Further Guidance from ECJ on Insureds Right to Choose Their Own Lawyer

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The Court of Justice of the EU (ECJ) recently considered the issue of an insured person’s right to choose their own lawyer under a legal expenses insurance policy, in the case of Orde van Vlaamse Balies and Ordre des barreaux francophones et germanophone v Ministerraad (Case C-667/18).

Similar questions have come before the ECJ a few times in recent years in different contexts within legal expenses insurance. There is often a wrangle between insurers and the insured on the issue.

Insurers may try to insist that the insured must appoint a defence lawyer from the insurer’s own panel. It makes commercial sense for the insurer, as they are usually responsible for funding the insured’s legal fees and panel law firm rates have been pre-agreed by the insurer. However, the insured’s own legal representative will know their client’s business better. Sometimes they already be briefed and have advised on the matter before the insurer gets involved and instructs lawyers from its own panel.

This case considered the meaning of Article 201(1) (a) of the Solvency II Directive,
“(1) Any contract of legal expenses insurance shall expressly provide that:

(a) where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person“.

The question was whether the term “proceedings” referred to in that Article includes judicial or extrajudicial mediation proceedings in which a court is involved or is capable of being involved.

The ECJ ruled that “proceedings” did indeed include judicial or extrajudicial mediation. Indeed, the ECJ held that “…any stage, even a preliminary stage, which is capable of leading to proceedings before a judicial body must be regarded as falling within the term ‘proceedings’“.

This decision reflects the ECJ’s approach of a broad interpretation of the rights of insured persons, in line with the context and objectives pursued by EU Directives, which seek to provide adequate protection for the interests of insured persons. The position is clear, namely that freedom of choice of a lawyer cannot be refused.

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