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The nature and basis of liability for non-performance or improper performance of disclosure duties. Commentary on the judgment of the Supreme Court, Civil Chamber of 23 September 2016, ref. II CSK 697/15[2]

The commentary analyses the nature and basis of liability for non-performance or improper performance of disclosure duties in the context of the judgment of the Polish Supreme Court, Civil Chamber of 23 September 2016 r. (reference II CSK 697/15). The study provides considerations about the legitimacy of situating such liability within contractual and tortious regimes. In this context, special attention attaches to the problems of analysing the customer's demands and needs as a requirement imposed on insurance distributors. Another important question concerning the decision is the assessment of claims asserted by indirect victims in the context of abuse of a subjective right (Art. 5 of the Polish Civil Code). In conclusion, the practical consequences of adopting liability for non-performance or improper performance of disclosure duties in the form proposed by the Supreme Court in the above-mentioned decision, especially under the applicable legislative framework, are identified.

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2. Judgment of the Supreme Court (SN) of 23 September 2016, reference II CSK 697/15, Legalis No. 1544156.

Keywords: insurance contract, adequacy of insurance coverage, duty to disclose, tort liability, insurance brokerage, analysis of demands and needs, indirect violation of rights and interests.

1. The problems of liability for improper fulfilment or non-fulfilment of the duty to define a customer's demands and needs, imposed on insurance distributors under Art. 20 of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution[3] and implemented into the national law under the Act on Insurance Distribution (u.d.u.),[4] attract much interest in academic literature.[5]

Although the Supreme Court (SN) judgment was delivered before the entry into force of the Act on Insurance Distribution, within the framework of the now repealed Act on Insurance Intermediation (u.p.u.),[6] the decision prompts analysis for at least two reasons. First, the Supreme Court concluded in the judgment that a violation by a broker of the obligation to perform a precise analysis of the customer's insurance risk may sometimes fulfil the prerequisites of tortious liability under Art. 415 of the Polish Civil Code (k.c.)[7] vis-à-vis the customer's successors. Second, the considerations raised in the commented judgment are relevant to the determination of the legal basis of liability for violation of disclosure duties imposed on the insurance distributor under the current legislative framework. The essence of the matter referred to the Supreme Court was a response to the question of whether a broker's disclosure obligations to the insurance customer were violated. In the case of an affirmative answer, it was necessary to determine if the breach of those obligations might possibly fulfil the prerequisites of tortious liability under Art. 415 k.c. At the same time, in the decision under comment, the SN strived to consider if civil liability insurance concluded by the customer – a pilot – was compatible with Polish law and, therefore, if the concluded insurance contract was valid. The final question discussed by the SN was the assessment of the plaintiff's claim in the light of its compliance with the principles of social coexistence (Art. 5 k.c.).

The answers to these questions are of major importance, not only for legal practice, but also from the point of view of the basis and scope of liability of an insurance distributor.

2. The judgment was delivered in light of the following facts. On 2 September 2006, in a plane crash, a pilot died together with the only passenger – the spouse of the plaintiff and father of the minor plaintiff. The flight was manned by a one-person crew and had been arranged purely for pleasure. The accident was a direct consequence of the pilot's error when making a turn. The plane's speed was too low, as a result of which, it went into a spin and hit the ground. On 5 July 2006, the pilot had concluded with an insurer, through the defendant insurance broker, an aviation liability insurance contract (OC). The subject of the insurance was the civil liability of the plane's operator against

3. Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (Recast), OJ L 2016, No. 26, p. 19, as amended.
4. Act of 15.12.2017 on insurance distribution (Dz.U. 2017 poz. 2486, as amended).
5. For more, see: M. Fras, *Analiza potrzeb klienta przy zawieraniu umowy na kolejny okres ubezpieczenia*, „Wiadomości Ubezpieczeniowe" 2020, nr 2; E. Bagińska, *Wpływ klauzul generalnych na proces zawierania umowy ubezpieczenia w świetle ustawy o dystrybucji ubezpieczeń*, „Wiadomości Ubezpieczeniowe" 2019, nr 3; B. Kucharski, *Cywilnoprawne konsekwencje niedostosowania przez dystrybutora produktu ubezpieczeniowego do wymagań i potrzeb klienta*, „Prawo Asekuracyjne" 2019, nr 3.
6. Act of 22.05.2003 on Insurance Intermediation (Dz.U. 2003 no 124 poz. 1154, as amended).
7. Act of 23.04.1964 – *Civil Code* (Dz.U. 1964 nr 16, poz. 93).

third parties, other than passengers, for damage caused as a consequence of the aircraft's use. The contract did not cover civil liability towards persons on board the aircraft other than crew members. The action was brought against the spouse of the deceased pilot, the insurer and the broker.

Because of an omission to specify what insurance products were presented by the defendant to the customer, the SN referred the case back to the Court of Appeal for re-examination. As a result, on 22 March 2017, the Court of Appeal in Łódź[8] delivered a decision annulling the judgment and referring the case back to the Circuit Court in Łódź for re-examination.

3. As regards the legitimacy of the decision, the verdict and its motives can be approved. However, an issue requiring an in-depth analysis is the broker's violation of the obligation to precisely analyse the insurance market. A mere conclusion that such violation may "sometimes fulfil" the prerequisites for tortious liability vis-à-vis the policyholder's successors is insufficient to determine the scope of liability for damages. In this connection, a question should be asked about the criteria governing – in the context of disclosure duties – the fulfilment of the prerequisites for the establishment of tortious liability. What types of violations can qualify as a tort giving rise to liability for damages, and what parties incur such liability? Finally, what are the limits of damage subject to compensation and how is such damage to be redressed?

4. When analysing the concluded insurance contract in respect of its conformity with Polish law, the SN justly – invoking Art. 37(3) item (4) of the Aviation Law Act[9] – noted that one of the prerequisites of entry in the Polish register of civil aircrafts is valid civil liability insurance for damage caused as a result of the aircraft's operation. Accordingly, the President of the Civil Aviation Authority (ULC), within the scope of his competences, recognised the insurance contract as compatible with the provisions of Polish and international law. In the course of the proceedings, it was noted that, in practice, customers most often decide to take out civil liability insurance only for the aircraft operator. At the same time, the ULC, which for many years had received insurance policies concluded in Germany, had, on their basis, entered aircrafts in the register or extended the class award to a given plane. The ULC had never questioned the conformity of an insurance policy concluded in Germany with Polish law. At the same time, the SN, by reference to Art. 4 (2)[10] of Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004,[11] pointed out that the intention of the EU legislator was to ensure insurance coverage with regard to every flight within the Union. Therefore, it would not be possible to accept a practice of imposing on air carriers and aircraft operators any additional obligations reaching beyond the defined minimum requirements in Poland. On the basis of the above conclusions, the SN held that the obligation to take out insurance had been complied with.

8. Judgment of the Court of Appeal in Łódź of 22 March 2017, I ACa 16/17, Legalis No. 2055121.
9. Act of 3.07.2002 r. – Aviation law (Dz.U. 2002 no 130 poz. 1112).
10. According to the provision, air carriers and aircraft operators shall ensure that insurance cover exists for each and every flight, regardless of whether the aircraft operated is at their disposal through ownership or any form of lease agreement, or through joint or franchise operations, code-sharing or any other agreement of the same nature.
11. Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, OJ L 2004, No. 138, as amended.

5. With the above-mentioned scope of insurance coverage, particular attention attaches to the question of liability for the improper performance of brokerage duties and the conclusion of ineffective civil liability insurance of an aircraft operator.

Under the legal framework applicable at the time of delivery of the judgment under comment, the potential liability of the broker was a consequence of the broker's obligation to conduct activities having regard to the interests of the parties to the insurance contract, as laid down in Art. 26 u.p.u.[12] In addition, under Art. 26(1) item (2) u.p.u., an insurance broker is obliged "before concluding the insurance contract, to give written advice, on the basis of a reliable analysis of offers in a quantity sufficient to prepare a recommendation, of the most appropriate insurance contract, and explain in writing the grounds for the recommendation." As justly concluded by the SN, a broker is obliged to carry out a precise analysis of the insurance risk incurred by the customer (a risk assessment) and to give advice in respect of the adequacy of the insurance coverage. The intention behind this requirement, referred to as information and advisory duties, is to provide to the customer a recommendation of the most favourable insurance contract possible considering the extent of the customer's insurance coverage and the customer's actual needs.[13] This involves provision to the customer of such information that allows them to verify if a given recommendation actually corresponds to the customer's demands.[14] It must be noted that the Act on Insurance Intermediation implemented Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation.[15]

The court established the defendant company's mode of operation as a fact relevant to its judgment. The broker tried to obtain information from the potential policyholder about the aircraft type (brand, model, year of construction) as this determined the minimum amount of cover, and the number of passenger seats indicated the number of passengers to be covered by insurance protection. On the basis of such data, an offer was provided, and the customer chose the scope of insurance they wanted to take out. In the context of compulsory insurance, a distinction should be made between: civil liability insurance of the operator and civil liability insurance of the passenger. In practice, some customers choose the full option (i.e. an insurance package for both the operator and passenger), while others choose only liability insurance for the operator, arguing that they do not need additional insurance for a passenger. Quite importantly, these insurance types are not sold in a package, and each of them has a separate limit of liability. It should be noted that a broker could conclude a contract within a short period of time, even on the basis of a telephone

12. In literature, it is pointed out that the broker's professionalism, diligence, expertise, honesty and competence are the prerequisites allowing recognition of a brokerage agreement as *contractus uberrimae fidei*. See: Ł. Orłowski, *Umowa brokerska jako contractus uberrimae fidei*, „Prawo Asekuracyjne" 2023, no 3, p. 3–16.

13. See also: S. Byczko, M. Serwach, *Uwagi ogólne,* in: *Prawo zobowiązań – umowy nienazwane. System Prawa Prywatnego. Tom 9, wyd. 4,* (ed.) W. Katner, C.H. Beck, Warszawa 2023, p. 1039.

14. S. Byczko, M. Serwach, *Ustawa o pośrednictwie ubezpieczeniowym, art. 26,* [in:] *Prawo spółdzielcze – Umowy nienazwane. System Prawa Prywatnego. Tom 9,* [ed.] W. Katner, 2010, Legalis nb 82.

15. Directive 2002/92/EC of 9.12.2002 on insurance mediation, OJ EC L 9 15.01.2003. Directive 2002/92/EC introduced many obligations with regard to the activities of insurance intermediation, including with regard to the taking up and pursuit of the activities, sanctions for violation of statutory requirements, disclosure obligations of insurance intermediaries, and additional protection of customers making insurance-based investments.

conversation because the broker used fixed rates according to the plane model. However, this was not always the case as customers would sometimes ask for a list of offers.[16]

Although the pilot seeking insurance coverage, in his first meeting with the defendant company, sought comprehensive insurance including civil liability, AeroCasco and emergency insurance, in a subsequent meeting, he requested a civil liability insurance offer for an aircraft operator only. Having received information from the defendant that, as a part of the compulsory insurance of this type of plane, it is necessary to take out an option including passenger coverage, the pilot rejected the insurance offer with regard to passengers, arguing that he flew alone. The customer did not request written documentation from the defendant.

The SN rightly emphasised that, when determining if the broker had complied with their obligations, it was necessary to examine if the defendant presented insurance products to the customer, including an analysis of the cost of civil liability insurance of the aircraft's operator covering also a third party taking part in the flight – as compared to the cost of civil liability insurance without such person, and to that person's additional insurance depending on the frequency of their flights. This, in turn, was to be decisive when it came to the determination of whether the broker had duly complied with their information and advisory duties. A person seeking insurance coverage, however, is not – which should be stressed – bound by the recommendation presented by an insurance broker, and may freely choose an offer objectively less favourable, for example, guided only by the amount of premium.[17]

Moving on to the question of the broker's liability to their customer (person seeking insurance coverage) – in line with an opinion expressed in judicial practice and academic literature[18] – the broker is liable, under the terms of the contractual liability regime, for non-performance or improper fulfilment of an obligation under the contract concluded between them and the policyholder. However, an opinion has also been presented in literature, according to which, non-performance of an obligation can be recognised as an unlawful act within the meaning of Art. 415 k.c. if, in addition to the non-performance of an obligation, there has also been a violation of a general duty.[19] In fact, the SN, in the decision under comment, when discussing the broker's liability towards third parties (i.e. the customer's successors), concluded that the prerequisites for the establishment of tortious liability may exist.

Elaborating on the ideas expressed by the SN in the commented decision, it must be concluded that the establishment of the broker's liability vis-à-vis third parties requires the fulfilment of the general prerequisites of Art. 415 k.c., whereby the harmful event (tort) is the omission to carry out a precise analysis of the insurance market from the point of view of the customer (a risk assessment) and non-fulfilment or improper fulfilment of the advisory duty with regard to the adequacy

16. On such occasions, agents of the defendant would also enter into negotiations with Polish insurers and present to the customer a list of offers expected by the latter. Customers who asked for intermediation with the German insurer generally knew the rates of Polish insurers, and, upon reading the offer of the German insurer, requested conclusion of the contract.

17. P. Bałasz, K. Szaniawski, in: *Ustawa o pośrednictwie ubezpieczeniowym. Komentarz*, (ed.) P. Bałasz, K. Szaniawski, Kraków 2005, Art. 26, LEX.

18. J. Ziemba, in: *Ustawa o dystrybucji ubezpieczeń. Komentarz,* wyd. 1, (ed.) P. Machulak, J. Ziemba, Legalis 2018, Art. 28, Nb 1, E. Wieczorek, *Komentarz do ustawy o pośrednictwie ubezpieczeniowym,* [in:] *Prawo ubezpieczeń gospodarczych. Tom I, Komentarz,* wyd. II, ed. E. Wieczorek, Warszawa 2010, LEX, Art. 26, judgment of SN of 22 February 2008, V CSK 444/07, Legalis No. 313322.

19. So: M. Fras, *Analiza potrzeb …,* p. 15.

of insurance coverage, which gave rise to an award of compensation from the pilot's successors for the material (or non-material) damage suffered by the family members of the deceased passenger. Unlawfulness should be based on violation of legal provisions,[20] good morals and principles of loyalty in legal transactions, the principles of social coexistence or standards of professional conduct, especially considering the broker's role.[21] As regards the group of persons entitled to compensation of damage, the SN concentrated on the pilot's successors, bearing in mind the claims asserted against them by family members of the deceased passenger. Concerning the limits of compensable loss and methods of its redress, general rules should apply.

Finally, in addition to the above, Art. 22 (1) u.p.u. must be mentioned. It provides for compulsory civil liability insurance to be taken out by brokers on account of pursuing brokerage activities, covering damage caused to parties seeking insurance coverage, policyholders, insured parties or beneficiaries under the insurance contract.[22] As a consequence, the insurance covers the broker's liability to persons with whom the broker has not entered into a contractual relationship, especially to an injured party entitled to compensation under the insurance contract.[23]

5. The Act on Insurance Distribution superseded the previously applicable Act on Insurance Intermediation. Under Art. 7(1) u.d.u., an insurance distributor, when distributing insurance, must act honestly, reliably and professionally, according to the best interests of the customer. At the same time, the legislator, under Art. 8 u.d.u., imposed a number of requirements on the insurance distributor so as to enable the customer to make an informed decision, and to ensure conformity of the proposed insurance contract or insurance guarantee contract with the customer's demands and needs regarding the insurance coverage or guarantee coverage.

In the context of the distributor's liability for non-performance or improper performance of disclosure duties, it must be concluded that the liability regime lacks systemic uniformity.[24] Disclosure obligations arise mainly at the pre-contractual stage, that is prior to the establishment of an obligational relationship, which moves the regime away from contractual liability. A question that should be asked at this point concerns a possibility to assert claims against the insurance distributor under Art. 415 k.c., that is, within the framework of the tortious liability regime.

6. Before answering that question (in light of the considerations raised against the background of the commented decision), one should, at least on a rudimentary level, refer to the solutions adopted in German law. Unlike under Polish law, liability for damage caused as a consequence of the failure by the insurance distributor to properly fulfil its information obligations is expressly situated within the legal regime of liability for *culpa in contrahendo*.[25] Under § 311(2) BGB, it is assumed

20. Especially that a broker is bound by statutory requirements.
21. R. Strugała, *Dobra i interesy chronione w strukturze czynu niedozwolonego*, Warszawa 2019, p. 164.
22. However, insurance does not cover possible damage the broker can cause to an insurance undertaking. For more, see: M. Orlicki, *Obowiązkowe ubezpieczenie odpowiedzialności cywilnej brokerów ubezpieczeniowych*, in: *Broker w świetle prawa i praktyki ubezpieczeniowej,* (ed.) M. Serwach, Łódź 2012, p. 225 et seq.
23. M. Krajewski, K. Kruczalak, E. Rott-Pietrzyk, P. Zapadka, *Broker ubezpieczeniowy,* in: *Prawo umów handlowych. System Prawa Handlowego. Tom 5, wyd. 5*, (ed.) M. Stec, C.H. Beck, Warszawa 2017, p. 663.
24. O. Zgonina, *Standardy analizy wymagań i potrzeb klienta w procesie dystrybucji ubezpieczeń w Niemczech*, „Wiadomości Ubezpieczeniowe" 2024, no 2, p. 58.
25. O. Zgonina, *Standardy analizy wymagań …,* p. 66.

that between the parties, by reason of the mere commencement of negotiations or establishment of business contacts, a special type of obligational relationship arises. In addition, the provision of § 241(2) BGB requires that the parties take into account, when performing their obligations, the rights and interests of the counterparty. Therefore, among the general prerequisites of liability for damage caused by the improper provision of information, the following can be mentioned: breach of the due diligence requirement and damage causally linked to the breach, as well as fault.

Under German law, the liability of the insurance distributor for a violation of information and advisory duties is governed by special provisions, namely, § 6(5) *Versicherungsvertragsgesetz* (VVG) (with regard to insurance undertakings as a part of the so-called direct distribution channel) and § 63(5) VVG (with regard to insurance intermediaries).[26] This regime is based on the principle of pre-contractual liability. Even before the entry into force of § 63 VVG, the obligations of an insurance broker were extensive. The broker was viewed as a representative of the interests, and trusted advisor, of the policyholder, obliged to conclude the desired insurance contract.[27] § 61(1) VVG, in turn, defines the requirements incumbent on an insurance intermediary, who is obliged to create conditions which allow their customer to make an independent, informed decision about the conclusion of the contract, and to explain if the contract corresponds to the customer's needs (adequacy test).[28] As a result, the intermediary should establish the customer's wishes and needs, advise the customer, including justifications for each and every piece of advice, and inform the customer about the most important risk exclusions.

In the Polish legal system, the legislator has not provided for an implied pre-contractual relationship of a contractual nature. Moreover, the provisions implementing the IDD Directive and governing the question of disclosure duties imposed on insurance distributors do not provide for any sanctions for their violation. This, in turn, merely demonstrates the relevance of the discussion about the nature of the liability for non-performance or improper performance of disclosure duties and their coverage by the tortious liability regime. Within the framework of the previously applicable Art. 26(1) item (2) u.p.u., no doubt was left that the broker incurred liability under the contractual regime. Despite the differences between the current statutory framework and the former provisions of the Act on Insurance Intermediation, both regimes share a common basis in tort liability.

7. In the judgment under comment, the SN pointed out that the broker's violation of an obligation to precisely analyse the insurance risk from the point of view of the customer, as a result of which the scope of the civil liability insurance of an aircraft was limited due to the omission to insure a passenger, could fulfil the prerequisites for the establishment of tortious liability, under Art. 415 k.c., vis-à-vis the customer's successors. In this regard, the question considered relevant by the SN was if the customer was presented with insurance products available on the market which would meet the customer's needs, together with an analysis of the costs of civil liability insurance of an aircraft operator (in a variant allowing for a person taking part in the flight, without such person, and with additional insurance in that respect). At the same time, there are no reasons to exclude tortious liability in the relationship between the broker and the customer.

26. See judgment of OLG Hamm of 6 May 2013, 18 U 114/12, BeckRS 2013, 12054.
27. Judgment of BGHZ of 26 March 2014, IV ZR 422/12, BeckRS 2014, 7862, para 25.
28. H.P. Schwintowski [in:] E. Bruck, W. Möller (eds.), *Versicherungsvertragsgesetz (VVG),* Berlin 2010, § 61, item. 3.

In this context, the question of whether non-performance or improper performance of a disclosure duty by the insurance distributor, including the demands and needs test, may qualify as a tort should be raised and, furthermore, whether a tort was committed against a third party.

In the literature, a view has been presented that the liability imposed on the insurance distributor for violation of disclosure obligations should be analysed within the framework of the *ex contractu* regime. Thus, respectively, in relation to a broker, liability arises under the brokerage agreement, and, in relation to other distributors, it is derived from a statutory obligation arising by operation of law.[29] On the other hand, opinions have been presented that the assertion of claims for non-performance or improper performance of such duties should be situated within the *ex delicto* liability regime.[30] The last of the presented views was put into question because of the nature of disclosure obligations and their qualification as general duties applicable to everyone.[31] However, one can only agree with the opinion that non-performance of an obligation may be considered an unlawful act within the meaning of Art. 415 k.c. if, in addition to the non-performance, a violation of a general duty has occurred.[32]

It can be even concluded that, when applying the legal provisions in force to the facts of the case assessed in the commented decision, the results of the analysis will be the same, and, in consequence, tortious liability should be established – both in relation to the customer and his successors.

8. The analysed facts also require an analysis from the point of view of contracts with a protective effect towards a third party, a concept which has had a significant impact on German law. An uncodified contract (other than one under § 328 BGB) with a protective effect towards a third party assumes that the creditor is entitled to claim the principal fulfilment and a third party is covered by special protection by the debtor so that they have a right to assert their own contractual claims in the case of breach of the protection duty by the debtor.[33] In the first place, the purpose of such contract is to protect an injured party, and among the prerequisites for the establishment of liability, the following should be mentioned: the existence of an obligation between the creditor and the debtor, the lack of an obligation between the debtor and the third party, coverage of the third party by contractual protection in accordance with the contract with a protective effect towards the third party, a violation of the obligation, lack of exoneration and damage suffered.[34] In German case law, it is assumed that a contract with a protective effect towards a third party is based on an interpretation of the contract and that the third party is covered by a duty of diligence and

29. B. Kucharski, *Cywilnoprawne konsekwencje niedostosowania przez dystrybutora produktu ubezpieczeniowego do wymagań i potrzeb klienta*, „Prawo Asekuracyjne" 2019, nr 3 (100), p. 31.

30. M. Dziedzic, *Problem odpowiedzialności za nienależyte wykonanie obowiązku informacyjnego*, „Studia Prawnicze" 4 (212)/2017, p. 94.

31. M. Fras, *Analiza potrzeb …,* p. 15.

32. Tak: M. Fras, *Analiza potrzeb …,* p. 15.

33. Sz. Balcarek, *Umowa ze skutkiem ochronnym na rzecz osoby trzeciej – konstrukcja i dopuszczalność*, „Forum Prawnicze" 2024, no 1(81), p. 50.

34. Among the prerequisites for contractual coverage of particular persons, the following are indicated: proximity of the third party to the provision, interest in the protection of the third party, recognizability of the protected group of third parties and the need for protection of the third party. See: Sz. Balcarek, *Umowa ze skutkiem ochronnym na rzecz osoby trzeciej – konstrukcja i dopuszczalność*, „Forum Prawnicze" 2024, no 1(81), p. 51, and literature cited therein.

care so that they may claim compensation in the case of breach of such duty[35] (the third party is exposed to the danger of violating protective obligations to the same level as the creditor[36]).

In the judgment of 23 April 2019, OLG Brandenburg[37] held that the insured person – within the framework of a contract for the protection of third party rights – may be entitled to seek compensation from an insurance broker for breach of the advisory duty under §§ 61, 63 VVG. The facts of the case were the following. The plaintiff – because of an expected assumption of the position of district chimney sweep – intended to buy real estate where he would live with his family and maintain his office. The plaintiff, together with his wife, held a consultative meeting with the broker in 2010 and, finally, in 2012 the plaintiff's spouse (not the plaintiff himself – for tax reasons) bought the real estate. In 2013, the house burnt down, and the fire spread to other, neighbouring properties. However, the insurer refused to pay compensation for the damage caused to the neighbouring buildings, justifying the refusal by pointing to the lack of insurance coverage of a building in which a business activity was also conducted. The court stressed that the prerequisites for applying the construction of a contract with a protective effect towards a third party were fulfilled because the plaintiff was particularly interested in insurance coverage of the real estate. Moreover, the plaintiff, who obtained legal standing in the proceedings as a result of assignment of claims, already at the time of the advisory conversation strived to take into account future risks, before they materialised, and the lack of title of a master chimney sweep or failure to conclude the contract for the sale of the real estate – as it was in this case – were irrelevant in terms of the broker's liability. If the plaintiff had known that the insurance coverage would be excluded because he was conducting a business activity in the building, he would have either leased other premises or excluded that contractual clause by way of agreement, possibly providing for a higher premium, or would have concluded an additional insurance contract. At the same time, there were no grounds to refer to the plaintiff's contributory negligence because the plaintiff contracted the broker's advice and clearly specified the risk to be insured against, which meant that the plaintiff could legitimately rely on the provided information.[38]

The use of the concept of a contract with a protective effect towards a third party cannot be excluded under Polish law. In literature, brokers are mentioned as parties in relation to whom the concept could potentially apply.[39] This is supported by the fact that incorrect advice can lead to serious consequences, including to damage suffered by third parties. In the context of the analysed decision, it can be concluded that since a civil liability insurance contract was concluded, the contract could protect not only the interests of the insured person (perpetrator) but also, in a particular way, potentially injured parties. Since the broker breached the information duty to his customer, by doing so the broker not only created an insurance gap but also violated the interests of third parties. In the same way as regards the commented decision, the prerequisites for the estab-

35. Judgment of BGH of 14 June 2012, IX ZR 145/11, BeckRS 2012, 14811.

36. C. Grüneberg [in:] O. Palandt (eds.), *Bürgerliches Gesetzbuch. Kommentar*, München 2019, § 328, para. 16 et seq.

37. Judgment of OLG Brandenburg of 23 April 2019, 6 U 95/17, BeckRS 2019, 9089.

38. Material damage suffered by a policyholder is the difference between the actual condition (consequent to the erroneous advice) and a hypothetical condition that would be the case if the broker had given correct advice. See: H.-P. Schwintowski in: E. Bruck, W. Möller (eds.), *Versicherungsvertragsgesetz (VVG)*, Berlin 2010, § 63, item. 20.

39. Sz. Balcarek, *Umowa ze skutkiem ochronnym na rzecz osoby trzeciej – konstrukcja i dopuszczalność*, „Forum Prawnicze" 2024, no 1(81), p. 62.

lishment of liability, as developed in German literature, were fulfilled and, in particular, there was an obligation between the pilot and the broker, third parties suffered damage, and the obligation was breached without any conditions excluding fault.

9. In the context of the case in which the commented judgment was delivered, the question arises of dismissing claims asserted against the pilot's spouse under Art. 5 k.c. on account of abuse of law. As explained by the Circuit Court in Łódź, which dismissed the action in this respect, both the plaintiff and the defendant lost their husbands in the accident, and, after their deaths, were confronted with a comparable life situation. The Court of Appeal in Łódź, when setting aside the judgment and referring the case back for re-examination, drew attention to the need to consider all circumstances of the case.

These considerations can be elaborated on so as to determine if a claim of indirect victims can be dismissed under the clause of incompatibility with the principles of social coexistence (Art. 5 k.c.).

The norm under Art. 5 k.c. may apply if the following prerequisites are met: 1) the entitled party has a right (substantive law right) to which the abuse relates; 2) the entitled party exercises the right held; 3) exercise of the right is in violation of one of the criteria listed in Art. 5 k.c., i.e. principles of social coexistence or the socio-economic purpose of the right.[40] This provision applies to situations when – formally speaking – the entitled party is a holder of a particular subjective right[41] but, considering the facts of the case and the specific legal norm, the exercise of the entitled party's right violates the principles indicated in Art. 5 k.c. Such refusal to grant protection to a subjective right is of exceptional nature.[42] Undoubtedly, the intention behind the construction was to make the legal system more flexible, permitting the court to functional reflect on the purpose of a particular right and the court's axiological arguments, allowing an assessment of the right's exercise through the prism of principles of equity and morality.[43]

As highlighted in literature, the plea of an abuse of right can be made in every subjective configuration, including by an insurer against a plaintiff asserting claims under the perpetrator's civil liability insurance.[44] Among the criteria for assessment of abuse of law, one should consider the non-existence of a personal interest, a failure to demonstrate a breach of a personal interest, or the purpose of the suit.[45] Referring the above to the discussed matter, it must be concluded that, in principle, the criteria have been met.

It seems that the mere fact of being confronted with a similar factual situation as the plaintiff (death of the spouse), in principle, does not lead to the automatic exclusion of the defendant's liability, especially considering that heirs are responsible for inherited debts.[46] Nonetheless, a certain conflict of values can be identified, and Art. 5 k.c. should not, as such, permit its automatic application. In light of the above, it will be necessary to examine the life situation of the parties

40. Judgment of SN of 25 June 2025, I CSK 1085/25, Legalis No. 3237158.
41. For more, see: M. Pyziak-Szafnicka, *Prawo podmiotowe*, „Studia Prawa Prywatnego" 2006, no 1, p. 15.
42. Judgment of the Circuit Court in Łódź of 1 October 2020, III Ca 1075/19, Legalis No. 2576008.
43. Decision of SN of 29 May 2025, I CSK 2991/24, Legalis No. 3221644.
44. E. Bagińska, M. Wałachowska, *Nadużycie prawa podmiotowego a dochodzenie roszczenia o zadośćuczynienie pieniężne z tytułu śmierci osoby bliskiej*, „Wiadomości Ubezpieczeniowe" 2014, no 1, p. 17.
45. E. Bagińska, M. Wałachowska, *Nadużycie prawa podmiotowego …,* pp. 17–20.
46. Judgment of SN of 18 March 2010, V CSK 337/09, Legalis No. 358179.

(spouses) and the possible consequences of allowing the plaintiff's claim (including whether such resolution would affect her livelihood). In addition, it must be established whether the defendant widow has her own, independent claim as a consequence of the death of a close person.

10. In the light of the above considerations, it must be concluded that the position expressed in the commented decision can pave the way for determining the basis and limits of a broker's tortious liability, under the applicable legal framework, towards the insured person and third parties. Although the position was not explained in more detail by the SN, a careful analysis of the written justification for the judgment of 23 September 2016 points to a conclusion about its validity. One should not lose sight of the fact that even the existence of a contractual relationship between the parties does not preclude a tortious basis of claims for damages.

At the same time, when analysing a broker's liability vis-à-vis third parties, consideration should be given to a concept deeply entrenched in German law, that is the contract with a protective effect towards a third party.

The concept of abuse of subjective right and its incompatibility with the principles of social coexistence should be analysed with particular care. One harmful event can give rise to damage suffered by a number of parties, and the wrongdoer may, at the same time, be an injured party. The uncritical acceptance of the model excluding liability in such factual situations would hinder the assertion of claims by injured parties – both at the procedural stage and at the stage of the liquidation procedure. At the same time, it must be noted that, because of the legislator's use of a general clause, every single situation requires careful analysis.

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Charakter i podstawy odpowiedzialności z tytułu niewykonania albo nienależytego wykonania obowiązków informacyjnych. Glosa do wyroku Sądu Najwyższego Izby Cywilnej z dnia 23 września 2016 r., sygn. II CSK 697/15

Glosa stanowi próbę analizy charakteru i podstawy odpowiedzialności z tytułu niewykonania albo nienależytego wykonania obowiązków informacyjnych, na gruncie wyroku Sądu Najwyższego Izby Cywilnej z dnia 23 września 2016 r. (sygn. II CSK 697/15). Opracowanie zawiera rozważania na temat prawidłowości umiejscowienia tej odpowiedzialności w ramach reżimu kontraktowego i reżimu deliktowego. Na tym tle w sposób szczególny zarysowuje się problematyka analizy wymagań i potrzeb klienta nałożona na dystrybutorów ubezpieczeń. Równie ważką kwestią na tle glosowanego orzeczenia pozostaje ocena roszczeń pośrednio poszkodowanych w kontekście nadużycia prawa podmiotowego (art. 5 k.c.). W podsumowaniu podjęto próbę oznaczenia praktycznych konsekwencji przyjęcia odpowiedzialności z tytułu niewykonania albo nienależytego wykonania obowiązków informacyjnych w kształcie zaproponowanym przez Sąd Najwyższy w glosowanym orzeczeniu, zwłaszcza w obowiązującym stanie prawnym.

Słowa kluczowe: umowa ubezpieczenia, adekwatność ochrony ubezpieczeniowej, obowiązek informacyjny, odpowiedzialność deliktowa, pośrednictwo ubezpieczeniowe, analiza wymagań i potrzeb, pośrednie naruszenie praw i interesów.

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