THE OBLIGATION TO INFORM ONE ANOTHER OF THE INSURANCE CONTRACTIG PARTIES. LIMITS AND CONTENT OF THE OBLIGATION, FROM THE POINT OF VIEW OF EACH OF THE CONTRACTING PARTIES.

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Abstract

In contractual relationships, in general, and as regards the insurance contract, in particular, the obligation to inform one another is of particular importance, all the more so as it is an effective means of protection for both contracting parties.

The obligation of the professional to provide advice to the user of insurance services in order to conclude the contract requires the observance of certain principles such as loyalty and good faith and is carried out, as a rule, by insurance intermediaries.

The obligation to advice of the insurer refers, and at the same time is limited, exclusively to the framework of the insurance operation, without involving external aspects and that are presumed to be known by all. According to some opinions, the obligation to advice is distinguished from the obligation to provide information, the content of which is distinct and refers to the contractual relationship and not to the pre-contractual relationship.

Also, the other contracting party, the insured, has the obligation to inform the insurer, being mandatory that the insured acts in good faith when providing the information required by the insurer, information that is considered by the insurer important when taking over and quantifying the risk.

The insurance contracts must be executed with the utmost good faith. The aspects related to hiding certain key elements are often found in insurance contracts. Failure to inform or distortion of the facts is a violation of the obligation to inform, involving, together with fraud, serious consequences in the execution of the contract by the insured.

All these aspects will be the subject of our analysis, presented within this article.

Keywords: *information, advice, insurance, fraud, good faith, distortion*

1. The obligation of the insurance products distributor to provide information and advice in accordance with the European and national legislation

When the insured risk occures and we find out that the insurance agreement does not cover the risk, the reaction is to say that we were poorly advised.

Distinct from classical claims based on contract, we notice, more and more, the occurence of complaints based on poor information and/or advice.

For a long time, insurance intermediaries advised their clients verbally. Therefore, those who considered to have been poorly adviced had to prove the deficient advice, which in practice was quite difficult.

The Directive of the European Parliament and of the Council of 20 January 2016 on insurance distribution, provides drawing in the responsability of the insurance distributors for the deficiencies of advice and information. The cited regulatory document, concerning the harmonization of national provisions on insurance distribution, establishes the obligation to issue a written document with regard to the information made and, generally, allows the customers to benefit of the same level of protection, regardless of the differences between the distribution channels.

The Directive applies to all natural or legal persons who are established in a Member State of the European Union or who wish to establish in a Member State for the purpose of performing the activity of distribution of insurance and reinsurance products and of carrying out those activities. The Directive does not apply to the accessory insurance intermediaries.

The regulatory document regulates the obligation to provide advice and information and stipulates that, prior to the conclusion of an insurance contract, the distributor of insurance products must establish, based on the information provided by the client, the needs of that client and, accordingly, disclose to the client objective information, with regard to a specific product, in a comprehensible way, in order to allow the client to make a decision on insurance contracting in full awarness.

At the same time, the Directive also provides that, to the extent that the pieces of advice are provided prior to the conclusion of a specific insurance contract, the distributor of insurance products must provide the customer with a customized recommendation, explaining to the client the reasons why a particular product better satisfies his/her demands and needs.

According to the Directive, the insurance intermediary must propose the contract that best suits the needs of the client.

If the insurance distributor reckons, based on the information received, that the product is not the most suitable for the client, it is required that the client is notified in this respect.

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The liability for the poor information or advice lies with the insurance distributor.

The liability of the insurance intermediary may be subsequently undertaken, in the event that when the event occurs, there shall be proved that the proposed contract was not best suited to the client`s situation and that another contract would have made it possible to avoid a situation of non-existence of the guarantee.

At the same time, the Directive also provides that the insurance intermediaries or the insurance company must provide the client with the appropriate information regarding the service provided, on a durable medium, in the meaning that a written document, with regard to the information made, shall exist. All the information provided to the client shall be delivered on paper, with some exceptions, strictly regulated.

As regards the insurance distribution, the national legislation has implemented the provisions of the European Union (EU) Directive 2016/97.

Thus, the Law no. 236/2018 on insurance distribution stipulates the requirements applicable to the distributors of insurance products and transposes the provisions of the Directive 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

According to this national regulatory document, the information, including the information about the marketing of the products, must be clear and must not mislead the customers.

The insurance distributor has the obligation to inform the customer to what extent the service provided is about advice on the insurance products offered according to the law.

As defined by the law, by customer it is understood only the natural person, according to the applicable national legislation, and by client it is understood both the customer and the client as legal person.

It must also be clear whether the distributor carries out the activity on behalf of an insurer or independently, as well as who pays him.

According to the provisions of the law, brought in line with the provisions of the Directive, the insurance distribution represents the activity consisting in the following sub-activities: advising on insurance contracts, proposing such contracts or carrying out other work preparatory to the conclusion of such contracts.

The activity of insurance distribution may also consist in concluding such contracts or assisting in the management or performance of such contracts, in particular in the case of a claim, including the provision of information on one or more insurance contracts in accordance with the criteria selected by the clients on a website or by other means of communication.

The insurance distribution activity also includes the compilation of an insurance product ranking list, including price and product comparisons, or a discount on a premium, if the client has the possibility to conclude, directly or indirectly, an insurance contract using a website or other means of communication.

For the purposes of the law, the following activities are excluded from being regarded as distribution activities: a) the occasional provision of information in the context of another professional activity where the provider is limited to it, without assisting a client in concluding or performing an insurance or reinsurance contract; b) the management of claims of a company on a professional basis, and the assessment and regulation/processing of claims; c) the mere provision of data and information on potential contractors, to intermediaries or companies, if the provider is limited to it, without providing assistance in concluding an insurance or reinsurance contract; d) the mere provision of information about insurance or reinsurance products, intermediaries or companies to potential contractors, if the provider is limited to it, without providing assistance in concluding an insurance or reinsurance contract. (3) The terms and expressions provided for in para. (1) shall be supplemented by those defined by the Law no. 237/2015.

In accordance with the provisions of the Law no. 236/2018, the insurance intermediaries are those natural or legal persons, other than a company or its employees and other than an accessory insurance intermediary, who initiate or carry out an insurance distribution activity, in return for remuneration.

The processes carried out by the distributors, including the decision-making process, and the supervisory process carried out by A.S.F. (the Financial Supervisory Authority) are substantiated by supporting documents, the Law no. 236/2018 stating the so-called principle of documentation.

The documentation is made on durable medium, defined by the law as the instrument which, on the one hand, allows the client to store the information that is addressed to him personally so that the information can be used for future reference for a period of time adequate for the purpose of the information, and on the other hand, allows the exact reproduction of the information stored.

The law establishes, in accordance with the Directive, the requirements for information and conduct in the performance of the activity, stating that the insurance distributors must always act honestly, fairly and professionally in order to fit best to the interests of their clients.

The information relating to the subject matter of this law, including advertisements, which are addressed to the clients or potential clients by the insurance distributors, must be accurate, clear and non-misleading and easily identifiable (art. 12).

In this regard, before concluding an insurance contract, the insurers and/or the insurance intermediaries must provide their clients, in due time, with certain information, namely: a) **in the case of insurers and intermediaries:** (i) their identity and address; (ii) the capacity of intermediary or insurer, as

applicable; (iii) if they provide advice on the insurance products marketed; (iv) the procedures provided for by art. 4 para. (20) and the information on out-of-court complaint procedures and appeals procedures provided for by art. 4 para. (27); b) **in the case of intermediaries:** (i) the register in which they are registered and the means by which the registration can be checked; (ii) whether they represent the client or act for and on behalf of the insurer.

The law clearly distinguishes between the obligation to provide advice and the obligation to provide information.

The obligation to provide advice. As far as the advice information is concerned, before the conclusion of insurance contracts, the insurance distributors must assess the requirements and needs of the clients, based on the information obtained from them, so that the proposed contracts are in line with them.

In the event that the advice is given prior to the conclusion of a specific contract, the insurance distributors make customized recommendations for the clients, documenting the reason for the suitability of a particular product to the clients` requirements and needs, by adapting to the complexity of the proposed insurance product and to the type of client.

The advice is provided after the analysis of a sufficiently large number of insurance contracts available on the market, so that the customized recommendation is made based on professional criteria and the insurance contract is best suited to the needs of the client.

Within the obligation to provide advice, they must provide clients with objective information about the proposed insurance product, in an easily understandable form, in order to allow them to make an informed decision.

1.2. The obligation to provide information. General aspects.

According to the doctrine[1], the general pre-contractual obligation to provide information exists independently of an express provision of the law.

The general legal basis for the existence of the obligation to provide information lies, under the old regulations, in the extensive construction of **art. 970 paragraph 1** of the 1864 Civil Code, according to which: *„They (the agreements) must be performed in good faith",* this text being unanimously construed by the doctrine and the case law arisen from the provisions of the old regulations, that applies also to the pre-contractual period.

Under the new regulation, **art. 14** of the Civil Code provides that (1) *„any natural or legal person must perform his/its obligations in good faith, in accordance with the public order and good morals. (2) Good faith is presumed until proven otherwise",* and **art. 1170** of the Civil Code provides that *„The parties must act in good faith both during the **negotiation** and the conclusion of the contract and throughout its execution. They can not eliminate or limit this obligation".*

The second thesis of art. 1170 of the Civil Code adds that the parties can not eliminate or limit this obligation, which gives the rule of the first thesis, **a public order nature**. A similar rule is provided by the principles of the European Contract Law.

If this is the general rule applicable to contract matters, we must point out that good faith is specifically regulated also with regard to the mechanism for concluding contracts by **art. 1183,** which details the obligation of good faith **during the negotiations** and provides the sanction for bad faith conduct, namely the obligation to repair the damage caused to the other party.

Violation, by the insurer, of the rights of the insured has as a consequence, with respect to the clauses resulting from these violations, namely their lack of effect, their lack of opposability to the insured (the equivalent of the absolute nullity).

According to an opinion expressed in the specialized doctrine [2] before the law nr. 236/2018 was enacted, *„there will also be taken into account the regulations in the field of customer protection, legislated mainly by the Law no. 296/2004 on the consumption code. The Law no. 296/2004 provides the regulation of legal relations created between traders and customers on purchasing products and services, including financial services (art. 1). Under the Law no. 296/2004, the notion of financial services includes some services of banking nature, credit, insurance, private pensions and investments or payments ... We note that, according to art. 27 of the law, the customers* (and therefore also the insurance customers - our emphasis, MD) *have the right to be fully, accurately and precisely informed of the essential characteristics of the products and services, so that the decision they adopt in relation to them corresponds best to their needs and to be educated in their capacity as customers, and according to art. 78, traders are prohibited from stipulating abusive clauses in contracts concluded with customers".*

1.3. The obligation to provide information according to the Law no. 236/2018.

Without prejudice to the provisions of art. 107 of the Law no. 237/2015, prior to the conclusion of a contract, irrespective of whether or not advice is given and whether or not the insurance product is part of a package, the insurance distributor applies the provisions of the law on how to provide information about that product.

That information shall be delivered using a standardized insurance product information document, according to the legal provisions, called „PID", an information document prepared by the creator of the

[1] L.Pop, „Tratat de drept civil. Obligaţiil". Vol II. Contractul. Ed Universul Juridic, Bucureşti 2009 pag 281
[2] Vasile Nemeş, „Dreptul asigurărilor" Ediţia a 4-a Editura Hamangiu 2012, pag. 194,

non-life insurance product in a succinct and stand-alone manner.

The information document shall be presented and structured using legible characters in order to be clear and easy to read and shall be written in the official language used in the Member State where the insurance product is offered or in another language, if an agreement is entered into between the customer and the distributor in this regard. P.I.D. must be accurately structured, not-confusing and must contain the title „Insurance Product Information Document".

It will also include the statement specifying that full pre-contractual and contractual information shall be provided in other documents.

The P.I.D. is delivered together with the information required to be transmitted according to the legal provisions and shall include the following information: a) the type of insurance; b) a summary of the cover of the insurance including: (i) the main risks; (ii) the insured amount; (iii) geographical coverage, if applicable; (iv) the summary of the excluded risks, if applicable; c) methods of payment of premiums and frequency of payments; d) the main exclusions for which no claims can be made; e) obligations at the beginning of the contract; f) obligations during the term of the contract; g) obligations in case of claims; h) the contract period, including the start and end dates of the contract; i) methods of termination of the contract.

The information provided in accordance with the provisions of the law shall be communicated to the clients on paper, clearly and accurately, in a manner that is comprehensable to the customer, in one of the following official languages: of the Member State where the risk is situated, of the Member State of the committment, in the language agreed upon by the parties. Transmission will be free of charge.

By way of exception, if certain conditions are met, the information may be provided to the clients using one of the following means of communication: a) a durable medium, other than paper; b) a website, and only if the delivery method is appropriate in the context of the activity carried out between the insurance distributors and the clients and offers the possibility for the clients to choose between information on paper and other durable medium, the clients choosing the second option.

The provision of information is considered to be appropriate if there is evidence that those clients have access to the Internet on a regular basis. The provision by the client with an email address for the purpose of that activity is considered such proof.

In the case of telephone sales, the information provided to the clients before the conclusion of the contract, including the PID, is provided in accordance with the national and European Union rules directly applicable to the distance marketing of customers financial services.

1.4. The sanction for non-compliance by the insurer with the obligation to provide information in national case law.

The insurer`s failure to comply with the obligation to provide information and the consequences that it implies considering the obligations of the contracting parties, is also pointed out by the national case law.

In accordance with the civil decision no. 620 dated 26 February 2009, delivered by the High Court of Cassation and Justice, court order that was published in a case law review, the author Cristina Enache, judge magistrate at the Prahova Tribunal[3] and on the website www.scj.ro, it has been sanctioned the culpable conduct of the insurer consisting in not handing over a copy of the conditions, not mentioning the cases excluding the liability of the insurer in the section of the insurance policy specially created for that purpose, also noting that *„the insured did not give his consent with regard to the clause concerning the exclusion causes of the insurer".*

In the reasoning of the decision of the High Court of Cassation and Justice no. 620/26.02.2009 the following recitals are noted:

„The High Court, analyzing the appealed decision in terms of the criticisms made based on the provisions of art. 304 pt. 7, 8 and 9 of the Civil Procedure Code, in relation to the deeds and proceedings of the file and the relevant legal provisions, finds that they are not such as to lead to the cassation or the modification of the decision of the appelate court. In this respect, it is noted that the appealed decision is correctly and coherently reasoned, the appelate court justly establishing that, although there is a mention on the insured`s statement that he took note of the terms and conditions of the contract, it is not signed by the insured claimant (page 6)and the insurer defedant did not prove that he handed a copy of the above mentioned general conditions to the insured or that he has a copy signed by him, and that the section of the insurance policy specially created for cases excluding the insurer`s liability is not filled in (page 5) and the insurance agent did not request the insured to submit the construction authorization, nor did he inform him that the existence of such an authorization conditioned the conclusion of the insurance contract by the insurer, so that, the court judiciously noted that the insured claimant did not express the consent with regard to the clauses concerning the reasons of exclusion of the liability of the insurer, the court also fairly construed the clauses of the insurance contract in litigation ..... References of the appellant to the breach of the provisions of the Law no. 50/1991 are void in this case, because the penalties provided for by this law can not be applied incidentally, at the request of a legal person governed by private law, and in order to take effect in the case of a trade contract of another nature. Therefore, the Court

[3] Cristiana Dana Enache, „Clauze abuzive în contractele încheiate între consumatori şi profesionişti", Editura Hamangiu, 2012

considers that the appelate court has correctly construed and enforced the law, for this reason, under art. 312 para. (1) of the Civil Procedure Code, the appeal will be dismissed as unfounded."

In another case decision, which is also extremely relevant as regards the failure of the insurer to comply with the obligation to provide information, the Covasna Tribunal notes in the recitals of the civil decision no. 142R/28.05.2014 the following:

„Noting that the insured risk has occured, the judicial review court finds that the aspect to be examined in the case concerns the effects of the clause that exonerates the liability which the defendant insurer made use of in justifying the refusal to pay the insurance indemnity, clause that has been challenged by the claimant insured and to which the first ground of appeal relates to ..... Analyzing the above clause, the court will note that it has the legal nature of a ***standard clause*** *in the meaning presented by art. 1202 para. 2 of the New Civil Code, according to which „There are considered standard clauses the provisions established in advance by one of the parties for general and repeated use and which are included in the contract without being negotiated with the other party", a hypothesis that is found in this case, considering that this clause is written by the insurer and is inserted in a brochure or book, according to the terminology used by the appellee in the statement of defence, and it is not the result of a negotiation with the insured. At the same time, the clause clearly has the legal nature of a liability exemption clause, given the fact that it is provided a hypothesis in which, although the insured risk occures, the insurer`s contractual obligation is removed.*

Therefore, considering the nature of the clause in question, the court will take into account that it is subject to the express provision of art. 1203 of the New Civil Code, according to which ***„the standard clauses providing for the benefit of the person proposing them the limitation of liability, ... shall have effect only if expressly accepted by the other party".***

But, in this case, the judicial review court will note that the insured did not adopt by signing this clause stipulated in his detriment, from the evidence presented to the case it did not result that he had been informed of the conditions of the insurance and that he had taken note of their content and much less that he would have agreed and would have accepted this clause, since the condition required provided for by the above mentioned legal provision has not obviously been fulfilled in order for that clause to take effect.

In view of the above, considering the nature of the clause and its drastic effect, to completely remove the obligation of the insurer - who has received the insurance premiums - to pay the insurance indemnity, ***the court notes that an assertion that the agreement of the insured would appear from other clauses or related provisions is contrary to the compulsory rule of the Civil Code, a rule which unequivocally states that this clause must be expressly accepted, not tacitly and generically.***

The judicial review court shall not, in this respect, consider the defense of the appellee that in the insurance policy has been stated that the insured acknowledged and received the insurance conditions and that those conditions are part of the contract, these terms being insufficient to express the acceptance by the insured of the clause presented by the appellee - defandant."

2. The obligation of the insured to provide information to the insurer. General aspects.

The pre-contractual stage is always marked by various communications or attempts of communication, sometimes abandoned, by future contractors.The deficiencies arising with regard to the pre-contractual information are always the cause of an important litigation.

The insurance operation is often too technical for the uniformed insured, who should be informed and advised by the professional.

It is therefore the responsibility of the insurer to provide the insured with a limitative and precise insurance questionnaire and to provide him with a copy of the draft contract together with the insurance conditions, as well as with detailed information regarding insurance exclusions and covers/guarantees.

As regards the insured, the obligation to provide information consists in presenting the risk in a frank and accurate manner, the exact description of the proposed risk belonging to the insurance contract and being carried out based on the information requested by the insurer through the insurance questionnaire.

In the concrete process of concluding an insurance contract, the insured performs his obligation to declare the risk only after receiving the first information provided by the professional.

The information that the insured provides to the insurer in relation to the risk that he wishes to cover is an essential element of the contract. This information, by itself, allows the insurer to assess to what extent he accepts to offer the guarantee of the insurance contract.

The basis for the obligation to declare any circumstances which might lead to a risk lies in the principle of extreme good faith or „uberrime fidei". Therefore, the obligation of the insured to inform the insurer must be carried out in maximum good faith.

In order to establish the extent of the obligation to declare, it arises also the issue of the person who determines the extent of the obligation. Therefore, the main issues will be to know how to determine the measurement criteria and who has the responsibility to establish the statement framework.

If the liability for the content of the statement lies with the declarant himself, he will always be liable for the information deficiencies.

The existence of a particular circumstance, known to the insured, must be disclosed to the insurer,

because otherwise, assuming the insured risk arises, it will come down to what the insurer would have done if he knew that situation prior to the conclusion of the contract, the assumptions being the following: either the insurer would have refused to contract, or would have committed to cover the risk only in return for a higher premium.

As far as the insurer is concerned, his main objective, at this stage, is to accurately measure the risks and to assess the costs.

Consequently, insofar as he is the one that takes over the responsibility of establishing the questions from the insurance questionnaire, the first stage, but a very important stage in the risk statement, is to determine the circumstances existing at the conclusion of the contract in relation to the insured asset, which is subject to the statement and which may influence his opinion.

The circumstances that may affect and influence the insurer`s opinion may be very different. They vary not only depending on the different categories of insurance but also depending on each specific case.

In this context, a clarification is necessarily required: if the insurer is the one that determines the extent of the obligation to provide information, he will not be able to blame the co-contractor for the insufficiency of the information, insofar as the insured has provided exact answers to all the questions.

In the system of the so-called spontaneous statement of the insured, the insured had to declare, when concluding the contract, all the circumstances known to him and which can help the insurer make the risk assessment.

This procedure proved to be impractical because the insured does not have or has little experience in insurance, which implicitly leads to his inability to assess the importance and relevance of the information regarding the conditions of taking over the risks by the insurer.

The jurisprudence has moderated the use of the spontaneous statement, and the so-called limited statements were adopted, within the questionnaire proposed by the insurer. It was considered that the insurer, given his own experience, as a professional, is sufficiently trained in order to adequately and comprehensively determine all the information he needs for a correct risk assessment.

The system of the limited statement therefore consists in providing exact answers to the questions asked by the insurer, within the form for the risk statement, a form through which, upon the conclusion of the contract, the insurer inquires the insured with regard to the circumstances that are likely to determine him to assume guarantee coverage and risk taking.

However, regardless of the insurer`s help through the questionnaire, the insured is still required to declare all information known by him, that could influence the insurer`s opinion with regard to the risk.

The circumstances known to the insured and that have to be declared to the insurer may be objective or subjective. The objective circumstances are those that concern the subject of the contract itself and that allow the insurer to determine the possibility and intensity of the risk, such as fire insurance, being of interes for example the construction materials, the neighborhood and the destination of the building.

The subjective circumstances are those that refer to the person of the underwriter, meaning if an insured event occurred under a previous insurance contract, if he previously terminated an insurance contract with another company, if he was subject to civil or criminal convictions, or if he has already been insured for the same risks by another insurance company.

In the doctrine, there has been raised the issue of the consequences of an on-site visit of the insurer, namely to the asset to be insured. The issue that arises is to know whether such a visit would involve, as a consequence, the limitation of the extent of the obligation to declare incumbent upon the insured.

Does an inspection procedure carried out by the insurer represent the signal of a waiver of the insurer to make use of an inaccurate statement made by the insured?

The waiver should mean that the insurer already knows the inaccuracy of the statement at the time of the inspection, having the value of a simple presumption of knowing the circumstances of the risk.

No such conclusion can be drawn, as the obligation to determine the framework of the statement belongs to the insurer, who must ask questions to the insured.

Insofar as a pertinent question is asked to the insured, he can not refuse to answer, even if he is able to prove that the insurer already knows the answer.

If, because of the ineffectiveness of the inspection, the insurer has not been able to notice certain aspects and, as a consequence, he has failed to question the insured about those aspects, the insurer will not objectively be able to blame the insured for not giving an exact statement.

The risk inspection is only an additional way to check the accuracy of the risk assessment. The existence of a risk inspection will automatically determine a facilitation of the obligation to declare of the insured, who often knows the reality better than others.

The insured is bound to answer correctly the questions asked by the insurer, even if he knows for sure that the insurer knows the answers. The questionnaire has the role of facilitating the risk statement and the insured has the obligation to submit to the insurer`s guidance.

Also, there has been raised the question whether the insured is exonerated of the obligation to declare, when certain aspects, as a consequence of their public knowledge, are, or ought to be known by the insurer.

The French jurisprudence[4] has admitted that the insured does not have to declare to the insurer any elements of which the latter is presumed to have knowledge of. It is the case of a famous sportsman for whom it has been decided that he did not have the obligation to make a statement regarding his speedboat racing, since these activities as well as his engagement in sports competitions were public and should have been known by the insurer. The insurer is not a mere addressee of the statement, he has a precise role in the procedure.

The insured are protected against dangers resulting from inaccurate and obscure questions. An incomplete questionnaire can be assimilated to an ambiguous questionnaire. Consequently, incomplete, partial answers might be attributable to the insurer and not to the insured. The inaccurate nature of the answers, consequence of ambiguous questions, can lead to the elimination of the insured`s suspicion of bad faith. In a 1993 judgment, the French Court of Cassation showed that the accuracy and the honesty of the insured`s statements must be assessed depeding on the questions presented in the risk statement questionnaire[5]. For example, if the insurer asks the insured to indicate the risk history occurring within a specified period of time, he can not blame the insured for not indicating the events that had occurred before or after that period.

The insurer has also the possibility to obtain the information necessary for the risk assessment also by other means, the risk statement not being the only way. Thus, the insurance company may request the provision, from another insurer, of the risk statement signed by that insured when concluding contractual relations with the other insurer.

The omission of the insured to answer to one or more of the questions asked by the insurer, especially when he is aware of the issues he has been asked of, may result in the refusal to pay compensation for the omission in statements.

In one case, the French case law considered the deliberate nature of the insured`s omission to answer to a particular question when the insured, aware of the risk of land compaction, refused (omitted) to answer the insurer`s question and, moreover, did not provide him with the proof of the technical check required by the insurer.[6]

In fulfilling an obligation to provide information, such as the one regarding the risk statement, it is required that the transmission of the document is done, in order have the proof for that, thus raising a crucial issue, namely the proof of making the statement.

The distinctiveness of the insurance contract lies not only in the evidence or in determining who is responsibile for the burden of proof, but, also in the fact that, in the process of searching for information about the risk, it may come into conflict with certain rights of the person, including those relating to confidentiality. These minuses give rise to a delicate problem, namely to know the limits of risk related research.

The first limit depends on the condition of good performance of the insurance, meaning no statement should be made if it does not serve the insurer in the risk assessment.

However, even in the presence of such a clear principle, in practice, there have been pointed out situations in which there has been a conflict between the compulsoriness to preserve the medical confidentiality and the need to declare certain information, for purposes of insurance coverage, information likely to lead to a breach of medical confidentiality, which has a general and absolute nature.

2.1. Th obligation to inform. The effects of bad faith of the insured.

An insurer who criticises his insured that the latter has violated the obligation to declare must prove, by all means, a number of aspects such as: the fact that the insured, knowing the existence of a circumstance likely to influence the insurer`s opinion on the risk, has not made the statement or made an inaccurate statement.

If the insurer claims that the insured has acted intentionally, he will also have to prove the bad faith of the contractor, otherwise good faith is presumed. The bad faith means that the reluctance or the false statement is intentional, most often happening for the insured to benefit of a more advantageous premium regime.

It is necessary to demonstrate not only the bad faith of the insured, but also the fact that the simulated circumstance had consequences on the insurer`s opinion regarding the risk.

The starting point of the analysis is the evidence of a wrong answer to the questionnaire given by the insured, but the false statement does not equal bad faith.

To the extent that the intentional nature of the inaccurate statement can not be established, the declarant should not be subject to sanctions, as his bad faith is not proved.

The bad faith is sovereignly appreciated by the first instance judges, in particular, taking into account the insured`s personal capacity to become aware of the effects of the inaccurate or false statement. However, it is also necessary to take into account the way the questions are drafted.

Thus, if the insured proves to be in difficulty to understand precisely the questions asked by the insurer, the judge may dismiss the bad faith.

In the presence of inaccurate answers to the questions in the questionnaire, one can also draw the conclusion that the declarant has a limited understanding capacity, aspect which also appeals to tolerance in the assessment of his bad faith. However, those who possess particular professional competences, for example, of the kind that helps them understand the

[4] Cass 1 er civil, 2 martie 1994, Campagnie Abeille Paix Vie c/ Banque Commerciale Privee et M. Coudray, RGAT, 1994, p. 469
[5] Cass, 1 er civile, 17 martie 1993, Mem Manon c/ Societe Cogirout La Henin et Societe Assurance vie, RGAT 1993, p. 547
[6] Cass, 1 er civil, Societe Visconti c/Cie Yorkshire General Accident Fire and Life Corp, RGDA, 1997, p. 123, note du Jerom Kullmann.

meaning of the questions asked by the insurer, should not benefit from this tolerance.

The case law affirmed the sovereign power of the first instance judge to assess the intentional nature of the erroneous statement.

If the judge finds that, at the time of the underwriting, the insured was unaware of the circumstance omitted or of its effects, its importance may be understated and, finally, the consequences of the omission removed, since the ignorance or knowledge of the declarant, which are not intentional, should not lead to incurring any sanctions.

The insured in default can not claim that he had not been advised by the insurer regarding his obligation to act in good faith or regarding the consequences of an inaccurate, omissive or untruthful statement. The insurer can not be liable to inform the insured with regard to the sanctions applied in case of his bad faith.

If the insurer wants to obtain the nullity of the contact, the evidence of the bad faith of the insured is not enough. Additionally, it is required that the insurer proves that, in his opinion, the falsity of the statement changed the subject of the risk and had consequences on the opinion that he might have had.

A possible defense of the insured may be, in this situation, to claim that the false statement, despite its intentional nature, did not alter the risk assessment.

There are no well-defined criteria to determine this fact, the insurer is free to prove that, if the omission or false statement of the insured are found, they would lead to either a refusal to contract or a higher premium regime.

2.2. The sanction that occurs in case of inaccurate statement or reluctance regarding the risk, according to the romanian Civil Code .

The Romanian legislator provided for in art. 2203 of the Civil Code, the obligation of the insured to inform the insurer, by way of a statement, answering, in writting, to the insurer`s questions.

Thus, the insured has the obligation to answer in writing to the questions asked by the insurer and to declare any information or circumstances known to him and which are also essential for the risk assessment at the conclusion of the contract. This obligation to provide information shall also be maintained during the performance of the contract, being provided that, if the essential circumstances regarding the risk change during the performance of the contract, the insured shall notify the insurer in writing of the change occurred. The same obligation also lies with the insurance contractor who became aware of the change occurred.

The sanction that occurs in the event of non-compliance with this obligation, non-compliance expressed by making an inaccurate statement or by an omission to declare, is the nullity of the insurance contract, a sanction that occurs only to the extent that the bad faith of the insured arises.

According to the provisions of art. 2204 para. 1 of the Civil Code, besides the general reasons for nullity, the insurance contract is null in the event of inaccurate statement or reluctance made in bad faith by the insured or by the insurance contractor with regard to the circumstances which, if had been known by the insurer, would have determined him not to give his consent or not to give his consent under the same conditions, even if the statement or the reluctance had no influence on the occurrence of the insured risk. The premiums paid remain acquired by the insurer, who, may also request the payment of the premiums due until the moment he became aware of the cause of the nullity.

The Civil Code adapts the sanction not only in relation to the good or bad faith of the insured, but also depending on the moment of finding the inaccurate statement or the reluctance in the statements of the insured.

Thus, the inaccurate statement or the reluctance on the part of the insured or of the insurance contractor, whose bad faith could not be established, does not draw in the nullity of the insurance.

In the event that the finding of the inaccurate statement or of the reluctance happens prior to the occurrence of the insured risk, the insurer has the right either to keep the contract requesting the premium to be increased, or to terminate the contract at the end of a period of 10 days calculated from the notification received by the insured, refunding to the latter the share of the premiums paid for the period during which the insurance no longer operates.

When the finding of the inaccurate statement or of the reluctance happens after the occurrence of the insured risk, the sanction, that occurs in the event that the bad faith of the insured could not be established, is the decrease of the compensation in relation to the ratio between the level of the premiums paid and the level of the premiums that should have been paid.

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