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## **Kommentar zu Art. 148 OR**

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- I. General remarks
- II. Internal liability quota of the joint and several debtors
  - A. Principal of equal distribution
  - B. Exceptions
- III. Recourse
  - A. Requirements and extent
  - B. Interest and legal costs
  - C. Prescription
- IV. Irrecoverable recourse claim

### **I. General remarks**

- 1 Art. 148 and Art. 149 CO regulate the internal relationship of the joint and several liability. The legal consequence in the internal relationship – the right of recourse – occurs if the joint and several debtor claimed by the creditor has borne more in the external relationship than their liability quota in the internal relationship (Art. 148 para. 2 CO).<sup>1</sup> The creditor's rights are also transferred to the joint and several debtor within the framework of subrogation according to Art. 149 CO.<sup>2</sup>

### **II. Internal liability quota of the joint and several debtors**

#### **A. Principal of equal distribution**

- 2 Art. 148 para. 1 CO presumes that all joint and several debtors have to bear the debt in equal quotas. Therefore, there is a reciprocal right of recourse for the joint and several debtor that has paid more than the amount of the joint and several debt divided by the number of co-debtors.<sup>3</sup>
- 3 Anyone who wishes to deviate from the legal principle of equal distribution and derive rights from it accordingly must prove this in accordance with the general distribution of the burden of proof in Art. 8 CC.<sup>4</sup>

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<sup>1</sup> CR-Romy, mn. 1 to Art. 148 CO; Perritaz, mn. 184; ZK-Krauskopf, mn. 4 to Art. 148/149 CO.

<sup>2</sup> BSK-Graber, mn. 1 to Art. 148 CO; CHK-Mazan, mn. 1 to Art. 148 CO; ZK-Krauskopf, mn. 167 to Art. 148/149 CO. Cf. commentary on Art. 149 CO for further reference.

<sup>3</sup> BGE 53 II 25 consid. 2.; decision of the Federal Supreme Court 4A\_582/2008 of 27 February 2009 consid. 4.2; BSK-Graber, mn. 2 to Art. 148 CO; Gautschi, mn. 156; Geissbühler, mn. 1247; KUKO-Jung, mn. 1 to Art. 148 CO; Perritaz, mn. 185; Tercier/Pichonnaz, mn. 1767; ZK-Krauskopf, mn. 62 to Art. 148/149 CO.

<sup>4</sup> BGE 53 II 25 consid. 2; decision of the Federal Supreme Court 5A\_672/2012 of 3 April 2013 consid. 8.3.2; BSK-Graber, mn. 3 to Art. 148 CO; CR-Romy, mn. 2 to Art. 148 CO; Gautschi, mn. 156.

## **B. Exceptions**

- 4 The legislator was aware that there may be legal relationships that impose a deviation from the principle of equal quota. In reality, unequal liability quotas are more common than an equal distribution.<sup>5</sup> By means of a contractual agreement between the joint and several debtors, for example, deviating internal liability quotas may be agreed upon (e.g. in the case of a simple partnership pursuant to Art. 533 CO).<sup>6</sup>
- 5 Aside from contractual clauses, the law provides for an exception to the equal quota in numerous places. First and foremost, Art. 50 et seq. CO should be mentioned. Whether at all and – if so – to what extent a liable tortfeasor can take recourse against the other persons involved is determined by judicial discretion (Art. 50 para. 1 CO). If several tortfeasors are liable on different legal grounds, liability is determined by the liability cascade according to Art. 51 para. 2 CO.<sup>7</sup>
- 6 Further deviations by law can be found in Art. 759 para. 3 CO on liability under corporation law, in Art. 640 para. 3 CC on recourse to co-heirs for debts of the deceased<sup>8</sup> and in Art. 649 CC on the bearing of costs and expenses among co-owners.<sup>9</sup>
- 7 Finally, constellations are conceivable in which a deviation of the legal principle is also to be pleaded due to the concrete circumstances. If two spouses jointly take out a loan to finance the husband's hobby, the wife should be granted a full right of recourse against her husband.<sup>10</sup>

## **III. Recourse**

### **A. Requirements and extent**

- 8 The right of recourse of the jointly and severally liable debtor presupposes that the debtor has actually performed to the creditor.<sup>11</sup> A mere court ruling obliging the performance is not sufficient. In addition, the debtor must have performed more than their internal

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<sup>5</sup> Schwenger/Fountoulakis, mn. 88.29; ZK-Krauskopf, mn. 69 to Art. 148/149 CO.

<sup>6</sup> BGE 133 III 6 consid. 5.3.3; BGE 116 II 316 consid. 2b; decision of the Federal Supreme Court 5A\_672/2012 of 3 April 2013 consid. 8.3.2; BK-Kratz, mn. 240 to Art. 148 CO; BSK-Graber, mn. 3 to Art. 148 CO; CR-Romy, mn. 3 to Art. 148 CO; Gautschi, mn. 154; KUKO-Jung, mn. 1 to Art. 148 CO; Perritaz, mn. 186; von Tuhr/Escher, p. 312; ZK-Krauskopf, mn. 57 to Art. 148/149 CO.

<sup>7</sup> BK-Kratz, mn. 234 et seq. to Art. 148 CO; Bucher, p. 496; CR-Romy, mn. 4 to Art. 148 CO; Gauch/Schluemp/Emmenegger, mn. 3738; Gautschi, mn. 159; Huguenin, mn. 2309; Schwenger/Fountoulakis, mn. 88.31 et seq.; Tercier/Pichonnaz, mn. 1767; ZK-Krauskopf, mn. 75 et seq. to Art. 148/149 CO. Cf. commentary on Art. 50 and 51 CO for further reference.

<sup>8</sup> Cf. decision of the Federal Supreme Court 5P.134/2002 of 5 September 2002 consid. 2.2.

<sup>9</sup> Cf. BK-Kratz, mn. 243 et seq. to Art. 148 CO and ZK-Krauskopf, mn. 70 to Art. 148/149 CO for further references.

<sup>10</sup> Schwenger/Fountoulakis, mn. 88.34.

<sup>11</sup> Surrogate performances are coequal. Cf. commentary on Art. 147 for further reference.

quota.<sup>12</sup> Both requirements must be proven by the joint and several debtor taking recourse.<sup>13</sup>

- 9 Consequently, Art. 148 para. 2 CO gives rise to an autonomous right of recourse that exists independently of the legal relationship between the joint and several debtors.<sup>14</sup> The joint and several debtor that has been prosecuted by the creditor can take recourse against the other joint and several debtors for the amount exceeding their fair share. This right of recourse is always a monetary debt. This means that a performance in kind or service must be converted into a monetary amount, if necessary.<sup>15</sup>
- 10 Finally, joint and several liability among the debtors only comprises in the external relationship with the creditor. The debtors are not jointly and severally liable to each other when facing a recourse claim of one of their co-debtors. Each debtor is only liable for their internal share.<sup>16</sup> An acquittal granted by the creditor to only one of the debtors does not affect the right of recourse in the internal relationship.<sup>17</sup>

## **B. Interest and legal costs**

- 11 The claim for recourse becomes due once the prosecuted joint and several debtor has paid more than their fair share to the creditor (cf. Art. 75 CO). Interest is owed on the recourse claim;<sup>18</sup> except as otherwise provided, the interest rate accounts for 5% p.a. (Art. 73 para. 1 CO).<sup>19</sup>
- 12 If a joint and several debtor defends him- or herself in a lawsuit against the creditor's claim, they may take recourse to the other joint and several debtors for the legal costs incurred. The prerequisite for this is that a victory in the civil action would have led to the release of all joint and several debtors and that the contestation of the claim has not been deemed hopeless.<sup>20</sup>

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<sup>12</sup> BGE 115 Ib 274 consid. 19b; BK-Kratz, mn. 57 and 65 to Art. 148 CO; CHK-Mazan, mn. 2 to Art. 148 CO; CR-Romy, mn. 9 to Art. 148 CO; Tercier/Pichonnaz, mn. 1764 et seq.; ZK-Krauskopf, mn. 35 et seq. to Art. 148/149 CO.

<sup>13</sup> Decision of the Federal Supreme Court 4A\_73/2014 of 19 June 2014 consid. 3; BSK-Graber, mn. 5 to Art. 148 CO; CHK-Mazan, mn. 4 to Art. 148 CO.

<sup>14</sup> BK-Kratz, mn. 29 to Art. 148 CO; ZK-Krauskopf, mn. 12 et seq. to Art. 148/149 CO.

<sup>15</sup> ZK-Krauskopf, mn. 41 and 67 to Art. 148/149 CO.

<sup>16</sup> BGE 103 II 137 consid. 4d; decision of the Federal Supreme Court 2A.252/2002 of 4 November 2002 consid. 3.2.2.2; BK-Kratz, mn. 91 to Art. 148 CO; BSK-Graber, mn. 7 to Art. 148 CO; Bucher, p. 496 et seq.; CHK-Mazan, mn. 7 to Art. 148 CO; Gauch/Schlupe/Emmenegger, mn. 3741; Geissbühler, mn. 1250; Huguenin, mn. 23 11; KUKO-Jung, mn. 2 to Art. 148 CO; Tercier/Pichonnaz, mn. 1770; von Tuhr/Escher, p. 316; ZK-Krauskopf, mn. 64 to Art. 148/149 CO.

<sup>17</sup> Cf. commentary on Art. 147 CO for further reference.

<sup>18</sup> BGE 57 II 324 consid. 4.; BK-Kratz, mn. 82 to Art. 148 CO; BSK-Graber, mn. 6 to Art. 148 CO; Bucher, mn. 497; KUKO-Jung, mn. 2 to Art. 148 CO.

<sup>19</sup> Bugnon, p. 99; ZK-Krauskopf, mn. 71 to Art. 148/149 CO.

<sup>20</sup> BGE 69 II 150 consid. 4d; BK-Kratz, mn. 84 et seq. to Art. 148 CO; BSK-Graber, mn. 6 to Art. 148 CO; Bucher, p. 497; Bugnon, p. 97; CHK-Mazan, mn. 3 to Art. 148 CO; CR-Romy, mn. 21 to Art. 148 CO; Gauch/Schlupe/Emmenegger, mn. 3743; KUKO-Jung, mn. 2 to Art. 148 CO; von Tuhr/Escher, p. 314. Different opinion ZK-Krauskopf, mn. 72 to Art. 148/149 CO.

### C. Prescription

- 13 The relative prescription period of the recourse claim lasts three years. It begins as soon as the joint and several debtor against whom recourse is sought has performed to the creditor and gained knowledge of the other joint and several debtors (Art. 139 CO). This requires cumulatively that the joint and several debtor entitled to recourse has concrete knowledge of the co-debtors and is also aware of all of the facts that establish the liability of the other party and thus enable legal action to be taken against them.<sup>21</sup>
- 14 Even if Art. 139 CO does not provide for an explicit absolute prescription period, an absolute ten-year period should be assumed by analogy with Art. 60 para. 1, Art. 67 para. 1 and Art. 127 para. 1 CO.<sup>22</sup> However, part of the doctrine rejects an absolute prescription period. The main point of criticism is that if an absolute time limit is affirmed from the time of the damaging event, the right of recourse could become time-barred even before it arises.<sup>23</sup> However, if the beginning of the limitation period is to be set at the time of performance of the debtor to the creditor – as is advocated here – the aforementioned concern is without cause and the application of an absolute prescription period may be approved.<sup>24</sup>
- 15 Art. 139 CO is applicable to cases of both perfect and imperfect joint and several liability.<sup>25</sup> The law then provides for its own prescription rules for numerous special-law liability provisions that must be observed.<sup>26</sup> These provisions take precedence over the general rule of Art. 139 CO.<sup>27</sup>

### IV. Irrecoverable recourse claim

- 16 If a joint and several debtor's internal quota can no longer be obtained in its entirety, the shortfall is to be borne equally by all of the joint and several debtors (Art. 148 para. 3 CO). This is the case if the debtor in question is insolvent, the costs of recourse proceedings would be disproportionate to the internal share or if the co-debtor is at an unknown domicile.<sup>28</sup>
- 17 If there should be an allocation formula that deviates from the principle stated in Art. 148 para. 1 CO based on a contractual agreement or the law, the shortfall of a joint and several debtor shall also be borne in accordance with this uneven allocation. Otherwise, the distribution is made according to heads.<sup>29</sup>

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<sup>21</sup> BSK-Däppen, mn. 5 to Art. 139 CO; CR-Pichonnaz, mn. 20 to Art. 139 CO; Huguenin, mn. 2314a.

<sup>22</sup> Before the statute of limitations for the right of recourse was regulated by law, the Federal Supreme Court ruled in favour of the existence of an absolute statute of limitations (BGE 133 III 6 consid. 5.4).

<sup>23</sup> Cf. CR-Pichonnaz, mn. 30 to Art. 139 CO; Werro, p. 28.

<sup>24</sup> BSK-Däppen, mn. 6 to Art. 139 CO; Fellmann, p. 217; Rothenberger, p. 98.

<sup>25</sup> CR-Pichonnaz, mn. 11 to Art. 139 CO; Fellmann, p. 216; Tercier/Pichonnaz, mn. 1771; Werro, p. 28. Different opinion BSK-Däppen, mn. 3 to Art. 139 CO.

<sup>26</sup> Cf. BK-Kratz, mn. 160 et seq. to Art. 148 CO and ZK-Krauskopf, mn. 131 et seq. to Art. 148/149 CO for further references.

<sup>27</sup> ZK-Krauskopf, mn. 130 et seq. to Art. 148/149 CO.

<sup>28</sup> BK-Kratz, mn. 280 to Art. 148 CO; BSK-Graber, mn. 9 to Art. 148 CO; CHK-Mazan, mn. 10 to Art. 148 CO; CR-Romy, mn. 20 to Art. 148 CO; Geissbühler, mn. 1256; Huguenin, mn. 2311; ZK-Krauskopf, mn. 158 to Art. 148/149 CO.

<sup>29</sup> BK-Kratz, mn. 278 to Art. 148 CO; BSK-Graber, mn. 8 to Art. 148 CO; Bugnon, p. 115; CR-Romy, mn. 19 to Art. 148 CO; Gauch/Schlupe/Emmenegger, mn. 3741; Geissbühler, mn. 1258;

- 18 The law provides in Art. 51 CO for a cascade that determines the liability among imperfect joint and several debtors. In this case, the bearing of the shortfall is also determined according to this cascade. There is therefore no apportionment if the joint and several debtors are on different levels of the cascade.<sup>30</sup>

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<sup>30</sup> BK-Kratz, mn. 278 to Art. 148 CO; BSK-Graber, mn. 8 to Art. 148 CO; Bugnon, p. 115; ZK-Krauskopf, mn. 160 to Art. 148/149 CO.

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