

Summary of my dissertation on the subject of the law of obligations:

“Isolated assignment of joint and several debts – possibility, conditions and legal consequences of the assignment of a claim against only one of joint and several debtors”

According to the explanatory notes for the draft of the German Civil Code (“BGB”), volume 2, at p. 124 f., the resolution of the question of which consequences arise from the assignment of joint and several debt obligations if the terms of the assignment encompass only the claim against one of the co-debtors, or even expressly exclude the transfer of the claims as against the other co-debtors, is most appropriately left to the courts and to academia.

Even 130 years later, the relationship between joint and several liability (sec. 421 et seq. BGB) and assignment (sec. 398 et seq. BGB) has not been satisfactorily clarified. Only the case where the claims are expressly assigned as against all joint and several debtors is unproblematic. In that case, pursuant to sec. 398 sentence 2 BGB, the assignee takes the place of the assignor in respect of all co-debtors. However, as far as the assignment of a claim as against individual joint and several debtors is concerned, joint and several obligations are like Siamese twins: Their separation appears to be momentous, risky, perhaps even indefensible.

Is it possible, at least in principle, to assign joint and several claims in isolation or are such claims inseparably linked? This initial question alone touches on core principles of civil law: How is joint and several liability structured? What effects does the assignment have? Are joint and several obligations ancillary rights within the meaning of sec. 401 para. 1 BGB, and which implications would this have for their separability? The prevailing opinion avoids the questions of whether joint and several claims can be assigned as against individual co-debtors in isolation by interpreting, as far as possible, the terms of the assignment to comprise the claims against all co-debtors. Where the terms of the assignment cannot be thus interpreted, the question arises whether the assignment of a joint and several claim as against individual co-debtors is only effective if all co-debtors agree. There is currently no consensus on this matter neither among courts nor among academics. Even if such an isolated assignment is effective, its legal consequences are unclear. The legal relationship between the debtors and creditors in case of joint and several debts which have been “separated” is not clear. Because assignment and joint and several liability frequently coincide, there is not only an academic but also a practical need for clarification. An example from everyday life could be as follows: The two corporations A and B contract the entrepreneur U to build a kindergarten and are jointly and severally liable for his payment. Under the terms of their contract, U is prohibited from assigning his claims

against A and B (per sec. 399 Var. 2 BGB). When U runs into financial difficulty, he asks to be allowed to sell these claims. B does not want to lift the prohibition of assignment, A, on the other hand, agrees. As a result, U sells and transfers his payment claim against A to Bank Z. B believes that this transaction is ineffective without its consent and that it therefore still owes the payment to U. Is B right?

There is hardly any federal court jurisprudence on such questions of assignment and joint and several liability. The academic treatment of such questions is at best superficial. The aim of my doctoral thesis is to fill the void in research on the isolated assignment of a joint and several obligation. The following theses are examined and confirmed: 1) An isolated assignment is possible. 2) An isolated assignment leaves the connection of joint and several liability intact. 3) The legal consequences of an isolated assignment are in principle acceptable, especially for the assignee. 4) An isolated assignment does not lead to a joint and several creditorship. 5) An isolated assignment is only effective if all joint and several debtors agree to it. 6) Whether a joint and several claim is assigned only as against individual co-debtors or as against all co-debtors depends primarily on the interpretation of the terms of the assignment. However, it is submitted that the terms of the assignment can only be interpreted to encompass all co-debtors in fewer constellations than is often assumed by the prevailing opinion. 7) If the assignment agreement does not encompass all individual obligations which are jointly and severally owed, these claims are in principle also transferred to the assignee by an analogous application of sec. 401 para. 1 BGB, as each joint and several claim is an ancillary right in relation to the other, irrespective of a particular security purpose.

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