman P., *Law and Economics of Insurance*, in: *The Oxford Handbook of Law and Economics. Volume II, Private and Commercial Law*, ed. F. Parisi, Oxford 2017.

Stelmach J., Brożek B., Załuski W., *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007.

Stelmach J., *Spór o ekonomiczną analizę prawa*, in: *Ekonomiczna analiza prawa w zastosowaniach prawniczych*, ed. J. Stelmach, M. Soniecka, Warszawa 2007.

Tennyson S., *Efficiency Consequences of Rate Regulation in Insurance Markets*, Networks Financial Institute Policy Brief No. 2007-PB-03, 2007, p. 1–26. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=985578

The impact of insurance fraud, Insurance Europe, Brussels 2013. https://insuranceeurope.eu/publications/492/the-impact-of-insurance-fraud/

Tokarczuk R.A., *Sprawiedliwość jako naczelna wartość prawa*, 'Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia, section G', 1997 vol. XLIV.

Van Boom W.H., *Insurance Law & Economics: An Empirical Perspective*, in: *Essays in the law and economics of regulation: in honour of Anthony Ogus,* eds. M. Faure, F. Stephen, Intersentia, Antwerp–Oxford–Portland 2008, pp. 253–276.

Vandt M., *Versicherungsvertragsrecht*, München 2016.

Ziemiak M.P., *Postanowienia niedozwolone na tle umów ubezpieczenia. Studium cywilnoprawne*, TNOiK, Toruń 2017.

Wprowadzenie do prawa i ekonomii ubezpieczeń

Artykuł dotyczy ważniejszych kwestii analizowanych w ramach ekonomicznej analizy prawa ubezpieczeń. Najpierw wskazane zostają różnice w ekonomicznym i prawnym rozumieniu ubezpieczenia. Zdaniem autora, porozumienie w zakresie wspólnego pojęcia wymaga zdefiniowania świadczenia ubezpieczyciela w umowie ubezpieczenia jako ponoszenia ryzyka. W drugiej kolejności omawiana jest asymetria informacji uprzywilejowująca ubezpieczających w szczególności kwestie selekcj negatywnej i pokusy nadużycia. PDalej, wskazane zostają przykłady asymetrii informacyjnej uprzywilejowującej ubezpieczycieli jako największych i najlepiej wykwalifikowanych graczy na rynku ubezpieczeniowym. Autor stara się wyjaśnić, w jaki sposób europejskie systemy prawne radzą sobie z przykładami asymetrii informacyjnej. Ostatnia część artykułu stara się odpowiedzieć na pytanie, które spośród podmiotów wyznaczających prawne uwarunkowania ubezpieczeń, tj. sądy, ustawodawca czy doktryna, mają najlepsze kwalifikacje, by odnaleźć równowagę w związku z przykładami asymetrii informacyjnej oraz sprzecznymi interesami uczestników rynku ubezpieczeniowego. W tej ostatniej kwestii autor nie formułuje jednoznacznego wniosku, wskazując, że wszystkie z wyżej wymienionych podmiotów odgrywają istotną rolę w rozwoju nowoczesnego i ekonomicznie efektywnego prawa ubezpieczeń.

Słowa kluczowe: ekonomiczna analiza prawa, ubezpieczenie, umowa ubezpieczenia, selekcja negatywna, pokusa nadużycia

DR HAB. BARTOSZ KUCHARSKI – Dr habil. in legal sciences, Professor at the University of Lodz, Department of Commercial and Business Law, Faculty of Law and Administration, Advocate
e-mail: bkucharski@wpia.uni.lodz.pl
ORCID: 0000–0002–3413–6817