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Direct claims against insurers

Direct actions in transport law under a French perspective or “Catch me if you can”

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Under French law, the right for a third party victim to sue the liability insurer is autonomous and even of public order. An insurance policy cannot contain a clause excluding such a right and every victim can rely on it. Under French law, the victim is even entitled to act against the insurer only, without suing the insured liable which becomes particularly interesting if the liable is or gets insolvent.

This seems almost too good to be true for third party victims which are typically in matter of transport the sender, the consignee or a subrogated insurer.

Indeed, in practice, third party victims rather often have to face various hurdles before obtaining indemnification from a liability insurer.

Such hurdles may result from the difficulty to identify the insurer or obtain access to the insurance policy (A) as well as from all kind of exceptions, defenses and limitations an insurer may oppose to the third party victim (B). Thus, the question arises whether a third party victim, in order to avoid discussions related to the contractual insurance policy, has not an interest to invoke tort law against an insurer (C).

A. How to catch the insurer's identity and the insurance policy ?

Based on general principles, it is up to the party alleging the existence of an insurer and of an insurance policy to proof such an allegation.

However, the third party victim has no direct access to the insurer the identity of which is often unknown to the victim.

Therefore, specific rules which aim to facilitate the burden of proof lying upon the third party victim apply.

a) Duty of the insured to disclose the identity of the insurer and the policy?

There exists no general duty in civil matters for the insured to disclose the identity of the insurer or the insurance policy to a third party victim.

Such a duty towards a third party victim exists however in criminal matters where article 388-1 of the Criminal Code imposes that "*Any person who may be civilly liable in consequence of an offence of homicide or unintentional injuries causing damage to another person which may be covered by an insurer, must state the name and address of such insurer, as well as the number of his insurance policy*".

In civil matters, Judges may order upon request the forced disclosure of the insurance policy by the insured based on articles 10 and 11 of the French Code of Civil Procedure.[1] In matters of transport law, there exists even a presumption of insurance coverage.

[1] Cour de Cassation (3rd chamber), 14 March 1990, n° 88-17082

Such same obligation lies upon the liquidator of an insured against whom insolvency proceedings were opened. Any official representative designated by court of an insolvent company would engage his professional liability if he does not disclose the identity of the insurer.

b) Duty of the insurer to confirm existence of an insurance policy and to disclose it?

According to French case law, it is possible to force the insurer to disclose the insurance police.[2]

As the third party victim is not supposed to have knowledge of the insurance policy, the burden of proof of its content lies logically upon the insurer. If the insurer intents to refuse coverage or to invoke any provision of the policy to limit coverage, it is up to the insurer to disclose the policy [3]

But what are the consequences if the insurer refuses to disclose the insurance policy to the third party victim?

If the existence of the insurance contract is admitted, but if the insurer is not willing or not in a position to disclose the insurance policy, the insurer has almost no chance to escape from full coverage. Indeed in such a situation and according to case law, no policy limits, self-retainers or exclusions may be opposed by the insurer against the third party victim.[4]

B. Once you got the insurer… how to catch its money?

Now that the third party victim obtained directly or indirectly after enforcement of a court order the insurers' identity and a copy of the insurance policy, a second battlefront may arise.

Indeed, if you are a happy claimant having a direct claim against the insurer, you may become very frustrated once you realize that insurers tend not to be very cooperative to pay out claims directed against them from third parties. Some insurers – assisted by smart and bright Lawyers - develop even very ingenious and creative means in order to try to resist to any payment or to limit payments.

Under French law, the basic principle, which is recalled in almost all decisions is that "*the victim's right against the insurer of the party liable for the damage originates from and is limited to the contract of insurance*".[5]

More particularly, article L 112-6 of the Insurance Code states that:

"*The insurer may invoke, against the policy holder or a third party who claims under the policy, exclusions invocable against the initial policyholder* ».

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[2] Cour de Cassation (2nd civil chamber), 12 June 1991, n° 90-11585
[3] Cour de Cassation (1st civil chamber), 2 July 1991, n° 88-18486 ; Cour de Cassation (1st civil chamber), 22 April 1992, n° 89-16034, Cour de Cassation (3rd civil chamber), 8 June 2010, n° 09-13482)
[4] Cour de Cassation (1st civil chamber), 7 July 1998, n° 96-16360 ; Cour de Cassation (2nd civil chamber), 3 February 2011, n° 10-14105 ; Cour de Cassation (1st civil chamber, 1 December 1993, n° 92-10733)
[5] Cour de Cassation (1st civil chamber), October 1st 1980.

This means that the third party victim (the claimant) is in no better position than the insured and has no more rights than the insured. As a consequence, the insurer is entitled to raise the same policy limits, exclusions and defenses than the insured.[6] Such limits, exclusions and defenses are those applicable at the time the damage occurs. But when does a "damage " occur by virtue of law ? Is it at the time the generating cause of the damage arises? Is it at the time the damage appears? Is it at the time the third party victim raises a claim?

French Courts give only very confusing answers to these essential questions and no clear trend is existing emerging to determine which insurance policy or which amendment to it one must look at[7]. In practice it is not rare that Parties, on the insurer and victim side, start to discuss about the version of the policy applicable before even looking at its provisions.

Under case law, only exemptions that already occurred before the event triggering coverage can be opposed to the third party victim.

To give some concrete examples:

- Article R 124-1 of the Insurance Code states that any fault committed by the insured after the occurrence of the damage cannot be opposed to the third party victim. This would be typically the case if the insured failed to declare the damage to the insurer or did it with delay [8], if the insured made false declarations to the insurer regarding the circumstances of the damage[9] or if the insured interfered with the insurer at the latter's harm[10].
- The insurer cannot refuse payment to the third party victim arguing that he already paid the insurance monies directly to the insured, which is prohibited under article L 124-3 of the Insurance Code. If the insures does so, he is exposed to have to pay twice and must then ask the insured to reimburse the insurance indemnity already paid out.[11]
- Since a change of the position of the French Supreme Court in 1993, the insurer can no longer reduce the insurance indemnity due to the third party victim by the amount of insurance premiums which remained unpaid.[12]

However, on the other hand, exemptions which already occurred or were underlying at the time of the damage can be opposed to the third party victim.

To illustrate, can be opposed to the third party victim:

- The fact that the insurance contract was void at the time of the damage, especially due to false declarations of the insured made before the damage arose[13].
- The circumstance that the insurance contract was already terminated at the time of the damage.[14]

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[6] (Cour de Cassation (1st civil chamber) 22 October 1991, n° 88-18277; Cour de Cassation (commercial chamber) 12 July.2011, n° 06-17155; Cour de Cassation, (1st civil chamber), 20 February.2011, n° 98-20583; Cour de Cassation (1st civil chamber), 8 June 1994, n° 92-10825.
[7] KULLMANN Jérôme, LAMY ASSURANCES, 2014, page 575
[8] Cour de Cassation (1st chamber), 2 April 1974, n° 73-10356, RGAT 1975, page 76 ; Cour de Cassation (1st civil chamber), 2 July 1991, n° 87-15.009, RGAT 1991, p. 846
[9] Cour de Cassation, 9 May 1956, RGAT 1956, page 147
[10] Court of Appels of Paris, 5 June 1930, RGAT 1930, page 1057
[11] Cour de Cassation (1st civil chamber), 19 February 1985, n° 84-11139, RGAT 1985, page 407 ; Cour de Cassation (1st civil chamber), 13 March, 1996, n° 93-20773, RGDA 1996, p. 718
[12] Cour de Cassation (1st civil chamber), 31 March 1993, n° 91-13637, RGAT 1993, p. 635
[13] Cour de Cassation (1st civil chamber), 23 June 1971, 70-10512, D. 1971, page 186

- Deductibles.
- The fact that the activity which caused the damage was not dully declared to the insurer (for example if the insured only declared an activity of carriage but with damages occurred during a prolonged period of warehousing).[15]
- The fact that the carrier did not strictly respect the security obligations imposed by the insurance contract, for example if the carrier did not use secured parking places for overnight stops in Southern Italy with high value cargo on board[16].
- Any other contractual exclusion or limitations of the insurance coverage, such as a maximum amount of insurance coverage or the geographical scope of insurance coverage[17].
- The exhaustion of the insurance guarantee, for example if the maximum annual coverage was achieved[18].

C. <u>May tort law allow to catch the insurer… and its money?</u>

If the third party victim cannot achieve its goal through the insurance contract, why not acting through tort ?

Former article 1382 of the French Civil Code (which became since October 1st 2016 article 1240) states that: "*Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it*".

This wording clearly shows that three distinct elements are necessary to engage liability: a fault, a damage and a causal link between the two. The burden of proof of all these elements falls on the claimant, which is the third party victim.

Unlike what we know from other jurisdictions, in France the very general provision of article 1382 Code Civil have consistently been found not to contain any limitations on the nature of protected rights and interests. In principle, all rights and interests are protected.

As imagination has no limit, from time to time, smart, creative and convincing Lawyers meet willing and open-minded Judges who may prefer to allow to indemnify a victim rather than protecting the interests of a naughty insurer refusing coverage.

One might therefore imagine to act against an insurer based on tort law, if the third party victim can establish that the insurer acted with fault and caused a damage to the third party victim.

To give an example, in a decision rendered by the Court of Appeals of LYON in 2009, the claim of a third party victim against the insurer of a carrier was admitted based on the fact that the insurer approved the decision of the insured, the carrier, to destroy the cargo following a traffic accident

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[14] Cour de Cassation (1st civil chamber), 25 February 1992, n°89-11711, Resp.civ.et assur. 1992, comm. n° 205; Cour de Cassation (2nd civil chamber), 4 July 2007, n° 06-14610, RGDA 2007, page 892, note Beauchard J.).
[15] Court of Appeals of Paris, 16 June, 1986
[16] Court of Appeals of Paris (7th chamber), 3 July 1986; Court of Appeals of Paris, 28 June 1991, BTL 1991, page 686; Court of Appeals of Versailles (12th chamber 1), 25 May 2004; Court of Appeals of Versailles (12th chamber 2),1 September 2015, BTL 2015, page 524
[17] Cour de Cassation (1st civil chamber), 22 May 1991, n° 88-18277 ; Cour de Cassation (commercial chamber), 12 July 2011, n° 06-17155).
[18] Cour de Cassation (1st civil chamber), 8 June 1994, n° 92-10825, RGAT 1994, page 874

although the specifications of the contract concluded between the carrier and the consignee prohibited such an unilateral destruction.[19]

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To conclude, French legislation, case law and practice is rather favorable to third party victims acting against the insurer. One must however bear in mind that coverage is not granted and not unlimited and that numerous hurdles exist for third party victims. Additional hurdles to those addressed in my presentation arise when a third party victim brings a claim before French court against a foreign liability insurer.

[19] Court of Appeals of LYON (3rd civil chamber), 13 October 2009, BTL 2010, page 416