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THE PECULIARITIES OF PERIL INSURED IN MEDICAL INSURANCE CONTRACT

Introduction

The dynamics of insurance contract relations directly affects the complication of the peril insured (covered risk) as we can observe the transformation of existing types of risks or the emergence of new ones which determines the relevance of this topic. Medical insurance is a form of protection against the risks that threaten the most valuable things, both personal and public, – health and life of a person. Peril insured is an object of medical insurance, which is connected with the insurance settlement for a medical assistance when/if the accident insured happens. Peril insured in a medical insurance contract has its features due to the specifics of a medical insurance and, in particular, due to the understanding of the legal relationships in this certain area.

The concept of risk in the civil law of Ukraine

Law dictionary gives a definition of risk, which is understood as a threat of unforeseen losses of the expected profit, income, property, funds due to the accidental change of the economic consequences, adverse conditions or the effect of force majeure; the degree of probability of a certain negative event, which may occur at a certain time or under certain circumstances, that is, a possible event, the occurrence of which is probable and random and causes unwanted consequences for the participant of the relevant legal relation-

ships.[1] In the science of civil law there are numerous papers devoted to the concept of "risk", but the only unambiguous approach to the definition of this term still cannot be found.

There is a suggestion to consider the concept of legal risk in a broad and narrow (own) understanding. Legal risk in the broad understanding is a type of legal presumption, which consists of the possibility of occurrence of losses or the acquisition of goods from a real danger or in the hope of an event included to the terms of a civil obligation or professional activity as a legal fact which may or may not occur. Legal risk in the narrow (own) understanding is considered to be a possible harm to an individual as a result of a certain danger, taking into account the probability of causing harm as a result of the impact of danger on non-pecuniary damage or the distribution of probabilities of harm to property damage.[2] There is an approach according to which the risk should be understood as a situation associated with the availability of a choice of the offered options, by assessing the probability of occurrence of a risk situation that can cause both positive and negative consequences.[3]

Based on the given above, we can conclude that risk is always connected with some uncertainty. The risk is mainly the probability of a certain consequence, and this will not necessarily be a negative ones.

In the science of civil law the risk is defined through the concept of a subjective risk. The vast majority of scientists consider the risk as a manifestation of a subjective right, which is formed under specific circumstances, as the psychological attitude of the person to the outcome of his/her own actions or actions of other people.[4]

Within this subjective approach some scientists consider the category of legal risk, linking it to the notion of an innocent liability. There is a statement according to which though the category of "risk" exists in parallel with the category of "fault", it also may exist alongside as a mental attitude of the person to the results of his/her own actions or actions of other people, as well as to the results of some random actions and accidentally-impossible events, expressed in the conscious

[1] K. Shemchushenko, *Law dictionary*, "Ukrainian encyclopedia named by M. Bazhan" 2004, Vol. 5, p. 317–318.

[2] I. Volosenko, *Risk in a civil law (concept, nature, types), PhD thesis*, Kiev 2011, p. 6–7.

[3] R. Sabodash, *Insuring of credit risks: civil aspects, PhD thesis*, Kiev 2007, p. 36–37.

[4] R. Maydanyk, *Anomalies in civil law of Ukraine*, Kiev 2007, p. 75.

understanding of the probability of some negative (property in particular) consequences.[5]

One of the supporters of the subjective risk theory believes that risk is a legal category that involves a person's subjective attitude towards the results of an objective phenomena that arise, continue, and cease independently of the will of the person, which is expressed in the conscious sense of the probability of occurrence of negative consequences and (or) positive ones. Risk is always a subjective attitude to the outcome, because the risk, which is not personified, ceases to be a risk for a certain person.[6]

According to another scientist the risk can only take place if there is a deviation between the planned and actual results. Such a deviation can be both positive and negative. A negative deviation happens as an unfavorable result. A positive deviation occurs when the actual result is more significant than one expected. Thus, the possibility of a negative deviation from the planned actual result, that is, what is called the risk. The probability of a positive deviation at the initial set of parameters for a single given event is defined as a "chance".[7]

Opposite to the subjective risk theory the theory of objective risk exists. Supporters of this approach identify the term of "risk" with the term of "adverse consequences". Risk is always a risk of adverse consequences (property or personal non-property), if it is unknown if these consequences will happen or not.

The essence of the objective risk theory lies in the fact that the risk is recognized as an objective and inevitable danger in the form of a normatively enshrined probability of occurrence of certain negative consequences and causing harm to some benefits or someone's interests. The risk exists despite of the will of the person and despite of his/her mental attitude to the possible occurrence of the adverse consequences or his/her actions or actions of other persons.[8]

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[5] O. Shemshur, *Notion and the legal nature of the risk in the private law*, "Herald of Kiev National University named after T. Shevchenko. Law Science" 2012, Add. 94, p. 106. http://nbuv.gov.ua/UJRN/VKNU_Yur_2012_94_30. Retrieved on April 23, 2018.

[6] R. Sabodash, *Insuring of credit risks: civil aspects, PhD thesis*, Kiev 2007, p. 8.

[7] R. Sabodash, *Insuring of credit risks: civil aspects, PhD thesis*, Kiev 2007, p. 38.

[8] O. Shemshur, *Notion and the legal nature of the risk in the private law*, "Herald of Kiev National University named after T. Shevchenko. Law Science" 2012, Add. 94, p. 106. http://nbuv.gov.ua/UJRN/VKNU_Yur_2012_94_30. Retrieved on April 23, 2018.

Based on the positions of the two above-mentioned risk theories in civil law science, a dualistic (compromise) theory of risk is also substantiated. The dualistic risk theory combines subjective and objective approaches to the understanding of the concept of risk. The risk is connected with the choice of an alternative, the calculation of the probability of the choice – that is a manifestation of its subjective side. But at the same time, the risk can also be considered as an objective category, since it can be generated by such processes, which do not depend on the will of a person and have external character regarding person's activity.[9]

Some say that the understanding of risk in only one of its aspects (subjective or objective) is unacceptable, since legal risk in some cases is subjective, and in others it is objective, which is caused by subjective or objective grounds of legal facts, the emergence of which causes the onset of a certain unwanted result. Risk has a subjective-objective nature, since it contains both objective and subjective elements, in this regard, it should be regarded as the possibility of conscious choice of a person's particular way of behavior, taking into account objective and inevitable danger that threatens civil rights and interests and the probable consequences of a probabilistic nature.[10]

Having analyzed the different positions of civil scientists on the concept of "risk", we agree that risk not always has a negative and unfavorable consequence or person always expects such a consequence. After all, the consequences can be both negative and positive. Also, it should be noted that the expectation of a positive effect is a motive for doing actions that may be negative for the person. Such a motive (the expectation of a positive result) is observed in each risk situation and in fact it is an incentive for the person that forces the person to act even if the actions may have a negative consequence for him and, therefore, is a necessary sign of the legal risk.

[9] O. Shemshur, *Notion and the legal nature of the risk in the private law*, "Herald of Kiev National University named after T. Shevchenko. Law Science" 2012, Add. 94, p. 106. http://nbuv.gov.ua/UJRN/VKNU_Yur_2012_94_30. Retrieved on April 23, 2018.

[10] I. Volosenko, *Risk in a civil law (concept, nature, types), PhD thesis*, Kiev 2011, p. 7.

Signs of a risk

Analyzing the essence of risk, its main characteristics should be singled out. The general features of a risk are following:

1. Risk uncertainty is the lack of security in the decision-making process and knowledge of a particular problem situation. Yes, there is always the risk of death or the risk of illness, but the moment it will happen is unknown. Uncertainty in social relations can be explained by various reasons; in particular, it may be caused by the absence of the exhaustive information; the subjective factors influence on the results of the analysis of the risk situation; the instability of the environment of the person's activity, which may include factors both legal and not legal.
   In addition, German theory of insurance law considers it important to recognize the indefinite risk through not the "objective" uncertainty, but through the "subjective" one. That is enough, that the parties considered the occurrence of an accident insured inevitable, and only the moment of the probable negative consequence remained unknown.[11]
2. The risk exists in any relationship which the person enters. The risk may arise even from the smallest event.
3. Risk is the result that should come in the future and that is expected by a person. After all, events that have already passed, do not carry a single aspect of risk. The person has no motive for committing any actions, since the event has already taken place and the consequences of the actions are obvious.[12]
4. Alternativeity is a feature of risk, which means that evaluation and choice out of several most favorable options for the behavior of the person always is a necessary condition. The ability to evaluate available alternatives and make certain decisions is a feature of risk, since the lack of choice means no risk.
5. Risk is always a subjective attitude to some results, because a negative or positive result, which is not related to the person, ceases to be a risk to a person. As already mentioned, the risk arises from any legal relationships, which the person enters, and that is why the result of these relationships matters only for this person.

[11] R. Sabodash, *Insuring of credit risks: civil aspects, PhD thesis*, Kiev 2007, p. 41.
[12] R. Sabodash, *Insuring of credit risks: civil aspects, PhD thesis*, Kiev 2007, p. 40.

The most sufficient definition of the concept of "risk", reflecting its basic features, should be put as follows: "risk is a legal category that involves a person's subjective attitude to the results of an objective phenomena, which arise, last and cease independently of the will of the person, expressed in the conscious understanding of the probability of occurrence of negative consequences, and (or) the desire to obtain some positive result.[13]

Peril insured in a medical insurance contract

Peril insured is a special type of risk, the specifics of which is determined by the nature of the insurance liabilities. Peril insured as a precondition and one of the main elements of an insurance obligation is based both on the contract and on any other basis of the occurrence of the specified relationships.

Insurance contracts are traditionally recognized as risky (aleatory) ones, since the insurer's obligation to pay an insurance settlement in favor of the insured or another person (the beneficiary) is dependent on the case (accident insured) specified in the contract.[14] The risk is an integral element of the insurance contracts in general, and the medical insurance contracts in particular. In insurance contractual relaitons risk is the criteria for assigning insurance contracts to the group of risk (aleatory) contracts, and the risk itself is considered to be a basis of the insurance contracts, the purpose of which is to eliminate or reduce the consequences of the accident insured. Exploring the concept of risk, the definition of peril insured given in Article 8 of the Law "On Insurance" should not be ignored. According to the Law peril insured is a certain event which in case of occurrence is carried out by the contract and which has all the signs of probability and accidental.[15]

Such features of peril insured as probability and chance act as a motive for the emergence of insurance medical legal relationships,

[13] R. Sabodash, *Insuring of credit risks: civil aspects, PhD thesis*, Kiev 2007, p. 42.

[14] I. Volosenko, *Peril insured in insurance relations*, "Entrepreneurship, economy and law" 2005, № 11, p. 118.

[15] *On the insurance: Law of Ukraine* 07.03.1996, № 85/96-BP. http://zakon2.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80.

as they determine the need for insurance in order to protect the health and life of the individual.

Peril insured inherited all the general features of the concept of "risk" mentioned above, and also a number of special (additional) features arising from the analysis of insurance legal relationship in the area of medical insurance. These special features of peril insured can be considered as additional legal conditions that make it possible to clearly distinguish this type of risk from all the others. Peril insured is not a possibility of occurrence of any danger, but involves a detailed definition of the nature of the danger which causes the consequences protected by a contract of medical insurance.

In each specific type of insurance, the risk is clearly individualized, but there are types of insurance contracts under which the person can be insured from several different hazards. Medical insurance contract is among such types of contracts. For example, life and health, as the objects of a medical insurance contract, can be insured against various hazards, such as accidents or illnesses or others.

Another feature of the peril insured in medical insurance contracts is that the danger to a person must exist at the moment of contracting, or, at least, there should be a probability of such a danger occurring in the future. Danger, stated in the medical insurance contract, should exist independently of the will of the insured, because the danger is the possibility of occurrence of an accident not some deliberate event. That is why the specificity of the peril insured is connected with the conditions for determining hazards. When concluding a medical insurance contract, it is necessary to set not only the danger itself, but also its extent, as the insurer must precisely know all the conditions of the risk that he assumes.

The level of danger is determined by putting on the insurer the duty of setting it. In particular, Article 21 of the Law of Ukraine "On Insurance" states that when entering insurance contract, the insurer is obliged to provide information to the insurance agent about all the circumstances known that can be essential for assessing the peril insured, and continue to inform him about any change of the peril insured.[16] The amount of risk is taken into account by the insurance

[16] *On the insurance: Law of Ukraine* 07.03.1996, № 85/96-BP. http://zakon2.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80.

agent when concluding the medical insurance contract or refusing to conclude it.

The fulfillment of such an obligation is based on the exclusive insurance law principle that is a principle of the highest trust between the parties (or maximum conscientiousness), according to which neither the insurer nor the insurance agent have the right to hide any information which is related to the object of insurance from each other.[17] The possibility of concluding an insurance contract and the existence of an insurance relationship is based on it and is determined precisely by the peril insured.

Conclusions

To summarize, we can say that existence of any insurance relationship without insurance risk is not possible. Peril insured is a precondition for the emergence of insurance relationships which determines the possibility of its existence. It is the possibility of the accident insured that causes the parties of the relations to remain in a state of risk. The risk to life or health determines the insurance interest of a person, which consists of the objective need to provide these objects with the relevant insurance settlement.

We believe that probability and uncertainty are those signs of a risk, which determine the need for insurance. They are motivating reasons for the emergence of insurance legal relationships under a medical insurance contract to protect property and non-property interests that are related to the life and health of a person.

[17] I. Volosenko, *Peril insured in insurance relations*, "Entrepreneurship, economy and law" 2005, № 11, p. 121.